

Legal Sidebar

U.S. Invokes Visa Sanctions under Section 243(d) of the INA for the First Time in 15 Years

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The United States recently invoked “visa sanctions” under [Section 243\(d\)](#) of the Immigration and Nationality Act (INA) against The Gambia for failing to accept the return of Gambian citizens and nationals removed from the United States. Section 243(d) provides the authority for the United States to [discontinue granting visas](#) to citizens and nationals of countries which [deny or “unreasonably delay”](#) the acceptance of their citizens or nationals who are ordered to be removed from the United States. Pursuant to this authority, the United States has [indicated](#) that it would discontinue granting visas to employees of the Gambian government and entities associated with the government, and their spouses and children, with certain exceptions, effective October 1, 2016. This action, which comes in the wake of congressional hearings regarding [“recalcitrant countries,”](#) marks the first time the Executive has exercised its authority under Section 243(d) since sanctions were imposed on [Guyana](#) in 2001, although the Executive has imposed certain “visa restrictions” [under other authority](#) at more recent dates. [Some](#) have wondered whether the sanctions imposed on The Gambia are consistent with the text of the INA.

[Section 243\(d\)](#) provides, in its entirety, that:

On being notified by the [Secretary of Homeland Security] that the government of a foreign country denies or unreasonably delays accepting an alien who is a citizen, subject, national, or resident of that country after the [Secretary of Homeland Security] asks whether the government will accept the alien under this section, the Secretary of State shall order consular officers in that foreign country to discontinue granting immigrant visas or nonimmigrant visas, or both, to citizens, subjects, nationals, and residents of that country until the [Secretary of Homeland Security] notifies the Secretary that the country has accepted the alien.

This text is not the subject of any regulatory interpretation by the Executive branch, nor do there appear to be any judicial or administrative decisions construing the text.

Certain aspects of Section 243(d)’s meaning seem clear based on the [“plain language”](#) of the statute and the application of generally applicable [principles of statutory interpretation](#). Namely, the Department of Homeland Security (DHS)—and not some other component of the Executive branch or the federal government—is tasked with determining whether a foreign country has “denie[d] or unreasonably delay[ed]” accepting the return of one or more of its citizens or nationals who were ordered to be removed from the United States. (Aliens can be removed from the United States on various grounds set forth in [Section 237](#) of the INA.) Once DHS makes such a determination, the Department of State (DOS) would appear to be required to impose some form of visa sanctions upon the country because the statute provides that the “Secretary of State *shall* order consular officers in that foreign country to discontinue granting . . . visas.” The word “shall” is [generally construed](#) to indicate mandatory action. These visa sanctions apparently can consist of the discontinuance of [immigrant visas](#), [nonimmigrant visas](#), or both, as the statute uses the disjunctive “or,” which is [ordinarily taken](#) to mean that only one of the listed actions needs to be satisfied.

Other aspects of Section 243(d)’s meaning are less clear, however. In particular, questions have been raised about whether the statutory references to “immigrant visas” and “nonimmigrant visas” mean that DOS must discontinue granting *all* types of immigrant and/or nonimmigrant visas, or whether it may discontinue granting some types of

immigrant/nonimmigrant visas, but not others. For example, if DOS opts to discontinue granting nonimmigrant visas, must it discontinue granting all [A visas](#) (diplomats or other foreign officials), [B visas](#) (visitors for business or pleasure), [C visas](#) (aliens transiting the United States), [D visas](#) (crewmembers), [E visas](#) (treaty traders and investors), [F visas](#) (foreign students), [G visas](#) (representatives of foreign governments working for international organizations), and [H visas](#) (temporary workers), etc.? Or may it select only some of these types for discontinuance (e.g., As and Gs)?

[Some](#) have suggested that Section 243(d)'s reference to "immigrant visas or nonimmigrant visas" means that DOS may determine whether to discontinue one or the other (or both) of these broad categories of visas, but once it has made that choice, it must discontinue all types of immigrant and/or nonimmigrant visas, apparently on the theory that the statute refers to immigrant/nonimmigrant visas collectively. The Executive, in contrast, has taken the view that it may discontinue some—but not all—types of immigrant/nonimmigrant visas, as evidenced by its recent actions as to The Gambia and its 2001 actions as to Guyana. In [both cases](#), DOS discontinued only the issuance of specific types of nonimmigrant visas, and not *all* nonimmigrant visas. DOS does not appear to have publicly articulated its rationale for adopting this interpretation, beyond noting [policy reasons](#) for limiting the use of visa sanctions. However, an argument could potentially be made that while Section 243(d) refers to immigrant/nonimmigrant visas in the plural, it does not expressly require the discontinuance of all types of immigrant/nonimmigrant visas. Insofar as Section 243(d) may be seen as ambiguous on this point, the DOS interpretation could potentially be seen as entitled to [some degree of deference](#). DOS could potentially also [cite historical practice](#) as supporting its interpretation, although courts have generally been reluctant to find that Congress "[acquiesced](#)" to a particular interpretation of a statute by the Executive based solely on the fact that Congress was aware of the Executive's interpretation and did not act to amend the statute.

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