

[NOT YET SCHEDULED FOR ARGUMENT]

No. 08-5078

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DR. ROGER C.S. LIN, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR DEFENDANT-APPELLEE

GREGORY G. KATSAS
Assistant Attorney General

JEFFREY A. TAYLOR
United States Attorney

MARK B. STERN
202-514-5089
MELISSA N. PATTERSON
202-514-1201
Attorneys, Appellate Staff
Civil Division, Room 7230
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, DC 20530-0001

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for Defendant/Appellee certifies as follows:

A) Parties And Amici:

1) The named plaintiffs in this lawsuit are Roger C.S. Lin, Chien-Ming Huang, Chou Chang, Ching-Yao Hou, Chen-Hua Liu, Chen-Ni Wu, Yang-Lung Yang, Yao-Jhih Ye, Ching-Wen Yen, and A-Chu Yuchiang. Also appearing as a plaintiff is the Taiwan Nation Party, on behalf of itself and its members.

2) The defendant is the United States of America.

3) There have been no intervenors or amici in this case, either in the district court or in this Court.

B) Ruling Under Review:

The ruling under review is the district court's order and memorandum opinion dated March 18, 2008, published at 539 F. Supp. 2d 173 (D.D.C. 2008). The court's opinion is reproduced in the Joint Appendix at JA23.

C) Related Cases:

This case has not been before this or any other Court. Counsel for appellee are not aware of any related cases.

Melissa N. Patterson

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BRIEF FOR DEFENDANT-APPELLEE

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331, the Administrative Procedure Act, 5 U.S.C. §§ 702, 704, and the Immigration and Nationality Act, 8 U.S.C. § 1503. See JA6 (Amended Complaint). The district court dismissed plaintiffs' claims on March 18, 2008. JA 23-37 (Order and Memorandum Opinion). Plaintiffs filed a timely notice of appeal on March 31, 2008. JA39. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court correctly concluded that the political question doctrine barred adjudication of plaintiffs' claims that they qualify as United States nationals by virtue of their residence in Taiwan.

2. Whether, assuming that this action were justiciable, plaintiffs' suit should be dismissed for failure to state a claim.

STATUTES AND REGULATIONS

The relevant statutory and regulatory provisions are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

Plaintiffs are residents of Taiwan and members of the Taiwan Nation Party, which is also a plaintiff. Plaintiffs allege that they are "United States nationals" by virtue of their residence in Taiwan and seek a declaration that they are entitled to passports and to other "rights and privileges as United States nationals." JA19. Plaintiffs invoked the equal protection and due process protections of the Fifth and Fourteenth Amendments, the Eighth Amendment, and the First Amendment right to petition the government. JA19-20. The district court dismissed the complaint under the political question doctrine. JA23-37; Lin v. United States, 539 F. Supp. 2d 173 (D.D.C. 2008). Plaintiffs

filed a timely notice of appeal.

STATEMENT OF FACTS

I. Factual Background

A. The status of Taiwan has long been a subject of international dispute. At the close of the Sino-Japanese War in 1895, China ceded sovereignty over Taiwan (then called Formosa) to Japan. JA23-24. Japan retained control of the island until the conclusion of World War II in 1945. Upon the surrender of Japan to the United States and its allies, General Douglas MacArthur issued an order instructing all Japanese forces in Taiwan to surrender to the Republic of China. Id.

In 1952, Japan and the Allied Powers, including the United States, signed a peace treaty which provided that "Japan renounces all right, title and claim to Formosa and the Pescadores," but did not otherwise address Taiwan's status. Treaty of Peace with Japan, Article 2(b), Treaties and International Acts Series 2490 (1952); JA42-43. In 1954, the United States and the Republic of China ("ROC") signed a mutual defense treaty wherein the United States recognized the Republic of China as the government of China and recognized Taiwan to be among its territories. See Mutual Defense Treaty Between the United States and the Republic of China, Dec. 2, 1954, 6 U.S.T. 433, Article VI (stating that "the terms 'territorial' and

'territories' shall mean in respect of the Republic of China, Taiwan and the Pescadores").

B. In 1972, the United States issued a joint communique with the People's Republic of China ("PRC"), acknowledging that from China's perspective, the "Taiwan question is the crucial question obstructing the normalization of relations between China and the United States." JA359; United States of America-People's Republic of China Joint Communique of Feb. 27, 1972 [Shanghai Communique], U.S. Department of State Bulletin, Vol. 66 (1972), No. 1708, at 437. The United States acknowledged the Chinese position that "Taiwan is a part of China," and confirmed that "[t]he United States government does not challenge that position." JA359-360; Shanghai Communique at 437-438.

In 1978, President Carter announced that as of January 1, 1979, the United States "is recognizing the government of the People's Republic of China as the sole legal government of China and is terminating diplomatic relations with the Republic of China." 44 Fed. Reg. 1075 (December 30, 1978); see JA 362; U.S. Department of State Bulletin, Vol. 79 (1979), No. 2023 at 25. The President's memorandum stated that the "[e]xisting international agreements and arrangements in force between the United States and Taiwan shall continue in force." Id. In his memorandum, President Carter also stressed that the "American people will maintain commercial, cultural, and other relations

with the people of Taiwan without official government representation and without diplomatic relations." 44 Fed. Reg. 1075. An executive order further detailed the manner in which the United States is to maintain unofficial relations with the people of Taiwan. See Exec. Order No. 12143 (June 22, 1979).

In 1979, the two countries issued a second joint communique regarding the establishment of diplomatic relations between the PRC and the United States. See JA362; United States of America-People's Republic of China Joint Communique of January 1, 1979 on Establishment of Diplomatic Relations, U.S. Department of State Bulletin, Vol. 79 (1979), No. 2022, at 25. In that Communique, the United States again acknowledged the "Chinese position that there is but one China and Taiwan is part of China." Id. The communique stated that the "people of the United States" would "maintain cultural, commercial, and other unofficial relations with the people of Taiwan." Id. President Carter made clear in a speech accompanying this communique that any relations with the current governing regime in Taiwan would be "nongovernmental." JA362.

Congress passed, and the president signed, the Taiwan Relations Act of 1979, 22 U.S.C. § 3301, later that year. Congress found that the enactment of this statute was "necessary - (1) to help maintain peace, security, and stability in the Western Pacific; and (2) to promote the foreign policy of the

United States by authorizing the continuation of commercial, cultural, and other relations between the people of the United States and the people on Taiwan." 22 U.S.C. § 3301(a).

Congress further declared that the policy of the United States is, inter alia, "to make clear that the United States decision to establish diplomatic relations with the People's Republic of China rests upon the expectation that the future of Taiwan will be determined by peaceful means." 22 U.S.C.

§ 3301(b)(3). Congress stated that it approved "the continuation in force of all treaties and other international agreements, including multilateral conventions, entered into by the United States and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, and in force between them on December 31, 1978, unless and until terminated in accordance with law." See 22 U.S.C. § 3303(c).

Under the Taiwan Relations Act, the United States exercises nonofficial relations with Taiwan through the American Institute in Taiwan, a "nonprofit corporation incorporated under the laws of the District of Columbia." See 22 U.S.C. §§ 3305, 3310a (stating that "[t]he American Institute of Taiwan shall employ personnel to perform duties similar to those performed by personnel of the United States and Foreign Commercial Service."). The Act provides that references in the laws of the United States to "foreign countries, nations, states, governments, or similar

entities" should be considered also to cover Taiwan. See 22 U.S.C. § 3303(b)(1). The Act also specifically provides that for the purposes of the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq., Taiwan may be treated as a "separate foreign state." See 22 U.S.C. § 3303(b)(6); 8 U.S.C. § 1152(b).

C. In 1982, the United States and the PRC issued a third joint communique, in which the United States agreed that "[r]espect for each other's sovereignty and territorial integrity and non-interference in each other's internal affairs constitute the fundamental principles guiding United States-China relations." See JA364; United States of America-People's Republic of China Joint Communique of Aug. 17, 1982-Weekly Compilation of Presidential Documents (August 23, 1982), at 1039. The United States and the PRC also "agreed that the people of the United States would continue to maintain cultural, commercial, and other unofficial relations with the people of Taiwan." Id.

D. In 1996, President Clinton issued an executive order, which superseded Executive Order 12143 but specified that the "[a]greements and arrangements referred to in paragraph (B) of President Carter's memorandum of December 30, 1978, entitled 'Relations With the People on Taiwan' (44 FR 1075) shall, unless otherwise terminated or modified in accordance with law, continue in force." Exec. Order No. 13014 (August 15, 1996), 61 Fed. Reg. 42963.

II. Procedural History

Plaintiffs are ten individuals and the Taiwan Nation Party, acting on behalf of approximately 1,000 of its members. JA5-6. They filed this action in October 2006, seeking a declaration that Taiwan was subject to United States jurisdiction and that the plaintiffs, as residents of Taiwan, were entitled to a range of constitutional protections. In an amended complaint, plaintiffs alleged that they had submitted passport applications to the American Institute in Taiwan and that the Institute refused to accept and process the applications. JA18. Plaintiffs alleged that this action had deprived them of their rights as "United States nationals," and requested a declaration that as Taiwanese residents, they are entitled to the protections of the First, Fifth, Eighth, and Fourteenth Amendments. JA19-20.

The district court granted the government's motion to dismiss, concluding that plaintiffs' challenge involved "a quintessential political question" that required "trespass into the extremely delicate relationship between and among the United States, Taiwan and China." JA29. The court noted that plaintiffs' claims to be "nationals of the United States" rested on their claim that the "United States is allegedly exercising sovereignty over Taiwan." JA29. As the court explained, the Supreme Court has repeatedly held that "determination of who is sovereign over specific territory is non justiciable," JA29, and,

as the court further held, plaintiffs' suit implicates several of the factors identified by the Supreme Court in Baker v. Carr, 369 U.S. 186 (1962), as relevant to justiciability under the political question doctrine.

The court noted that plaintiffs were asking it to "catapult over" a decision by the political branches to "obviously and intentionally not recognize[] any power as sovereign over Taiwan." JA32 (emphasis in original). The court explained that any uncertainty regarding Taiwan's status was the result of "longstanding tension between mainland China and the United States," rather than neglect by the United States or the rest of the world. JA33. "In the face of ... years and years of diplomatic negotiations and delicate agreements" between the United States and China, it "would be foolhardy for a judge to believe that she had the jurisdiction to make a policy choice on the sovereignty of Taiwan." JA34.

The court likewise found no "judicially discoverable and manageable standards" available to resolve plaintiffs' claim. The court explained that plaintiffs' case rested on their view that the United States had de jure authority over Taiwan by virtue of General Order No. 1, issued by General MacArthur in 1945. JA32. The court observed that "the judiciary is not equipped to interpret and apply, 50 years later, a wartime military order entered at a time of great confusion and undoubted

chaos." JA33.

SUMMARY OF THE ARGUMENT

Plaintiffs seek a judicial declaration of United States' sovereignty over Taiwan and a declaration that Taiwanese residents are nationals of the United States. The district court correctly concluded that plaintiffs' claims present a nonjusticiable political question. As the court explained, resolution of plaintiffs' suit would require the court to disregard the judgments of the political branches over five decades and to interject itself into sensitive matters of foreign policy. As the court further noted, General Order No. 1, issued by General MacArthur in 1945, would provide no judicially discoverable standards for addressing plaintiffs' contentions.

Assuming that this Court were to conclude that jurisdiction is not barred by the political question doctrine, dismissal would be required because plaintiffs have failed to state a claim on which relief can be granted. Plaintiffs claim to be non-citizen nationals by virtue of their birth in Taiwan. United States law, however, specifically provides that only persons born in American Samoa or Swains Island are deemed non-citizen nationals based on the location of their birth. See 8 U.S.C. § 1408; 8 U.S.C. § 1101(a)(29).

STANDARD OF REVIEW

A district court's dismissal for lack of jurisdiction is

reviewed de novo. See Shekoyan v. Sibley Intern., 409 F.3d 414, 420 (D.C. Cir. 2005).

ARGUMENT

I. Plaintiffs' Challenge Is Nonjusticiable Under The Political Question Doctrine.

A. "The political question doctrine is one aspect of 'the concept of justiciability, which expresses the jurisdictional limitations imposed on the federal courts by the 'case or controversy' requirement' of the Article III of the Constitution." Bancoult v. McNamara, 445 F.3d 427, 432 (D.C. Cir. 2006) (quoting Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 215 (1974)). The doctrine is "primarily a function of the separation of powers," id. (quoting Baker v. Carr, 369 U.S. 186, 210 (1962)) (quotation marks omitted), and "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution" to the legislative and executive branches. Wilson v. Libby, 535 F.3d 697, 704 (D.C. Cir. 2008) (internal quotation marks omitted).

While the parameters of the political question doctrine have not been susceptible to a precise formula, the Supreme Court has identified several considerations that may render a case nonjusticiable under the political question doctrine. In Baker v. Carr, 369 U.S. 186, 217 (1962), the Court noted six "formulations," that might render a case nonjusticiable: (1) "a

textually demonstrable constitutional commitment of the issue to a coordinate political department"; (2) "a lack of judicially discoverable and manageable standards for resolving it"; (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"; (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"; (5) "an unusual need for unquestioning adherence to a political decision already made"; or (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." Id. at 217.

While any one of these formulations would be sufficient for dismissal, see Bancoult, 445 F.3d at 432 (citing Schneider v. Kissinger, 412 F.3d 190, 194 (D.C. Cir. 2005)), all factors demonstrate that plaintiffs' claims are nonjusticiable. Indeed, as the district court explained, plaintiffs' challenge implicates the political question doctrine in the clearest way, inviting the court to disregard the conduct of foreign policy over five decades on the basis of a military order that provides no discoverable standards for resolving plaintiffs' claim.

B. As this Court has observed, "Article I, Section 8 of the Constitution ... is richly laden with delegation of foreign policy and national security powers to the legislature," Schneider, 412 F.3d at 194, and "Article II likewise provides

allocation of foreign relations and national security powers to the President, the unitary chief executive," id. at 195.

"Indeed, the Supreme Court has described the President as possessing plenary and exclusive power in the international arena and as the sole organ of the federal government in the field of international relations." Id. (internal quotation marks omitted)); see also Gonzalez-Vera v. Kissinger, 449 F.3d 1260, 1263-64 (D.C. Cir. 2006); Bancoult, 445 F.3d at 433.

These principles bar adjudication of suits that ask a court to determine issues of national sovereignty over a particular territory. Such a determination, as the Court explained in Jones v. United States, 137 U.S. 202 (1890), "is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government." Id. at 212 (collecting cases); see also Vermilya-Brown Co. v. Connell, 335 U.S. 377, 380 (1948) ("the determination of sovereignty over an area is for the legislative and executive departments"); Baker, 369 U.S. at 212 ("recognition of foreign governments ... strongly defies judicial treatment" and the "judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory").

Plaintiffs do not merely ask the Court to intrude into the

realm of foreign policy. They also ask that it disregard the foreign policy decisions of the political branches over a period of decades. Over fifty years ago, the United States recognized the Republic of China as the government of China, and further recognized Taiwan to be among China's territories. See Mutual Defense Treaty Between the United States and the Republic of China, Dec. 2, 1954, 6 U.S.T. 433, Article VI. President Nixon's 1972 visit to mainland China reopened communications with the People's Republic of China "after ... many years without contact," JA358, paving the way for a series of joint communiques between the United States and the PRC. JA357-364. These communiques highlighted the crucial nature of the "Taiwan question" in the "normalization of relations between China and the United States," JA359, and helped establish diplomatic relations between the PRC and the United States. JA362; 44 Fed. Reg. 1075 (announcing that the United States recognized the PRC as "sole legal government of China" and "terminating diplomatic relations with the Republic of China"). Although President Carter decided that the "people of the United States" would "maintain cultural, commercial, and other unofficial relations with the people of Taiwan," JA362, he also made it clear that any relations with the current governing regime in Taiwan would be "nongovernmental." JA362.

The political branches have further explicated the nature of

the United States' relationship with Taiwan in several executive orders and the Taiwan Relations Act. See Exec. Order No. 12143 (June 22, 1979) (regarding unofficial relations with Taiwan); Exec. Order No. 13014 (August 15, 1996), 61 Fed. Reg. 42963; 22 U.S.C. § 3301 (declaring that the policy of the United States is, inter alia, "to make clear that the United States decision to establish diplomatic relations with the People's Republic of China rests upon the expectation that the future of Taiwan will be determined by peaceful means").

Taiwan has been the subject of the most sensitive diplomatic concerns. Plaintiffs' suit asks the Court to set aside the policy determinations to maintain only unofficial relations with Taiwan and to establish diplomatic relationships with the People's Republic of China, see Exec. Order No. 13014, so as to "maintain peace, security, and stability in the Western Pacific." 22 U.S.C. § 3301. Plaintiffs thus ask the Court to interject itself into a matter that presents an "unusual need for unquestioning adherence to a political decision already made" and any court pronouncement would create "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." Baker, 369 U.S. at 217.

Plaintiffs' attempt to litigate foreign policy determinations is particularly anomalous because they offer no "judicially discoverable and manageable standards," Baker, 369

U.S. at 217, that would permit resolution of their suit. Plaintiffs urge that General Order No. 1 gave the United States the right to "an exclusive, supreme, unsupervised and unlimited role as the 'principal occupying Power' of Taiwan." Pl. Br. 35; JA8 (Plaintiffs' Am. Complaint) (stating that "General Douglas MacArthur, Supreme Commander for the Allied Powers, issued General Order No. 1" instructing Japanese officials within Taiwan to surrender to a representative of the Republic of China as a "representative of the Allied Powers"). They contend that this order established the de jure sovereignty of the United States over Taiwan. See JA32 ("General Order No. 1 made [the ROC representative] an agent for the principal occupying Power, i.e., the United States, and . . . nothing since has withdrawn that agency or substituted any other Power over Taiwan"); JA14 ("General Douglas MacArthur's General Order No. 1 . . . is still valid" and "[n]either the [San Francisco Peace Treaty] nor the Treaty of Taipei nor any other subsequent legal instruments changed the status of Taiwan").

As the district court recognized, it "is clear . . . that the judiciary is not equipped to interpret and apply, 50 years later, a wartime military order entered at a time of great confusion and undoubted chaos." JA33.

C. Plaintiffs' insistence that their claim is justiciable under the Immigration and Nationality Act ignores the antecedent

question of whether that Act applies to persons residing in Taiwan. See Pl. Br. 24-26; 8 U.S.C. § 1503 (limiting declarations of nationality to "any person who is within the United States") (emphasis added).

Plaintiffs' assertion that their challenge is justiciable because they seek "not to influence United States foreign policy," but rather to "vindicate their personal rights" conflates the question of standing with the political question doctrine. Pl. Br. 21-22. It is not their personal stake in the determination of which power has a legitimate claim to Taiwan sovereignty that is at issue, but rather the justiciability of that determination.

Plaintiffs' citations to other cases "touching on highly sensitive foreign relations" are inapposite. Pl. Br. 22-23. None of these cases required courts to either interpret wartime military orders or assert the United States' de jure sovereignty - notwithstanding the executive and legislative branches' many indications to the contrary - over a territory that is the subject of decades of carefully crafted diplomacy. Rather, all these cases involved judicial interpretation of statutes or treaties. See, e.g., Japan Whaling Ass'n v. American Cetacean Society, 478 U.S. 221 (1986) (declining to apply the political question doctrine after concluding that the issue in that case "presents a purely legal question of statutory interpretation");

Cheng Fu Sheng v. Rogers, 177 F. Supp. 281, 284 (D.D.C. 1959) (interpreting the term "country" in the Immigration and Nationality Act, and deferring to the views of the State Department regarding status of Taiwan), rev'd on other grounds by Rogers v. Cheng Fu Sheng, 280 F.2d 663 (D.C. Cir. 1960); United States v. Ushi Shiroma, 123 F. Supp. 145, 149 (D. Haw. 1954) (interpreting a ratified treaty and deferring to the Secretary of State's "reasonable construction of treaty terms"); Dupont Circle Citizens Ass'n v. District of Columbia Bd. of Zoning, 530 A.2d 1163 (D.C. App. 1987) (interpreting the language of the Taiwan Relations Act).

Plaintiffs likewise err in suggesting that the portions of Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), cited in the district court's decision are at odds with the Supreme Court's subsequent ruling in that case, Boumediene v. Bush, 128 S. Ct. 2229 (2008). Pl. Br. 27-28. The district court cited this Court's decision in Boumediene for the well-established proposition that "[t]he determination of sovereignty over an area, the Supreme Court has held, is for the legislative and executive departments." JA29 (quoting Boumediene, 476 F.3d at 992 (quoting Vermilya-Brown, 335 U.S. at 380)). Citing the same language of Vermilya-Brown, the Supreme Court in Boumediene affirmed the same principle and declined question the government's position that Cuba, not the United States,

"maintains sovereignty, in the legal and technical sense of the term, over Guantanamo Bay." Id. at 2252. In determining constitutional principles relevant in assessing the government's conduct, the Court looked not to issues of de jure sovereignty but to "the objective degree of control the Nation asserts over foreign territory." Id. at 2252-53. That ruling provides no support for plaintiffs' request that the Court declare their entitlement to be treated as United States nationals.

II. Plaintiffs Fail To State A Claim Upon Which Relief Can Be Granted.

Assuming that the Court were to reach the merits of the case, it should affirm the district court's decision because plaintiffs have failed to state a claim on which relief may be granted. See Haddon v. Walters, 43 F.3d 1488, 1491 (D.C. Cir. 1995) ("[W]e may affirm on different grounds the judgment of a lower court if it is correct as a matter of law[.]") (internal quotation marks omitted).

Plaintiffs invoke the Immigration Nationality Act ("INA"), which allows an individual to bring a declaratory judgment action if a person claims to be United States national and is denied "such right or privilege . . . upon the ground that he is not a national of the United States." 8 U.S.C. § 1503; Pl. Br. 1, 6, 20. Plaintiffs urge that they are nationals of the United States under 8 U.S.C. § 1101(a)(22)(B) which defines "national of the United States" to include "a person who, though not a citizen of

the United States, owes permanent allegiance to the United States." Contrary to plaintiffs' understanding, this section cannot be made applicable by asserting that the "Taiwanese people owe permanent allegiance to the United States," JA17. As the Second Circuit noted in Marquez-Almanzar v. INS, 418 F.3d 210, 218-219 (2nd Cir. 2005), "one cannot qualify as a U.S. national under 8 U.S.C. § 1101(a)(22)(B) by a manifestation of 'permanent allegiance' to the United States," a holding reached by every circuit to address the issue.¹

Section 1101(a)(22)(B) must be read in conjunction with 8 U.S.C. § 1408, which defines a non-citizen national as a "person born in an outlying possession of the United States on or after the date of the formal acquisition of such possession." See 8 U.S.C. § 1408(1). See Marquez-Almanzar, 418 F.3d at 217, 219.²

¹ See Hashmi v. Mukasey, 533 F.3d 700, 704 (8th Cir. 2008); Abou Haidar v. Gonzales, 437 F.3d 206, 207 (1st Cir. 2006); Omolo v. Gonzales, 452 F.3d 404, 408-09 (5th Cir. 2006); Sebastian Soler v. U.S. Attorney General, 409 F.3d 1280, 1285-87 (11th Cir. 2005); Perdomo-Padilla v. Ashcroft, 333 F.3d 964, 967-68, 972 (9th Cir. 2003); Salim v. Ashcroft, 350 F.3d 307, 310 (3d Cir. 2003); United States v. Jimenez Alcala, 353 F.3d 858, 861-62 (10th Cir. 2003). While the Fourth Circuit held differently in United States v. Morin, 80 F.3d 124 (4th Cir. 1996), it recently reversed itself and adopted the prevailing view that non-citizens are nationals by birth only when born in the outlying U.S. possessions defined by statute. See Fernandez v. Keisler, 502 F.3d 337, 349-51 & n.8 (4th Cir. 2007).

² Section 1408 defines three other situations for a person to be considered a non-citizen national, but plaintiffs are not making any allegations related to those situations. Plaintiffs have not alleged that their parents are nationals with residences in the United States, see 8 U.S.C. § 1408(2), that they are of an

The statute defines "outlying possessions of the United States" as "American Samoa and Swains Island." 8 U.S.C. § 1101(a)(29); see also Miller v. Albright, 523 U.S. 420, 467 n.2 (1998) (Ginsburg, J., dissenting) ("The distinction [between nationality and citizenship] has little practical impact today, however, for the only remaining noncitizen nationals are residents of American Samoa and Swains Island.") (citing 8 U.S.C. § 1101(a)(22)).

Plaintiffs likewise err in asserting that "the Taiwanese people owe permanent allegiance to the United States and have the status of United States nationals," because "the United States is holding de jure sovereignty over Taiwan." JA17. The United States has repeatedly made clear that Taiwan is not within its legal control. See Mutual Defense Treaty Between the United States and the Republic of China, Dec. 2, 1954, 6 U.S.T. 433, Article VI ("the terms 'territorial' and 'territories' shall mean in respect of the Republic of China, Taiwan and the Pescadores"); 22 U.S.C. § 3303(b)(1) (stating that references in the laws of the United States to "foreign countries, nations, states, governments, or similar entities" should be considered also to

unknown parentage, found in an outlying possession of the United States while under the age of five, 8 U.S.C. § 1408(3), or that one of each of their parents are nationals of the United States and who were present in the United States for at least seven years during a "continuous period of ten years," 8 U.S.C. § 1408(4). Rather, they have alleged that they are entitled to nationality status because of their claim that the "United States is holding de jure sovereignty over Taiwan." JA17.

cover Taiwan). The current relationship between the United States and Taiwan derives solely and exclusively from Executive Order No. 13014 of August 15, 1996, 61 Fed. Reg. 42963, and the Taiwan Relations Act of 1979, 22 U.S.C. 3301, et seq., both of which make clear that whichever entity does possess sovereignty over Taiwan, the United States does not.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

GREGORY G. KATSAS
Assistant Attorney General

JEFFREY A. TAYLOR
United States Attorney

MARK B. STERN
202-514-5089

MELISSA N. PATTERSON
202-514-1201
Attorneys, Appellate Staff
Civil Division, Room 7230
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, DC 20530-0001

DECEMBER 2008

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief complies with the type-volume limitation in Rule 32(a)(7)(B). The foregoing brief is presented in monospaced Courier New font of no more than 10.5 characters per inch. The brief contains 4,651 words, according to the count of this office's word processing system.

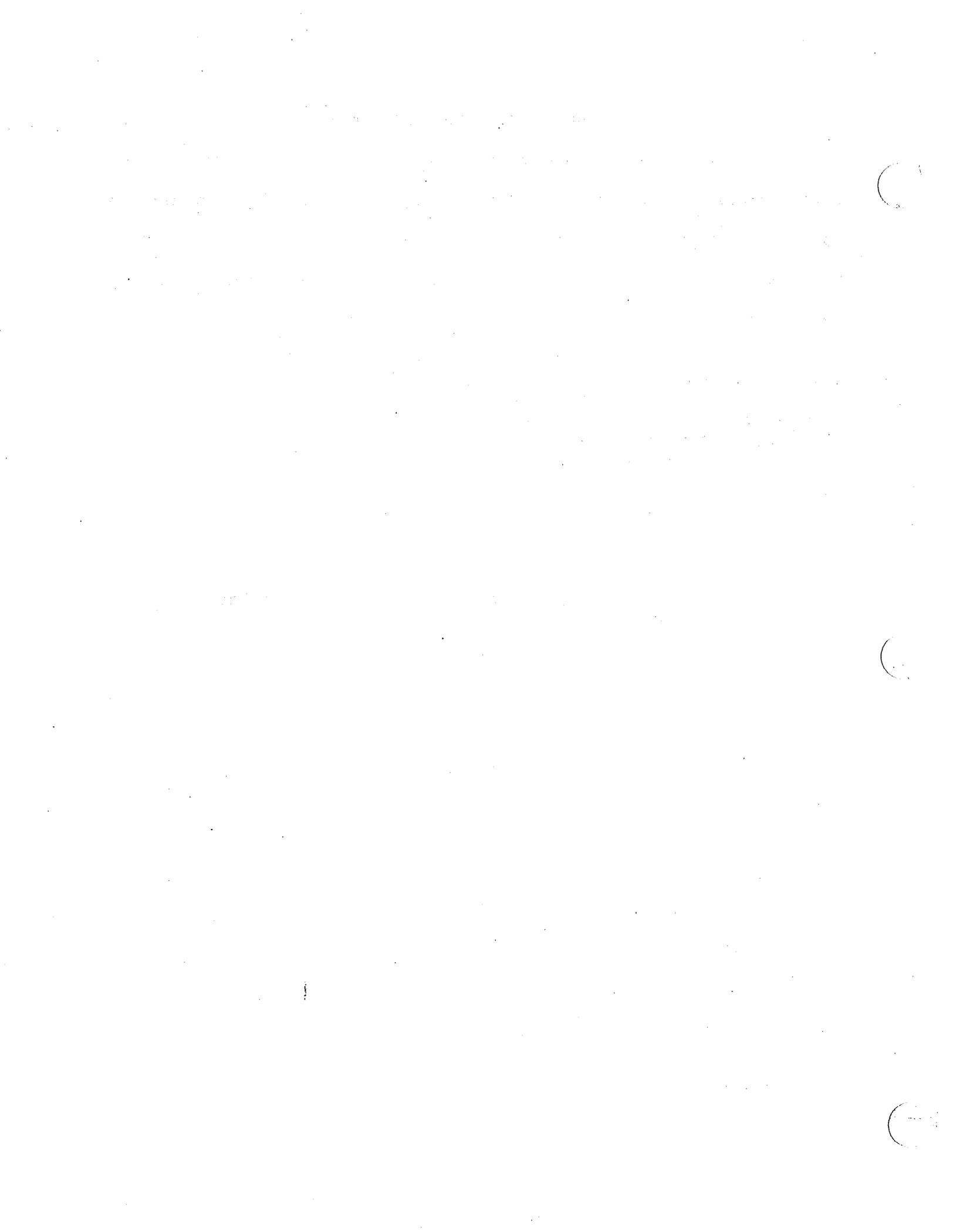
Melissa Patterson
Attorney for Defendant-Appellee

CERTIFICATE OF SERVICE

I certify that on December 3, 2008, I filed and served the foregoing Brief for Defendant-Appellee by delivering an original and fourteen copies to the Clerk of the Court by hand delivery, and by further causing two copies to be delivered by overnight delivery service to:

Charles H. Camp
Law Offices of Charles H. Camp
Firm: 202-457-7786
1319 Eighteenth Street, NW
Washington, DC 20036-0000

Melissa Patterson
Attorney for Defendant-Appellee



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Washington, DC 20036-0000



Melissa Patterson
Attorney for Defendant-Appellee

ADDENDUM

Effective: July 27, 2006

United States Code Annotated Currentness
Title 8. Aliens and Nationality (Refs & Annos)
Chapter 12. Immigration and Nationality (Refs & Annos)
Subchapter I. General Provisions (Refs & Annos)

§ 1101. Definitions

(a) As used in this chapter--

(1) The term "administrator" means the official designated by the Secretary of State pursuant to section 1104(b) of this title.

(2) The term "advocates" includes, but is not limited to, advises, recommends, furthers by overt act, and admits belief in.

(3) The term "alien" means any person not a citizen or national of the United States.

(4) The term "application for admission" has reference to the application for admission into the United States and not to the application for the issuance of an immigrant or nonimmigrant visa.

(5) The term "Attorney General" means the Attorney General of the United States.

(6) The term "border crossing identification card" means a document of identity bearing that designation issued to an alien who is lawfully admitted for permanent residence, or to an alien who is a resident in foreign contiguous territory, by a consular officer or an immigration officer for the purpose of crossing over the borders between the United States and foreign contiguous territory in accordance with such conditions for its issuance and use as may be prescribed by regulations. Such regulations shall provide that (A) each such document include a biometric identifier (such as the fingerprint or handprint of the alien) that is machine readable and (B) an alien presenting a border crossing identification card is not permitted to cross over the border into the United States unless the biometric identifier contained on the card matches the appropriate biometric characteristic of the alien.

(7) The term "clerk of court" means a clerk of a naturalization court.

(8) The terms "Commissioner" and "Deputy Commissioner" mean the Commissioner of Immigration and Naturalization and a Deputy Commissioner of Immigration and Naturalization, respectively.

(9) The term "consular officer" means any consular, diplomatic, or other officer or employee of the United States designated under regulations prescribed under authority contained in this chapter, for the purpose of issuing immigrant or nonimmigrant visas or, when used in subchapter III of this chapter, for the purpose of adjudicating nationality.

- (10) The term "crewman" means a person serving in any capacity on board a vessel or aircraft.
- (11) The term "diplomatic visa" means a nonimmigrant visa bearing that title and issued to a nonimmigrant in accordance with such regulations as the Secretary of State may prescribe.
- (12) The term "doctrine" includes, but is not limited to, policies, practices, purposes, aims, or procedures.
- (13)(A) The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.
- (B) An alien who is paroled under section 1182(d)(5) of this title or permitted to land temporarily as an alien crewman shall not be considered to have been admitted.
- (C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien--
- (i) has abandoned or relinquished that status,
 - (ii) has been absent from the United States for a continuous period in excess of 180 days,
 - (iii) has engaged in illegal activity after having departed the United States,
 - (iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings,
 - (v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, or
 - (vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.
- (14) The term "foreign state" includes outlying possessions of a foreign state, but self-governing dominions or territories under mandate or trusteeship shall be regarded as separate foreign states.
- (15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens--
- (A)(i) an ambassador, public minister, or career diplomatic or consular officer who has been accredited by a foreign government, recognized de jure by the United States and who is accepted by the President or by the Secretary of State, and the members of the alien's immediate family;
 - (ii) upon a basis of reciprocity, other officials and employees who have been accredited by a foreign government recognized de jure by the United States, who are accepted by the Secretary of State, and the members of their immediate families; and
 - (iii) upon a basis of reciprocity, attendants, servants, personal employees, and members of their immediate families, of the officials and employees who have a nonimmigrant status under (i) and (ii) above;
- (B) an alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as

a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure;

(C) an alien in immediate and continuous transit through the United States, or an alien who qualifies as a person entitled to pass in transit to and from the United Nations Headquarters District and foreign countries, under the provisions of paragraphs (3), (4), and (5) of section 11 of the Headquarters Agreement with the United Nations (61 Stat. 758);

(D)(i) an alien crewman serving in good faith as such in a capacity required for normal operation and service on board a vessel, as defined in section 1288(a) of this title (other than a fishing vessel having its home port or an operating base in the United States), or aircraft, who intends to land temporarily and solely in pursuit of his calling as a crewman and to depart from the United States with the vessel or aircraft on which he arrived or some other vessel or aircraft;

(ii) an alien crewman serving in good faith as such in any capacity required for normal operations and service aboard a fishing vessel having its home port or an operating base in the United States who intends to land temporarily in Guam and solely in pursuit of his calling as a crewman and to depart from Guam with the vessel on which he arrived;

(E) an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national, and the spouse and children of any such alien if accompanying or following to join him; (i) solely to carry on substantial trade, including trade in services or trade in technology, principally between the United States and the foreign state of which he is a national; (ii) solely to develop and direct the operations of an enterprise in which he has invested, or of an enterprise in which he is actively in the process of investing, a substantial amount of capital; or (iii) solely to perform services in a specialty occupation in the United States if the alien is a national of the Commonwealth of Australia and with respect to whom the Secretary of Labor determines and certifies 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;

(F) (i) an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study consistent with section 1184(l) of this title at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in a language training program in the United States, particularly designated by him and approved by the Attorney General after consultation with the Secretary of Education, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn, and (ii) the alien spouse and minor children of any alien described in clause (i) if accompanying or following to join such an alien, and (iii) an alien who is a national of Canada or Mexico, who maintains actual residence and place of abode in the country of nationality, who is described in clause (i) except that the alien's qualifications for and actual course of study may be full or part-time, and who commutes to the United States institution or place of study from Canada or Mexico;

(G)(i) a designated principal resident representative of a foreign government recognized de jure by the

United States, which foreign government is a member of an international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (59 Stat. 669)[22 U.S.C.A. 288 et seq.], accredited resident members of the staff of such representatives, [FN1] and members of his or their immediate family;

(ii) other accredited representatives of such a foreign government to such international organizations, and the members of their immediate families;

(iii) an alien able to qualify under (i) or (ii) above except for the fact that the government of which such alien is an accredited representative is not recognized de jure by the United States, or that the government of which he is an accredited representative is not a member of such international organization; and the members of his immediate family;

(iv) officers, or employees of such international organizations, and the members of their immediate families;

(v) attendants, servants, and personal employees of any such representative, officer, or employee, and the members of the immediate families of such attendants, servants, and personal employees;

(H) an alien (i) (a) [Repealed. Pub.L. 106-95, § 2(c), Nov. 12, 1999, 113 Stat. 1316] (b) subject to section 1182(j)(2) of this title, who is coming temporarily to the United States to perform services (other than services described in subclause (a) during the period in which such subclause applies and other than services described in subclause (ii)(a) or in subparagraph (O) or (P)) in a specialty occupation described in section 1184(i)(1) of this title or as a fashion model, who meets the requirements for the occupation specified in section 1184(i)(2) of this title or, in the case of a fashion model, is of distinguished merit and ability, and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 1182(n)(1) of this title, or (b1) who is entitled to enter the United States under and in pursuance of the provisions of an agreement listed in section 1184(g)(8)(A) of this title, who is engaged in a specialty occupation described in section 1184(i)(3) of this title, and with respect to whom the Secretary of Labor determines and certifies 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, or (c) who is coming temporarily to the United States to perform services as a registered nurse, who meets the qualifications described in section 1182(m)(1) of this title, and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that an unexpired attestation is on file and in effect under section 1182(m)(2) of this title for the facility (as defined in section 1182(m)(6) of this title) for which the alien will perform the services; or (ii)(a) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services, as defined by the Secretary of Labor in regulations and including agricultural labor defined in section 3121(g) of Title 26, agriculture as defined in section 203(f) of Title 29, and the pressing of apples for cider on a farm, of a temporary or seasonal nature, or (b) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession; or (iii) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States as a trainee, other than to receive graduate medical education or training, in a training program that is not designed primarily to provide productive employment; and the ali-

en spouse and minor children of any such alien specified in this paragraph if accompanying him or following to join him;

(I) upon a basis of reciprocity, an alien who is a bona fide representative of foreign press, radio, film, or other foreign information media, who seeks to enter the United States solely to engage in such vocation, and the spouse and children of such a representative, if accompanying or following to join him;

(J) an alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming temporarily to the United States as a participant in a program designated by the Director of the United States Information Agency, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training and who, if he is coming to the United States to participate in a program under which he will receive graduate medical education or training, also meets the requirements of section 1182(j) of this title, and the alien spouse and minor children of any such alien if accompanying him or following to join him;

(K) subject to subsections (d) and (p) of section 1184 of this title, an alien who--

(i) is the fiancée or fiancé of a citizen of the United States (other than a citizen described in section 1154(a)(1)(A)(viii)(I) of this title) and who seeks to enter the United States solely to conclude a valid marriage with the petitioner within ninety days after admission;

(ii) has concluded a valid marriage with a citizen of the United States (other than a citizen described in section 1154(a)(1)(A)(viii)(I) of this title) who is the petitioner, is the beneficiary of a petition to accord a status under section 1151(b)(2)(A)(i) of this title that was filed under section 1154 of this title by the petitioner, and seeks to enter the United States to await the approval of such petition and the availability to the alien of an immigrant visa; or

(iii) is the minor child of an alien described in clause (i) or (ii) and is accompanying, or following to join, the alien;

(L) an alien who, within 3 years preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse and minor children of any such alien if accompanying him or following to join him;

(M) (i) an alien having a residence in a foreign country which he has no intention of abandoning who seeks to enter the United States temporarily and solely for the purpose of pursuing a full course of study at an established vocational or other recognized nonacademic institution (other than in a language training program) in the United States particularly designated by him and approved by the Attorney General, after consultation with the Secretary of Education, which institution shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant nonacademic student and if any such institution fails to make reports promptly the approval shall be withdrawn, and (ii) the alien spouse and minor children of any alien described in clause (i) if accompanying or following to join such an alien, and (iii) an alien who is a

national of Canada or Mexico, who maintains actual residence and place of abode in the country of nationality, who is described in clause (i) except that the alien's course of study may be full or part-time, and who commutes to the United States institution or place of study from Canada or Mexico;

(N)(i) the parent of an alien accorded the status of special immigrant under paragraph (27)(I)(i) (or under analogous authority under paragraph (27)(L)), but only if and while the alien is a child; or

(ii) a child of such parent or of an alien accorded the status of a special immigrant under clause (ii), (iii), or (iv) of paragraph (27)(I) (or under analogous authority under paragraph (27)(L));

(O) an alien who--

(i) has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim or, with regard to motion picture and television productions a demonstrated record of extraordinary achievement, and whose achievements have been recognized in the field through extensive documentation, and seeks to enter the United States to continue work in the area of extraordinary ability; or

(ii)(I) seeks to enter the United States temporarily and solely for the purpose of accompanying and assisting in the artistic or athletic performance by an alien who is admitted under clause (i) for a specific event or events,

(II) is an integral part of such actual performance,

(III) (a) has critical skills and experience with such alien which are not of a general nature and which cannot be performed by other individuals, or (b) in the case of a motion picture or television production, has skills and experience with such alien which are not of a general nature and which are critical either based on a pre-existing longstanding working relationship or, with respect to the specific production, because significant production (including pre- and post-production work) will take place both inside and outside the United States and the continuing participation of the alien is essential to the successful completion of the production, and

(IV) has a foreign residence which the alien has no intention of abandoning; or

(iii) is the alien spouse or child of an alien described in clause (i) or (ii) and is accompanying, or following to join, the alien;

(P) an alien having a foreign residence which the alien has no intention of abandoning who--

(i) (a) is described in section 1184(c)(4)(A) of this title (relating to athletes), or (b) is described in section 1184(c)(4)(B) of this title (relating to entertainment groups);

(ii)(I) performs as an artist or entertainer, individually or as part of a group, or is an integral part of the performance of such a group, and

(II) seeks to enter the United States temporarily and solely for the purpose of performing as such an artist or entertainer or with such a group under a reciprocal exchange program which is between an organization or organizations in the United States and an organization or organizations in one or more foreign states

and which provides for the temporary exchange of artists and entertainers, or groups of artists and entertainers;

(iii)(I) performs as an artist or entertainer, individually or as part of a group, or is an integral part of the performance of such a group, and

(II) seeks to enter the United States temporarily and solely to perform, teach, or coach as such an artist or entertainer or with such a group under a commercial or noncommercial program that is culturally unique; or

(iv) is the spouse or child of an alien described in clause (i), (ii), or (iii) and is accompanying, or following to join, the alien;

(Q)(i) an alien having a residence in a foreign country which he has no intention of abandoning who is coming temporarily (for a period not to exceed 15 months) to the United States as a participant in an international cultural exchange program approved by the Secretary of Homeland Security for the purpose of providing practical training, employment, and the sharing of the history, culture, and traditions of the country of the alien's nationality and who will be employed under the same wages and working conditions as domestic workers; or (ii)(I) an alien citizen of the United Kingdom or the Republic of Ireland, 21 to 35 years of age, unemployed for not less than 12 months, and having a residence for not less than 18 months in Northern Ireland, or the counties of Louth, Monaghan, Cavan, Leitrim, Sligo, and Donegal within the Republic of Ireland, which the alien has no intention of abandoning who is coming temporarily (for a period not to exceed 24 months) to the United States as a participant in a cultural and training program approved by the Secretary of State and the Secretary of Homeland Security under section 2(a) of the Irish Peace Process Cultural and Training Program Act of 1998 for the purpose of providing practical training, employment, and the experience of coexistence and conflict resolution in a diverse society, and (II) the alien spouse and minor children of any such alien if accompanying the alien or following to join the alien;

(R) an alien, and the spouse and children of the alien if accompanying or following to join the alien, who--

(i) for the 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States; and

(ii) seeks to enter the United States for a period not to exceed 5 years to perform the work described in subclause (I), (II), or (III) of paragraph (27)(C)(ii);

(S) subject to section 1184(k) of this title, an alien--

(i) who the Attorney General determines--

(I) is in possession of critical reliable information concerning a criminal organization or enterprise;

(II) is willing to supply or has supplied such information to Federal or State law enforcement authorities or a Federal or State court; and

(III) whose presence in the United States the Attorney General determines is essential to the success of an authorized criminal investigation or the successful prosecution of an individual involved in the criminal organization or enterprise; or

(ii) who the Secretary of State and the Attorney General jointly determine--

(I) is in possession of critical reliable information concerning a terrorist organization, enterprise, or operation;

(II) is willing to supply or has supplied such information to Federal law enforcement authorities or a Federal court;

(III) will be or has been placed in danger as a result of providing such information; and

(IV) is eligible to receive a reward under section 2708(a) of Title 22,

and, if the Attorney General (or with respect to clause (ii), the Secretary of State and the Attorney General jointly) considers it to be appropriate, the spouse, married and unmarried sons and daughters, and parents of an alien described in clause (i) or (ii) if accompanying, or following to join, the alien;

(T)(i) subject to section 1184(o) of this title, an alien who the Secretary of Homeland Security, or in the case of subclause (III)(aa) the Secretary of Homeland Security and the Attorney General jointly; [FN2] determines--

(I) is or has been a victim of a severe form of trafficking in persons, as defined in section 7102 of Title 22,

(II) is physically present in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands, or at a port of entry thereto, on account of such trafficking,

(III)(aa) has complied with any reasonable request for assistance in the Federal, State, or local investigation or prosecution of acts of trafficking or the investigation of crime where acts of trafficking are at least one central reason for the commission of that crime; or

(bb) has not attained 18 years of age, and

(IV) the alien would suffer extreme hardship involving unusual and severe harm upon removal;

(ii) if accompanying, or following to join, the alien described in clause (i)--

(I) in the case of an alien described in clause (i) who is under 21 years of age, the spouse, children, unmarried siblings under 18 years of age on the date on which such alien applied for status under such clause, and parents of such alien; or

(II) in the case of an alien described in clause (i) who is 21 years of age or older, the spouse and children of such alien; and

(iii) if the Secretary of Homeland Security, in his or her discretion and with the consultation of the Attorney General, determines that a trafficking victim, due to psychological or physical trauma, is unable to cooperate with a request for assistance described in clause (i)(III)(aa), the request is unreasonable.

(U)(i) subject to section 1184(p) of this title, an alien who files a petition for status under this subparagraph, if the Secretary of Homeland Security determines that--

- (I) the alien has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity described in clause (iii);
- (II) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) possesses information concerning criminal activity described in clause (iii);
- (III) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official, to a Federal, State, or local prosecutor, to a Federal or State judge, to the Service, or to other Federal, State, or local authorities investigating or prosecuting criminal activity described in clause (iii); and
- (IV) the criminal activity described in clause (iii) violated the laws of the United States or occurred in the United States (including in Indian country and military installations) or the territories and possessions of the United States;
- (ii) if accompanying, or following to join, the alien described in clause (i)--
- (I) in the case of an alien described in clause (i) who is under 21 years of age, the spouse, children, unmarried siblings under 18 years of age on the date on which such alien applied for status under such clause, and parents of such alien; or
- (II) in the case of an alien described in clause (i) who is 21 years of age or older, the spouse and children of such alien; and
- (iii) the criminal activity referred to in this clause is that involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy; or solicitation to commit any of the above mentioned crimes; or
- (V) subject to section 1184(q) of this title, an alien who is the beneficiary (including a child of the principal alien, if eligible to receive a visa under section 1153(d) of this title) of a petition to accord a status under section 1153(a)(2)(A) of this title that was filed with the Attorney General under section 1154 of this title on or before December 21, 2000, if--
- (i) such petition has been pending for 3 years or more; or
- (ii) such petition has been approved, 3 years or more have elapsed since such filing date, and--
- (I) an immigrant visa is not immediately available to the alien because of a waiting list of applicants for visas under section 1153(a)(2)(A) of this title; or
- (II) the alien's application for an immigrant visa, or the alien's application for adjustment of status under section 1255 of this title, pursuant to the approval of such petition, remains pending.

(16) The term "immigrant visa" means an immigrant visa required by this chapter and properly issued by a consular officer at his office outside of the United States to an eligible immigrant under the provisions of this chapter.

(17) The term "immigration laws" includes this chapter and all laws, conventions, and treaties of the United States relating to the immigration, exclusion, deportation, expulsion, or removal of aliens.

(18) The term "immigration officer" means any employee or class of employees of the Service or of the United States designated by the Attorney General, individually or by regulation, to perform the functions of an immigration officer specified by this chapter or any section of this title.

(19) The term "ineligible to citizenship," when used in reference to any individual, means, notwithstanding the provisions of any treaty relating to military service, an individual who is, or was at any time permanently debarred from becoming a citizen of the United States under section 3(a) of the Selective Training and Service Act of 1940, as amended (54 Stat. 885; 55 Stat. 844), or under section 4(a) of the Selective Service Act of 1948, as amended (62 Stat. 605; 65 Stat. 76)[50 App. U.S.C.A. 454(a)], or under any section of this chapter, or any other Act, or under any law amendatory of, supplementary to, or in substitution for, any of such sections or Acts.

(20) The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

(21) The term "national" means a person owing permanent allegiance to a state.

(22) The term "national of the United States" means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.

(23) The term "naturalization" means the conferring of nationality of a state upon a person after birth, by any means whatsoever.

(24) Repealed. Pub.L. 102-232, Title III, § 305(m)(1), Dec. 12, 1991, 105 Stat. 1750.

(25) The term "noncombatant service" shall not include service in which the individual is not subject to military discipline, court martial, or does not wear the uniform of any branch of the armed forces.

(26) The term "nonimmigrant visa" means a visa properly issued to an alien as an eligible nonimmigrant by a competent officer as provided in this chapter.

(27) The term "special immigrant" means--

(A) an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad;

(B) an immigrant who was a citizen of the United States and may, under section 1435(a) or 1438 of this title, apply for reacquisition of citizenship;

(C) an immigrant, and the immigrant's spouse and children if accompanying or following to join the immig-

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Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 8, Aliens and Nationality (Refs & Annos)
Chapter 12. Immigration and Nationality (Refs & Annos)
Subchapter III. Nationality and Naturalization
Part I. Nationality at Birth and Collective Naturalization

§ 1408. Nationals but not citizens of the United States at birth

Unless otherwise provided in section 1401 of this title, the following shall be nationals, but not citizens, of the United States at birth:

- (1) A person born in an outlying possession of the United States on or after the date of formal acquisition of such possession;
- (2) A person born outside the United States and its outlying possessions of parents both of whom are nationals, but not citizens, of the United States, and have had a residence in the United States, or one of its outlying possessions prior to the birth of such person;
- (3) A person of unknown parentage found in an outlying possession of the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in such outlying possession; and
- (4) A person born outside the United States and its outlying possessions of parents one of whom is an alien, and the other a national, but not a citizen, of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than seven years in any continuous period of ten years--
 - (A) during which the national parent was not outside the United States or its outlying possessions for a continuous period of more than one year, and
 - (B) at least five years of which were after attaining the age of fourteen years.

The proviso of section 1401(g) of this title shall apply to the national parent under this paragraph in the same manner as it applies to the citizen parent under that section.

CREDIT(S)

(June 27, 1952, c. 477, Title III, ch. 1, § 308, 66 Stat. 238; Aug. 27, 1986, Pub.L. 99-396, § 15(a), 100 Stat. 842; Oct. 24, 1988, Pub.L. 100-525, § 3(2), 102 Stat. 2614.)

Current through P.L. 110-449 approved 11-21-08

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Effective:[See Notes]

United States Code Annotated Currentness
Title 8. Aliens and Nationality (Refs & Annos)
Chapter 12. Immigration and Nationality (Refs & Annos)
Subchapter III. Nationality and Naturalization
Part IV. Miscellaneous

§ 1503. Denial of rights and privileges as national

(a) Proceedings for declaration of United States nationality

If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of Title 28 against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any removal proceeding under the provisions of this chapter or any other act, or (2) is in issue in any such removal proceeding. An action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege and shall be filed in the district court of the United States for the district in which such person resides or claims a residence, and jurisdiction over such officials in such cases is conferred upon those courts.

(b) Application for certificate of identity; appeal

If any person who is not within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may make application to a diplomatic or consular officer of the United States in the foreign country in which he is residing for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission. Upon proof to the satisfaction of such diplomatic or consular officer that such application is made in good faith and has a substantial basis, he shall issue to such person a certificate of identity. From any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing his reasons for his decision. The Secretary of State shall prescribe rules and regulations for the issuance of certificates of identity as above provided. The provisions of this subsection shall be applicable only to a person who at some time prior to his application for the certificate of identity has been physically present in the United States, or to a person under sixteen years of age who was born abroad of a United States citizen parent.

(c) Application for admission to United States under certificate of identity; revision of determination

A person who has been issued a certificate of identity under the provisions of subsection (b) of this section, and while in possession thereof, may apply for admission to the United States at any port of entry, and shall be sub-

ject to all the provisions of this chapter relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise. Any person described in this section who is finally denied admission to the United States shall be subject to all the provisions of this chapter relating to aliens seeking admission to the United States.

CREDIT(S)

(June 27, 1952, c. 477, Title III, ch. 4, § 360, 66 Stat. 273; Sept. 30, 1996, Pub.L. 104-208, Div. C, Title III, § 308(d)(4)(P), 110 Stat. 3009-619.)

1996 Acts. Amendment by section 308 of Div. C of Pub.L. 104-208 effective, with certain exceptions and subject to certain transitional rules, on the first day of the first month beginning more than 180 days after Sept. 30, 1996, see section 309 of Div. C of Pub.L. 104-208, set out as a note under section 1101 of this title.

Current through P.L. 110-449 approved 11-21-08

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Effective:[See Text Amendments]

United States Code Annotated, Currentness
Title 22. Foreign Relations and Intercourse
Chapter 48. Taiwan Relations

§ 3301. Congressional findings and declaration of policy

(a) Findings

The President having terminated governmental relations between the United States and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, the Congress finds that the enactment of this chapter is necessary--

- (1) to help maintain peace, security, and stability in the Western Pacific; and
- (2) to promote the foreign policy of the United States by authorizing the continuation of commercial, cultural, and other relations between the people of the United States and the people on Taiwan.

(b) Policy

It is the policy of the United States--

- (1) to preserve and promote extensive, close, and friendly commercial, cultural, and other relations between the people of the United States and the people on Taiwan, as well as the people on the China mainland and all other peoples of the Western Pacific area;
- (2) to declare that peace and stability in the area are in the political, security, and economic interests of the United States, and are matters of international concern;
- (3) to make clear that the United States decision to establish diplomatic relations with the People's Republic of China rests upon the expectation that the future of Taiwan will be determined by peaceful means;
- (4) to consider any effort to determine the future of Taiwan by other than peaceful means, including by boycotts or embargoes, a threat to the peace and security of the Western Pacific area and of grave concern to the United States;
- (5) to provide Taiwan with arms of a defensive character; and
- (6) to maintain the capacity of the United States to resist any resort to force or other forms of coercion that would jeopardize the security, or the social or economic system, of the people on Taiwan.

(c) Human rights

Nothing contained in this chapter shall contravene the interest of the United States in human rights, especially with respect to the human rights of all the approximately eighteen million inhabitants of Taiwan. The preservation and enhancement of the human rights of all the people on Taiwan are hereby reaffirmed as objectives of the United States.

CREDIT(S)

(Pub. L. 96-8, § 2, Apr. 10, 1979, 93 Stat. 14.)

Current through P.L. 110-449 approved 11-21-08

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Effective: [See Text Amendments]

United States Code Annotated Currentness
Title 22, Foreign Relations and Intercourse
Chapter 48, Taiwan Relations

§ 3303. Application to Taiwan of laws and international agreements

(a) Application of United States laws generally

The absence of diplomatic relations or recognition shall not affect the application of the laws of the United States with respect to Taiwan, and the laws of the United States shall apply with respect to Taiwan in the manner that the laws of the United States applied with respect to Taiwan prior to January 1, 1979.

(b) Application of United States laws in specific and enumerated areas

The application of subsection (a) of this section shall include, but shall not be limited to, the following:

(1) Whenever the laws of the United States refer or relate to foreign countries, nations, states, governments, or similar entities, such terms shall include and such laws shall apply with respect to Taiwan.

(2) Whenever authorized by or pursuant to the laws of the United States to conduct or carry out programs, transactions, or other relations with respect to foreign countries, nations, states, governments, or similar entities, the President or any agency of the United States Government is authorized to conduct and carry out, in accordance with section 3305 of this title, such programs, transactions, and other relations with respect to Taiwan (including, but not limited to, the performance of services for the United States through contracts with commercial entities on Taiwan), in accordance with the applicable laws of the United States.

(3)(A) The absence of diplomatic relations and recognition with respect to Taiwan shall not abrogate, infringe, modify, deny, or otherwise affect in any way any rights or obligations (including but not limited to those involving contracts, debts, or property interests of any kind) under the laws of the United States heretofore or hereafter acquired by or with respect to Taiwan.

(B) For all purposes under the laws of the United States, including actions in any court in the United States, recognition of the People's Republic of China shall not affect in any way the ownership of or other rights or interests in properties, tangible and intangible, and other things of value, owned or held on or prior to December 31, 1978, or thereafter acquired or earned by the governing authorities on Taiwan.

(4) Whenever the application of the laws of the United States depends upon the law that is or was applicable on Taiwan or compliance therewith, the law applied by the people on Taiwan shall be considered the applicable law for that purpose.

(5) Nothing in this chapter, nor the facts of the President's action in extending diplomatic recognition to the People's Republic of China, the absence of diplomatic relations between the people on Taiwan and the United States, or the lack of recognition by the United States, and attendant circumstances thereto, shall be construed in any administrative or judicial proceeding as a basis for any United States Government agency, commission, or department to make a finding of fact or determination of law, under the Atomic Energy Act of 1954 [42 U.S.C.A. § 2011 et seq.] and the Nuclear Non-Proliferation Act of 1978 [22 U.S.C.A. § 3201 et seq.], to deny an export license application or to revoke an existing export license for nuclear exports to Taiwan.

(6) For purposes of the Immigration and Nationality Act [8 U.S.C.A. § 1101 et seq.], Taiwan may be treated in the manner specified in the first sentence of section 202(b) of that Act [8 U.S.C.A. § 1152(b)].

(7) The capacity of Taiwan to sue and be sued in courts in the United States, in accordance with the laws of the United States, shall not be abrogated, infringed, modified, denied, or otherwise affected in any way by the absence of diplomatic relations or recognition.

(8) No requirement, whether expressed or implied, under the laws of the United States with respect to maintenance of diplomatic relations or recognition shall be applicable with respect to Taiwan.

(c) Treaties and other international agreements

For all purposes, including actions in any court in the United States, the Congress approves the continuation in force of all treaties and other international agreements, including multilateral conventions, entered into by the United States and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, and in force between them on December 31, 1978, unless and until terminated in accordance with law.

(d) Membership in international financial institutions and other international organizations

Nothing in this chapter may be construed as a basis for supporting the exclusion or expulsion of Taiwan from continued membership in any international financial institution or any other international organization.

CREDIT(S)

(Pub. L. 96-8, § 4, Apr. 10, 1979, 93 Stat. 15.)

Current through P.L. 110-449 approved 11-21-08

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Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 22. Foreign Relations and Intercourse
Chapter 48. Taiwan Relations

§ 3305. The American Institute in Taiwan**(a) Conduct of programs, transactions, or other relations with respect to Taiwan**

Programs, transactions, and other relations conducted or carried out by the President or any agency of the United States Government with respect to Taiwan shall, in the manner and to the extent directed by the President, be conducted and carried out by or through--

(1) The [FN1] American Institute in Taiwan, a nonprofit corporation incorporated under the laws of the District of Columbia, or

(2) such comparable successor nongovernmental entity as the President may designate,

(hereafter in this chapter referred to as the "Institute").

(b) Agreements or transactions relative to Taiwan entered into, performed, and enforced

Whenever the President or any agency of the United States Government is authorized or required by or pursuant to the laws of the United States to enter into, perform, enforce, or have in force an agreement or transaction relative to Taiwan, such agreement or transaction shall be entered into, performed, and enforced, in the manner and to the extent directed by the President, by or through the Institute.

(c) Preemption of laws, rules, regulations, or ordinances of District of Columbia, States, or political subdivisions of States

To the extent that any law, rule, regulation, or ordinance of the District of Columbia, or of any State or political subdivision thereof in which the Institute is incorporated or doing business, impedes or otherwise interferes with the performance of the functions of the Institute pursuant to this chapter, such law, rule, regulation, or ordinance shall be deemed to be preempted by this chapter.

CREDIT(S)

(Pub. L. 96-8, § 6, Apr. 10, 1979, 93 Stat. 17.)

[FN1] So in original. Probably should not be capitalized.

Current through P.L. 110-449 approved 11-21-08