

# The Limitations Of White House's Visa Overstay Memo

By Andrew Greenfield

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On April 22, 2019, President Donald Trump issued a policy memorandum[1] targeting foreign nationals who enter the United States legally and remain beyond their required departure dates — so-called overstays.

Citing the [U.S. Department of Homeland Security's](#) Fiscal Year 2018 Entry/Exit Overstay Report,[2] the memo directs the Department of Homeland Security and [U.S. Department of State](#) to recommend ways to reduce the number of overstays who enter as tourists or business visitors from countries with “unacceptably high” overstay rates of more than 10%,[3] as well as visitors entering the U.S. under the Visa Waiver Program.



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The memo endorses strategies federal agencies have routinely used to boost compliance with visa requirements. These include suspending or limiting visa issuance, curtailing the amount of time individuals may remain in the United States, and imposing additional documentary requirements.[4]

Section 3 of the new memo instructs the agencies to impose admission bonds as a means of improving compliance. While immigration bonds are commonplace, requiring bond as a condition for receiving a visa or admission to the United States is highly unusual.

This article summarizes data from the 2018 overstay report as it relates to the policies articulated by the memo. It also analyzes the nature and enforceability of admission bonds and their potential impact.

**2018 Overstay Report**

## ***Methodology and Limitations***

DHS must report to Congress annually on the number of visa “overstays” by country of citizenship.[5] An overstay in this context is a temporary visa holder whose immigration documents require them to depart the United States by a specific date during the fiscal year but who fail to do so.

The 2018 overstay report provides data on individuals who arrived and departed the United States by air and sea, but shares only limited information about land border crossings due to data collection obstacles at the Canadian and Mexican borders.[6] The report also excludes a small percentage of temporary visa categories, such as diplomats, crewman and individuals transiting through the United States.[7]

DHS concedes that it treats as an “overstay” anyone for whom the government cannot locate a record or evidence of departure. Departure records are principally drawn from outbound passenger manifests provided by commercial carriers, which are less reliable than the biometric data collected by DHS for arrivals.[8] Because they are far more likely to travel to and from the U.S. by land, data for Canadians and Mexicans is reported separately.[9] Since those who enter by air or sea but depart by land may also be missed by DHS, the 2018 overstay report should be viewed as a high estimate rather than a dispositive account of departure compliance; i.e., overstay rates are likely lower than what is reported.

Notwithstanding its limitations, the 2018 overstay report provides key data. Most important, for the second straight year visa overstay rates have declined.[10] Of the roughly 55 million travelers covered in the study, DHS calculated an overstay rate of 1.22%, or 666,582 missed departures.[11] While this is a high number in absolute terms, it reflects that nearly 99% of entrants left the United States on time.

Of those who overstayed during the fiscal year, 1.04% remained in the U.S. by the time the fiscal year ended on Sept.30, 2018.[12] DHS also took a snapshot of 2018 fiscal year overstays who were still in the U.S. unlawfully as of March 1, 2019, and those numbers revealed a further drop in the overstay rate to 0.76%.

These additional metrics are important because they show that even among those who overstayed their visas, nearly half remained in the U.S. for only a limited period of time; they did

not stay indefinitely to exploit our laws or compete with U.S. workers. Compliance with the immigration laws is crucial, but there are any number of harmless reasons why one might overstay for a short period of time, including health-related reasons.[13]

### ***Visa Waiver and Visitor Visa Compliance***

The 2018 overstay report further breaks down overstay numbers by visa type and nationality. In assessing the rates of overstay for visitors to the United States in the “B” visa category, it addresses citizens from visa waiver countries separately from other nationals.[14]

Citizens of 38 countries who wish to enter the U.S. for short-term business visits or tourism have the option of entering the United States without a visa under the Visa Waiver Program. Individuals who pursue this option may remain for up to 90 days and cannot apply to stay longer; they must depart within 90 days. The United States determines which countries’ citizens may travel to the U.S. visa-free in part based on overstay rates.

About 23 million nationals from visa waiver countries who entered the U.S. as visitors were expected to depart the United States during the fiscal year. Of these, 0.41% overstayed.[15] As expected, this overstay rate is much lower than the general overstay rate of 1.22% referenced above. Of the 38 visa waiver countries, nationals of seven — Chile, Greece, Hungary, Latvia, Lithuania, Portugal and Spain — had overstay rates at or above 1% and none had overstay rates exceeding 1.8%.[16] As explained above, based on the government’s data collection limitations, these numbers are likely higher than the number of actual overstays.

As for visitors from non-visa waiver countries, overstay rates, as well as the number of departures expected during the fiscal year, span a wide range. Nationals of one country — Cyprus — had an overstay rate of 0.40%,[17] which is lower than the average overstay rate of 0.41% for nationals of visa waiver countries. There are also many countries with overstay rates significantly lower than at least one of the current visa waiver countries. Since overstay rates are a factor in whether the U.S. government will permit a country’s nationals to visit the United States visa-free, we may see very low overstay countries such as Cyprus and Croatia considered for the visa waiver program in the future.

Some countries may have lower overstay rates because U.S. consular officers deny visitor visas to a large percentage of visa applicants from that country, thus preventing likely overstays from entering the U.S. in the first place. The government did not provide this data in the 2018

overstay report, but as a general matter applicants for visitor visas from less developed countries are more likely to have their applications denied.

Nationals of 20 countries had visitor overstay rates that reach or exceed 10%, which is the threshold percentage for which Trump has asked federal agencies to study and take remedial action. The highest of these percentages — 44.67% — are for nationals of the African nation of Djibouti, but only 403 Djibouti citizens had departure dates in fiscal year 2018,[18] so the economic impact of these overstays is arguably negligible. In fact, when viewing the data in terms of absolute numbers, the countries with the highest overstay rates have comparatively very low numbers of visitors in the United States.

Approximately 38 million foreign visitors, i.e., persons admitted to the United States under the Visa Waiver Program or with a visitor visa (excluding Canadians and Mexicans), had departure dates during FY 2018.[19] DHS could not confirm the departure or a status extension for about 400,000 of these visitors, thus deeming them overstays.[20] Of these 400,000 overstays, only 36,000 — 0.09% — are nationals of the 20 countries Trump has ordered for extra scrutiny.[21] If you remove just one country from that list — Nigeria — nationals of the remaining 19 countries, most of which are in Africa, comprise just 6,223 overstays, or 0.015% of the visitor overstay population.[22]

The new memo provides that its principal policy objectives are to ferret out individuals who “abuse the visa process” and “undermine the integrity of our visa system and harm the national interest.” It’s curious, then, why a major feature of the administration’s focus is on such a tiny percentage of the overstay population. It might be more prudent for the administration to concentrate its efforts on countries whose nationals comprise the largest numbers of overstays rather than the largest percentages.

### **Admission Bonds**

Section 3 of the new memo directs DHS and DOS to develop measures for requiring foreign nationals to post bond before they are issued visas or admitted to the United States. This is a highly unusual and potentially restraining, albeit lawful, prerequisite for legitimate travel.

The government commonly requires unauthorized persons in [U.S. Immigration and Customs Enforcement](#) custody to post “delivery” bonds as a condition of their release and to ensure their appearance at scheduled court dates. Detainees given the option of departing the United States

voluntarily and avoiding formal removal may be required to post “voluntary departure” bonds as a condition of release and timely departure.

Far less common are admission bonds, a tool the president has directed his agencies to sharpen for more widespread use. These bonds would require individuals applying for visas or entry into the United States to pay a fee — the bond — which would be returned if they abide by the terms of their visas and timely depart, or forfeited if they fail to meet these conditions.

While admission bonds are rarely used in practice, Congress provides DHS with broad authority to prescribe forms of bond, including admission bonds, it deems necessary to execute the immigration laws.[23] The Immigration and Nationality Act authorizes federal agencies to prescribe the giving of bond in a sufficient amount to ensure that foreign nationals depart the United States at the expiration of their authorized stay or upon failure to abide by the terms of their visas.[24] A bond may also be forfeited where foreign nationals violate the terms of their visas even if they timely depart the United States.[25] The government’s broad authority also includes requiring bond as a condition for the approval of a visa petition.[26]

Admission bonds for visitors and students are explicitly addressed in Section 221(g) of the INA.[27] U.S. consular officers who determine that an intending visitor or student is otherwise eligible for a visa may require and set the amount of a bond in order to ensure the applicant maintains his or her immigration status and departs the United States on or before the expiration of his or her period of authorized stay.[28] Corresponding regulations at 8 CFR §221.1 provide that the [U.S. Citizenship and Immigration Services](#) office with jurisdiction over the foreign national’s intended place of residence or port of entry may accept a bond at the request of a consular officer.

The new memo and a related briefing statement released by the White House[29] do not indicate how the government should activate the use of these bonds. Unlike other portions of the memo, the provision on bonds is not tied to particular types of visas or rates of overstay. This leaves open the possibility of a worldwide program prompting consular officers at their discretion to require bonds in exchange for visas regardless of nationality, foreign residence or history of visa abuse.

In theory, the option of admission bonds could result in some applicants receiving bond-associated visas where today their visas would simply be denied. But given the Trump administration’s general inclination to make other visa categories more restrictive,[30] we could

just as easily see bonds imposed on the lawful travel of individuals who under existing policies would have been granted visas without the condition precedent of a bond.

Admission bonds will increase the cost and administrative burden of U.S. travel for foreign nationals seeking to visit, work or study in the United States lawfully. Depending on whether and how high bond prices are set and how time-consuming they are to obtain, admission bonds could deter legal travel by making it less affordable and/or less attractive to those who may find the idea of posting bond as a condition for entering the United States unwelcoming or repugnant.

## **Conclusion**

The administration's desire to turn some of its attention away from the southern border and address overstays makes sense given the high number, albeit low percentage, of temporary visitors that overstay. The methods proposed for tackling this problem, however, seem suboptimal in achieving the new memo's stated policy objectives.

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*[Andrew Greenfield](#) is managing partner of the Washington, D.C. office at [Fragomen, Del Rey, Bernsen & Loewy LLP](#).*

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[1] Presidential Memorandum on Combating High Nonimmigrant Overstay Rates, [www.whitehouse.gov/presidential-actions/presidential-memorandum-combating-high-nonimmigrant-overstay-rates/](http://www.whitehouse.gov/presidential-actions/presidential-memorandum-combating-high-nonimmigrant-overstay-rates/), April 22, 2019.

[2] U.S. Dep't of Homeland Security, Fiscal Year 2018 Entry/Exit Overstay Report (the "2018 Overstay Report"), [https://www.dhs.gov/sites/default/files/publications/19\\_0417\\_fy18-entry-and-exit-overstay-report.pdf](https://www.dhs.gov/sites/default/files/publications/19_0417_fy18-entry-and-exit-overstay-report.pdf)

[3] See endnote i, *supra*, at Section 2(a).

[4] *Id.*, at 2(b).

[5] Immigration and Naturalization Service Data Management Improvement Act of 2000 (Pub. L. No. 106-215).

[6] 2018 Overstay Report, page 3.

[7] *Id.*, at 7.

[8] *Id.*, at 3.

[9] Border crossings and related departure data for Canadians and Mexicans are outside the scope of this article.

[10] *Id.*, at ii.

[11] *Id.*, at iii.

[12] 2018 Overstay Report, at iii.

[13] While in some cases USCIS will authorize additional time in the United States for foreign nationals to attend to temporary personal matters, visitors and other short-stay travelers may be unaware of this option, especially if they are not working with immigration counsel.

[14] The 2018 Overstay Report included data on other types of visas, such as foreign students and temporary workers, that were not the main focus of the president's new memo and not discussed in this article.

[15] 2018 Overstay Report, at 11.

[16] *Id.*, at 14, 15.

[17] *Id.*, at 17.

[18] Id.

[19] Id., at 13.

[20] Id.

[21] Id., at 16-19.

[22] Id., at 18.

[23] INA § 103(a)(3), (g)(2), 8 USC §1103(a)(3), (g)(2). See also, [Earle v. United States](#), 254 F.2d 384, 385 (2nd Cir. 1958).

[24] INA § 214(a)(1), 8 USC §1184(a)(1).

[25] See [Earle vs. United States](#), supra note xxiii, at 387.

[26] Matter of Grecian Palace, 10 I. & N. Dec. 710 (BIA R.C., 1962), Interim Decision 1390, 1962 WL 12926.

[27] INA § 221(g), 8 USC 1201(g).

[28] Id.

[29] President Donald Trump is Taking Action to Reduce Visa Overstays and Uphold the Rule of Law, [www.whitehouse.gov/briefings-statements/president-donald-j-trump-is-taking-action-to-reduce-visa-overstays-and-uphold-the-rule-of-law/](http://www.whitehouse.gov/briefings-statements/president-donald-j-trump-is-taking-action-to-reduce-visa-overstays-and-uphold-the-rule-of-law/), April 22, 2019.

[30] Pfahl, M. and Greenfield, A., The Latest Updates on H-1B Sponsorship, [Association of Corporate Counsel](#), ACC Docket, October 2018.