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Immigration: "Recalcitrant" Countries and the Use of Visa Sanctions to Encourage Cooperation with Alien Removals

The ability to repatriate foreign nationals (*aliens*) who violate U.S. immigration law is central to the immigration enforcement system. The Immigration and Nationality Act (INA) provides broad authority to the Department of Homeland Security (DHS) and the Department of Justice (DOJ) to remove certain foreign nationals from the United States.

Any foreign national found to be inadmissible or deportable under the grounds specified in the INA may be ordered removed. Those ordered removed may include unauthorized aliens (i.e., foreign nationals who enter without inspection, enter with fraudulent documents, or enter legally but overstay their temporary visas). Lawfully present foreign nationals who commit crimes or certain other acts may also be subject to removal. To effectuate a removal, the alien's country of citizenship must confirm the alien's nationality, issue travel documents, and accept his or her physical return by commercial flight or, where necessary, charter flight.

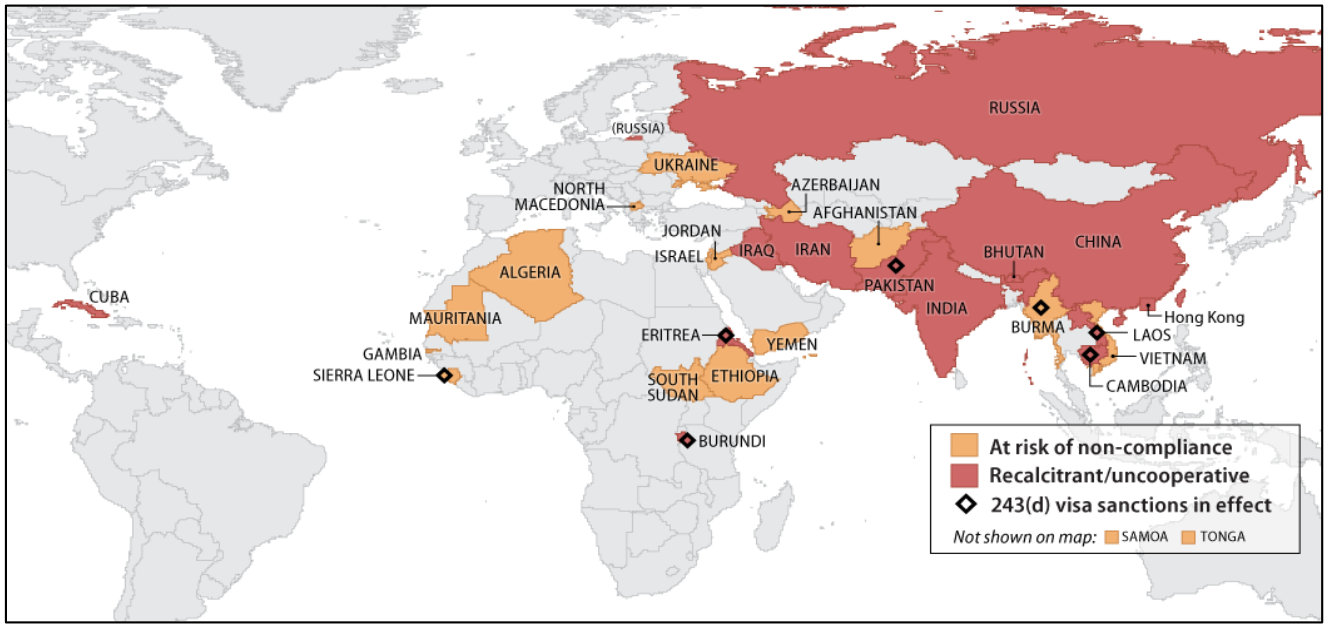
A 2001 Supreme Court ruling, *Zadvydas v. Davis*, generally limits the government's authority to indefinitely detain aliens who have been ordered removed. As a result, detained aliens subject to removal orders but for whom there is "no significant likelihood of removal in the reasonably foreseeable future," must be released into the United States after six months, with limited exceptions.

Recalcitrant Countries

According to DHS's Immigration and Customs Enforcement (ICE), most countries adhere to their international obligations to accept the timely return of their citizens. Countries that systematically refuse or delay the repatriation of their citizens, however, are considered by DHS to be "recalcitrant," also called "uncooperative." Countries that demonstrate some but not full cooperation are considered "at risk of non-compliance" (ARON). ICE currently classifies 13 countries as recalcitrant/uncooperative and 17 as ARON (**Figure 1**).

Countries are ranked on a scale ranging from uncooperative to cooperative, based on statistical data and analytic feedback on a range of assessment factors. These factors include a refusal to accept charter flight-based removals, the ratio of releases to removals, and average length of time between issuance of a removal order and removal. ICE also takes into account mitigating factors, such as a natural or man-made disaster or limited capacity (e.g., regarding law enforcement, inadequate records, and/or inefficient bureaucracy), to assess whether a country is intentionally uncooperative or incapable due to country conditions. Some countries disagree with ICE's assessments, maintaining that the United States has not adequately demonstrated that the persons ordered removed are indeed their nationals.

Figure 1. At Risk of Non-compliance (ARON), Recalcitrant, and Sanctioned Countries



Source: Map created by CRS using data from Esri Data and Maps, 2017. Boundary representation is not necessarily authoritative. ARON/recalcitrant data provided by DHS's Immigration and Customs Enforcement (ICE), current as of June 3, 2020. Sanctions data come from publically available sources including DHS press releases, U.S. embassy websites, and the *Federal Register*, current as of July 10, 2020.

Past Use of Visa Sanctions

INA §243(d) provides that if the Secretary of Homeland Security notifies the Secretary of State that a country "denies or unreasonably delays accepting an alien who is a citizen, subject, national, or resident of that country," the Secretary of State "shall order consular officers in that foreign country to discontinue granting immigrant visas or nonimmigrant visas, or both." The Secretary of State determines which categories of visas and visa applicants will be covered by the suspension. Visa issuance resumes once the Secretary of Homeland Security notifies the Secretary of State that the country has accepted its nationals upon removal from the United States.

This provision of law was enacted in 1952, and the United States used it during the Cold War to restrict visa issuances to certain ex-Soviet bloc nationals. Between the end of the Cold War and 2016, the designation was used once, against Guyana in 2001. Citing the Supreme Court's decision in *Zadvydas v. Davis*, DOJ—which was then in charge of removal decisions—imposed visa sanctions to ensure removal of 113 criminally convicted Guyanese nationals then in U.S. custody whom DOJ had deemed dangerous. These sanctions followed numerous unsuccessful U.S. diplomatic attempts to effect their removal. Within two months, Guyana responded by issuing travel documents to 112 of these nationals and sanctions were lifted.

This authority was not used again until 2016, after The Gambia resisted sustained pressure to cooperate with the repatriation of its nationals. This imposition of sanctions came on the heels of a July 2016 House Committee on Oversight and Government Reform hearing in which ICE and the Department of State (DOS) discussed various measures used to persuade recalcitrant countries to cooperate (see text box). Some Members from both parties urged DHS and DOS to move beyond diplomacy and impose visa sanctions under INA §243(d) both to elicit cooperation from a country, or countries, on which sanctions are imposed and to serve as a deterrent to non-cooperation by other countries. Some Members cited the case of Jean Jacques, a Haitian who committed a murder in Connecticut in 2015 following his release from prison after a second degree murder conviction. Despite repeated attempts, DHS had been unable to repatriate Jacques due to Haiti's refusal to issue travel documents.

Use of Visa Sanctions by the Trump Administration

Shortly after taking office, President Donald Trump issued Executive Order 13768, "Enhancing Public Safety in the Interior of the United States." Section 12 of the order, titled "Recalcitrant Countries," directs DHS and DOS to "effectively implement" the sanctions provided by INA §243(d). It also requires the Secretary of State to "ensure that diplomatic efforts and negotiations with foreign states include as a condition precedent the acceptance by those foreign states of their nationals who are subject to removal from the United States."

In September 2017, DOS imposed visa sanctions under INA §243(d) on four countries: Cambodia, Eritrea, Guinea, and Sierra Leone. In a press release, DHS maintained that these countries had failed to establish reliable processes for issuing travel documents to their nationals ordered removed. DHS reported that it had been forced to release into the United States 2,137 Guineans and 831 Sierra Leoneans with final orders of removal, many with serious criminal convictions. DHS also reported that some 700 Eritrean nationals and 1,900 Cambodian nationals with final orders of removal—some with serious criminal convictions—were residing in the United States. Sanctions on Guinea were lifted on August 27, 2018 after the country cooperated with repatriation requests from DHS.

DHS announced sanctions for two additional countries—Burma and Laos—on July 9, 2018, citing their failure to establish reliable processes for issuing travel documents and the resulting requirement for ICE to release into the United States some of their nationals, including some convicted of serious crimes. On January 31, 2019, DHS announced 243(d) visa sanctions against Ghana, which were lifted on January 17, 2020; sanctions against Pakistan were imposed on April 5, 2019. On June 12, 2020, sanctions were imposed on Burundi. With the exception of Eritrea, Laos, and Burundi, all 243(d) sanctions apply only to tourist/business visitor (B) visas for certain government officials and, in some cases, their families and attendants. A broader set of visa categories and applicants are covered by the sanctions imposed on Eritrea, Laos, and Burundi.

Alternatives to Visa Sanctions

Visa sanctions are not the only tool available to the U.S. government to encourage cooperation with alien removals. DHS and DOS work together to identify the most effective approach in each case, beginning with diplomatic efforts. They escalate to the use of sanctions when they determine that doing so will be effective and that the benefit will outweigh the potential negative impact on foreign policy interests. Some countries sharply restrict the foreign travel of their citizens and may be unmoved by visa sanctions; others may retaliate in ways detrimental to bilateral trade, tourism, law enforcement, or other forms of cooperation. In cases in which identity documents are not readily available and the foreign country questions the nationality of individuals with removal orders, a "recalcitrant" classification or visa sanctions may impede friendly bilateral relations.

Measures to Address Recalcitrant Countries

- Issue a demarche (i.e., a formal diplomatic request)
- Hold a joint meeting with the ambassador to the United States, DOS, and ICE
- Provide notice of the U.S. government's intent to exercise visa sanctions to gain compliance
- Impose visa sanctions
- Call for inter-agency meetings to pursue withholding of aid or other funding

DHS and DOS have reported success in achieving cooperation without resorting to visa sanctions, resulting in countries being removed from the recalcitrant or ARON lists. In July 2016, there were 23 recalcitrant and 62 ARON countries; as of June 2020, those numbers had dropped to 13 recalcitrant and 17 ARON countries, a reduction that DHS and DOS attribute to pressure and diplomacy.

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