

SUBCHAPTER E—VISAS

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Subpart A—General Provisions

§ 40.1 Definitions.

The following definitions supplement definitions contained in the Immigration and Nationality Act (INA). As used in the regulations in parts 40, 41, 42, 43 and 45 of this subchapter, the term:

(a)(1) *Accompanying or accompanied by* means not only an alien in the physical company of a principal alien but also an alien who is issued an immigrant visa within 6 months of:

(i) The date of issuance of a visa to the principal alien;

(ii) The date of adjustment of status in the United States of the principal alien; or

(iii) The date on which the principal alien personally appears and registers before a consular officer abroad to confer alternate foreign state chargeability or immigrant status upon a spouse or child.

(2) An “accompanying” relative may not precede the principal alien to the United States.

(b) *Act* means the Immigration and Nationality Act (or INA), as amended.

(c) *Competent officer*, as used in INA 101(a)(26), means a “consular officer” as defined in INA 101(a)(9).

(d) *Consular officer*, as defined in INA 101(a)(9) includes commissioned consular officers and the Deputy Assistant Secretary for Visa Services, and such other officers as the Deputy Assistant Secretary may designate for the purpose of issuing nonimmigrant and immigrant visas, but does not include a consular agent, an attaché or an assistant attaché. For purposes of this regulation, the term “other officers” in-

cludes civil service visa examiners employed by the Department of State for duty at visa-issuing offices abroad, upon certification by the chief of the consular section under whose direction such examiners are employed that the examiners are qualified by knowledge and experience to perform the functions of a consular officer in the issuance or refusal of visas. The designation of visa examiners shall expire upon termination of the examiners’ employment for such duty and may be terminated at any time for cause by the Deputy Assistant Secretary. The assignment by the Department of any foreign service officer to a diplomatic or consular office abroad in a position administratively designated as requiring, solely, partially, or principally, the performance of consular functions, and the initiation of a request for a consular commission, constitutes designation of the officer as a “consular officer” within the meaning of INA 101(a)(9).

(e) *Department* means the Department of State of the United States of America.

(f) *Dependent area* means a colony or other component or dependent area overseas from the governing foreign state.

(g) *DHS* means the Department of Homeland Security.

(h) *Documentarily qualified* means that the alien has reported that all the documents specified by the consular officer as sufficient to meet the requirements of INA 222(b) have been obtained, and the consular office has completed the necessary clearance procedures. This term is used only with respect to the alien’s qualification to apply formally for an immigrant visa; it bears no connotation that the alien is eligible to receive a visa.

(i) *Entitled to immigrant classification* means that the alien:

(1) Is the beneficiary of an approved petition granting immediate relative or preference status;

(2) Has satisfied the consular officer as to entitlement to special immigrant status under INA 101(a)(27) (A) or (B);

(3) Has been selected by the annual selection system to apply under INA 203(c); or

(4) Is an alien described in § 40.51(c).

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(j) *Foreign state*, for the purposes of alternate chargeability pursuant to INA 202(b), is not restricted to those areas to which the numerical limitation prescribed by INA 202(a) applies but includes dependent areas, as defined in this section.

(k) *INA* means the Immigration and Nationality Act, as amended.

(l) *Make or file an application for a visa* means:

(1) For a nonimmigrant visa applicant, submitting for formal adjudication by a consular officer of an electronic application, Form DS-160, signed electronically by clicking the box designated “Sign Application” in the certification section of the application or, as directed by a consular officer, a completed Form DS-156, with any required supporting documents and biometric data, as well as the requisite processing fee or evidence of the prior payment of the processing fee when such documents are received and accepted for adjudication by the consular officer.

(2) For an immigrant visa applicant, personally appearing before a consular officer and verifying by oath or affirmation the statements contained on Form DS-230 or Form DS-260 and in all supporting documents, having previously submitted all forms and documents required in advance of the appearance and paid the visa application processing fee.

(m) *Native* means born within the territory of a foreign state, or entitled to be charged for immigration purposes to that foreign state pursuant to INA section 202(b).

(n) *Not subject to numerical limitation* means that the alien is entitled to immigrant status as an immediate relative within the meaning of INA 201(b)(2)(i), or as a special immigrant within the meaning of INA 101(a)(27)(A) and (B), unless specifically subject to a limitation other than under INA 201(a), (b), or (c).

(o) *Parent, father, and mother*, as defined in INA 101(b)(2), are terms which are not changed in meaning if the child becomes 21 years of age or marries.

(p) *Port of entry* means a port or place designated by the DHS at which an alien may apply to DHS for admission into the United States.

(q) *Principal alien* means an alien from whom another alien derives a privilege or status under the law or regulations.

(r) *Regulation* means a rule which is established under the provisions of INA 104(a) and is duly published in the FEDERAL REGISTER.

(s) *Son or daughter* includes only a person who would have qualified as a “child” under INA 101(b)(1) if the person were under 21 and unmarried.

(t) *Western Hemisphere* means North America (including Central America), South America and the islands immediately adjacent thereto including the places named in INA 101(b)(5).

[56 FR 30422, July 2, 1991, as amended at 56 FR 43552, Sept. 3, 1991; 59 FR 15300, Mar. 31, 1994; 61 FR 1835, Jan. 24, 1996; 64 FR 55418, Oct. 13, 1999; 65 FR 54413, Sept. 8, 2000; 71 FR 34520, June 15, 2006; 73 FR 23068, Apr. 29, 2008; 75 FR 45476, Aug. 3, 2010]

§ 40.2 Documentation of nationals.

(a) *Nationals of the United States*. A national of the United States shall not be issued a visa or other documentation as an alien for entry into the United States.

(b) *Former Nationals of the United States*. A former national of the United States who seeks to enter the United States must comply with the documentary requirements applicable to aliens under the INA.

§ 40.3 Entry into areas under U.S. administration.

An immigrant or nonimmigrant seeking to enter an area which is under U.S. administration but which is not within the “United States”, as defined in INA 101(a)(38), is not required by the INA to be documented with a visa unless the authority contained in INA 215 has been invoked.

§ 40.4 Furnishing records and information from visa files for court proceedings.

Upon receipt of a request for information from a visa file or record for use in court proceedings, as contemplated in INA 222(f), the consular officer must, prior to the release of the information, submit the request together with a full report to the Department.

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§ 40.5 Limitations on the use of National Crime Information Center (NCIC) criminal history information.

(a) *Authorized access.* The FBI's National Crime Information Center (NCIC) criminal history records are law enforcement sensitive and can only be accessed by authorized consular personnel with visa processing responsibilities.

(b) *Use of information.* NCIC criminal history record information shall be used solely to determine whether or not to issue a visa to an alien or to admit an alien to the United States. All third party requests for access to NCIC criminal history record information shall be referred to the FBI.

(c) *Confidentiality and protection of records.* To protect applicants' privacy, authorized Department personnel must secure all NCIC criminal history records, automated or otherwise, to prevent access by unauthorized persons. Such criminal history records must be destroyed, deleted or overwritten upon receipt of updated versions.

[67 FR 8478, Feb. 25, 2002]

§ 40.6 Basis for refusal.

A visa can be refused only upon a ground specifically set out in the law or implementing regulations. The term "reason to believe", as used in INA 221(g), shall be considered to require a determination based upon facts or circumstances which would lead a reasonable person to conclude that the applicant is ineligible to receive a visa as provided in the INA and as implemented by the regulations. Consideration shall be given to any evidence submitted indicating that the ground for a prior refusal of a visa may no longer exist. The burden of proof is upon the applicant to establish eligibility to receive a visa under INA 212 or any other provision of law or regulation.

§§ 40.7–40.8 [Reserved]

§ 40.9 Classes of inadmissible aliens.

Subparts B through L describe classes of inadmissible aliens who are ineligible to receive visas and who shall be ineligible for admission into the United States, except as otherwise provided in

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the Immigration and Nationality Act, as amended.

[61 FR 59184, Nov. 21, 1996]

Subpart B—Medical Grounds of Ineligibility

§ 40.11 Medical grounds of ineligibility.

(a) *Decision on eligibility based on findings of medical doctor.* A finding of a panel physician designated by the post in whose jurisdiction the examination is performed pursuant to INA 212(a)(1) shall be binding on the consular officer, except that the officer may refer a panel physician finding in an individual case to USPHS for review.

(b) *Waiver of ineligibility—INA 212(g).* If an immigrant visa applicant is inadmissible under INA 212(a)(1)(A)(i), (ii), or (iii) but is qualified to seek the benefits of INA 212(g)(1)(A) or (B), 212(g)(2)(C), or 212(g)(3), the consular officer shall inform the alien of the procedure for applying to DHS for relief under the applicable provision of law. A visa may not be issued to the alien until the consular officer has received notification from DHS of the approval of the alien's application under INA 212(g), unless the consular officer has been delegated authority by the Secretary of Homeland Security to grant the particular waiver under INA 212(g).

(c) *Waiver authority—INA 212(g)(2)(A) and (B).* The consular officer may waive section 212(a)(1)(A)(ii) visa ineligibility if the alien qualifies for such waiver under the provisions of INA 212(g)(2)(A) or (B).

[56 FR 30422, July 2, 1991, as amended at 62 FR 67567, Dec. 29, 1997]

§§ 40.12–40.19 [Reserved]

Subpart C—Criminal and Related Grounds—Conviction of Certain Crimes

§ 40.21 Crimes involving moral turpitude and controlled substance violators.

(a) *Crimes involving moral turpitude—*
(1) *Acts must constitute a crime under criminal law of jurisdiction where they occurred.* A Consular Officer may make a

finding of ineligibility under INA 212(a)(2)(A)(i)(I) based upon an alien's admission of the commission of acts which constitute the essential elements of a crime involving moral turpitude, only if the acts constitute a crime under the criminal law of the jurisdiction where they occurred. However, a Consular Officer must base a determination that a crime involves moral turpitude upon the moral standards generally prevailing in the United States.

(2) *Conviction for crime committed under age 18.* (i) An alien will not be ineligible to receive a visa under INA 212(a)(2)(A)(i)(I) by reason of any offense committed:

(A) Prior to the alien's fifteenth birthday, or

(B) Between the alien's fifteenth and eighteenth birthdays unless such alien was tried and convicted as an adult for a felony involving violence as defined in section 1(1) and section 16 of Title 18 of the United States Code.

(ii) An alien tried and convicted as an adult for a violent felony offense, as so defined, committed after having attained the age of fifteen years, will be subject to the provisions of INA 212(a)(2)(A)(i)(I) regardless of whether at the time of conviction juvenile courts existed within the convicting jurisdiction.

(3) *Two or more crimes committed under age 18.* An alien convicted of a crime involving moral turpitude or admitting the commission of acts which constitute the essential elements of such a crime and who has committed an additional crime involving moral turpitude shall be ineligible under INA 212(a)(2)(A)(i)(I), even though the crimes were committed while the alien was under the age of 18 years.

(4) *Conviction in absentia.* A conviction in absentia of a crime involving moral turpitude does not constitute a conviction within the meaning of INA 212(a)(2)(A)(i)(I).

(5) *Effect of pardon by appropriate U.S. authorities/foreign states.* An alien shall not be considered ineligible under INA 212(a)(2)(A)(i)(I) by reason of a conviction of a crime involving moral turpitude for which a full and unconditional pardon has been granted by the President of the United States, by the Gov-

ernor of a State of the United States, by the former High Commissioner for Germany acting pursuant to Executive Order 10062, or by the United States Ambassador to the Federal Republic of Germany acting pursuant to Executive Order 10608. A legislative pardon or a pardon, amnesty, expungement of penal record or any other act of clemency granted by a foreign state shall not serve to remove a ground of ineligibility under INA 212(a)(2)(A)(i)(I).

(6) *Political offenses.* The term "purely political offense", as used in INA 212(a)(2)(A)(i)(I), includes offenses that resulted in convictions obviously based on fabricated charges or predicated upon repressive measures against racial, religious, or political minorities.

(7) *Waiver of ineligibility—INA 212(h).* If an immigrant visa applicant is ineligible under INA 212(a)(2)(A)(i)(I) but is qualified to seek the benefits of INA 212(h), the consular officer shall inform the alien of the procedure for applying to DHS for relief under that provision of law. A visa may not be issued to the alien until the consular officer has received notification from DHS of the approval of the alien's application under INA 212(h).

(b) *Controlled substance violators—(1) Date of conviction not pertinent.* An alien shall be ineligible under INA 212(a)(2)(A)(i)(II) irrespective of whether the conviction for a violation of or for conspiracy to violate any law or regulation relating to a controlled substance, as defined in the Controlled Substance Act (21 U.S.C. 802), occurred before, on, or after October 27, 1986.

(2) *Waiver of ineligibility—INA 212(h).* If an immigrant visa applicant is ineligible under INA 212(a)(2)(A)(i)(II) but is qualified to seek the benefits of INA 212(h), the consular officer shall inform the alien of the procedure for applying to DHS for relief under that provision of law. A visa may not be issued to the alien until the consular officer has received notification from DHS of the approval of the alien's application under INA 212(h).

[56 FR 30422, July 2, 1991, as amended at 64 FR 55418, Oct. 13, 1999]

§ 40.22 Multiple criminal convictions.

(a) *Conviction(s) for crime(s) committed under age 18.* An alien shall not be ineligible to receive a visa under INA 212(a)(2)(B) by reason of any offense committed prior to the alien's fifteenth birthday. Nor shall an alien be ineligible under INA 212(a)(2)(B) by reason of any offense committed between the alien's fifteenth and eighteenth birthdays unless such alien was tried and convicted as an adult for a felony involving violence as defined in section 1(l) and section 16 of Title 18 of the United States Code. An alien, tried and convicted as an adult for a violent felony offense, as so defined, committed after having attained the age of fifteen years, and who has also been convicted of at least one other such offense or any other offense committed as an adult, shall be subject to the provisions of INA 212(a)(2)(B) regardless of whether at that time juvenile courts existed within the jurisdiction of the conviction.

(b) *Conviction in absentia.* A conviction in absentia shall not constitute a conviction within the meaning of INA 212(a)(2)(B).

(c) *Effect of pardon by appropriate U.S. authorities/foreign states.* An alien shall not be considered ineligible under INA 212(a)(2)(B) by reason in part of having been convicted of an offense for which a full and unconditional pardon has been granted by the President of the United States, by the Governor of a State of the United States, by the former High Commissioner for Germany acting pursuant to Executive Order 10062, or by the United States Ambassador to the Federal Republic of Germany acting pursuant to Executive Order 10608. A legislative pardon or a pardon, amnesty, expungement of penal record or any other act of clemency granted by a foreign state shall not serve to remove a ground of ineligibility under INA 212(a)(2)(B).

(d) *Political offense.* The term “purely political offense”, as used in INA 212(a)(2)(B), includes offenses that resulted in convictions obviously based on fabricated charges or predicated upon repressive measures against racial, religious, or political minorities.

(e) *Waiver of ineligibility—INA 212(h).* If an immigrant visa applicant is ineli-

gible under INA 212(a)(2)(B) but is qualified to seek the benefits of INA 212(h), the consular officer shall inform the alien of the procedure for applying to DHS for relief under that provision of law. A visa may not be issued to the alien until the consular officer has received notification from DHS of the approval of the alien's application under INA 212(h).

[56 FR 30422, July 2, 1991, as amended at 62 FR 67567, Dec. 29, 1997]

§ 40.23 Controlled substance traffickers. [Reserved]**§ 40.24 Prostitution and commercialized vice.**

(a) *Activities within 10 years preceding visa application.* An alien shall be ineligible under INA 212(a)(2)(D) only if—

(1) The alien is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution, or the alien directly or indirectly procures or attempts to procure, or procured or attempted to procure or to import prostitutes or persons for the purposes of prostitution, or receives or received, in whole or in part, the proceeds of prostitution; and

(2) The alien has performed one of the activities listed in § 40.24(a)(1) within the last ten years.

(b) *Prostitution defined.* The term “prostitution” means engaging in promiscuous sexual intercourse for hire. A finding that an alien has “engaged” in prostitution must be based on elements of continuity and regularity, indicating a pattern of behavior or deliberate course of conduct entered into primarily for financial gain or for other considerations of material value as distinguished from the commission of casual or isolated acts.

(c) *Where prostitution not illegal.* An alien who is within one or more of the classes described in INA 212(a)(2)(D) is ineligible to receive a visa under that section even if the acts engaged in are not prohibited under the laws of the foreign country where the acts occurred.

(d) *Waiver of ineligibility—INA 212(h).* If an immigrant visa applicant is ineligible under INA 212(a)(2)(D) but is qualified to seek the benefits of INA

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212(h), the consular officer shall inform the alien of the procedure for applying to DHS for relief under that provision of law. A visa may not be issued to the alien until the consular officer has received notification from DHS of the approval of the alien's application under INA 212(h).

§ 40.25 Certain aliens involved in serious criminal activity who have asserted immunity from prosecution. [Reserved]

§§ 40.26–40.29 [Reserved]

Subpart D—Security and Related Grounds

§ 40.31 General. [Reserved]

§ 40.32 Terrorist activities. [Reserved]

§ 40.33 Foreign policy. [Reserved]

§ 40.34 Immigrant membership in totalitarian party.

(a) *Definition of affiliate.* The term *affiliate*, as used in INA 212(a)(3)(D), means an organization which is related to, or identified with, a proscribed association or party, including any section, subsidiary, branch, or subdivision thereof, in such close association as to evidence an adherence to or a furtherance of the purposes and objectives of such association or party, or as to indicate a working alliance to bring to fruition the purposes and objectives of the proscribed association or party. An organization which gives, loans, or promises support, money, or other thing of value for any purpose to any proscribed association or party is presumed to be an *affiliate* of such association or party, but nothing contained in this paragraph shall be construed as an exclusive definition of the term *affiliate*.

(b) *Service in Armed Forces.* Service, whether voluntary or not, in the armed forces of any country shall not be regarded, of itself, as constituting or establishing an alien's membership in, or affiliation with, any proscribed party or organization, and shall not, of itself, constitute a ground of ineligibility to receive a visa.

(c) *Voluntary Service in a Political Capacity.* Voluntary service in a political capacity shall constitute affiliation

with the political party or organization in power at the time of such service.

(d) *Voluntary Membership After Age 16.* If an alien continues or continued membership in or affiliation with a proscribed organization on or after reaching 16 years of age, only the alien's activities after reaching that age shall be pertinent to a determination of whether the continuation of membership or affiliation is or was voluntary.

(e) *Operation of Law Defined.* The term *operation of law*, as used in INA 212(a)(3)(D), includes any case wherein the alien automatically, and without personal acquiescence, became a member of or affiliated with a proscribed party or organization by official act, proclamation, order, edict, or decree.

(f) *Membership in Organization Advocating Totalitarian Dictatorship in the United States.* In accordance with the definition of *totalitarian party* contained in INA 101(a)(37), a former or present voluntary member of, or an alien who was, or is, voluntarily affiliated with a noncommunist party, organization, or group, or of any section, subsidiary, branch, affiliate or subdivision thereof, which during the time of its existence did not or does not advocate the establishment in the United States of a totalitarian dictatorship, is not considered ineligible under INA 212(a)(3)(D) to receive a visa.

(g) *Waiver of ineligibility—212(a)(3)(D)(iv).* If an immigrant visa applicant is ineligible under INA 212(a)(3)(D) but is qualified to seek the benefits of INA 212(a)(3)(D)(iv), the consular officer shall inform the alien of the procedure for applying to DHS for relief under that provision of law. A visa may not be issued to the alien until the consular officer has received notification from DHS of the approval of the alien's application under INA 212(a)(3)(D)(iv).

§ 40.35 Participants in Nazi persecutions or genocide.

(a) *Participation in Nazi persecutions.* [Reserved]

(b) *Participation in genocide.* [Reserved]

§§ 40.36–40.39 [Reserved]

Subpart E—Public Charge

§ 40.41 Public charge.

(a) *Basis for Determination of Ineligibility.* Any determination that an alien is ineligible under INA 212(a)(4) must be predicated upon circumstances indicating that, notwithstanding any affidavit of support that may have been filed on the alien’s behalf, the alien is likely to become a public charge after admission, or, if applicable, that the alien has failed to fulfill the affidavit of support requirement of INA 212(a)(4)(C).

(b) *Affidavit of support.* Any alien seeking an immigrant visa under INA 201(b)(2), 203(a), or 203(b), based upon a petition filed by a relative of the alien (or in the case of a petition filed under INA 203(b) by an entity in which a relative has a significant ownership interest), shall be required to present to the consular officer an affidavit of support (AOS) on a form that complies with terms and conditions established by the Secretary of Homeland Security. Petitioners for applicants at a post designated by the Deputy Assistant Secretary for Visa Services for initial review of and assistance with such an AOS will be charged a fee for such review and assistance pursuant to Item 61 of the Schedule of Fees for Consular Services (22 CFR 22.1).

(c) *Joint Sponsors.* Submission of one or more additional affidavits of support by a joint sponsor/sponsors is required whenever the relative sponsor’s household income and significant assets, and the immigrant’s assets, do not meet the Federal poverty line requirements of INA 213A.

(d) *Posting of Bond.* A consular officer may issue a visa to an alien who is within the purview of INA 212(a)(4) (subject to the affidavit of support requirement and attribution of sponsor’s income and resources under section 213A), upon receipt of a notice from DHS of the giving of a bond or undertaking in accordance with INA 213 and INA 221(g), and provided further that the officer is satisfied that the giving of such bond or undertaking removes the likelihood that the alien will become a public charge within the mean-

ing of this section of the law and that the alien is otherwise eligible in all respects.

(e) *Prearranged Employment.* An immigrant visa applicant relying on an offer of prearranged employment to establish eligibility under INA 212(a)(4), other than an offer of employment certified by the Department of Labor pursuant to INA 212(a)(5)(A), must provide written confirmation of the relevant information sworn and subscribed to before a notary public by the employer or an authorized employee or agent of the employer. The signer’s printed name and position or other relationship with the employer must accompany the signature.

(f) *Use of Federal Poverty Line Where INA 213A Not Applicable.* An immigrant visa applicant, not subject to the requirements of INA 213A, and relying solely on personal income to establish eligibility under INA 212(a)(4), who does not demonstrate an annual income above the Federal poverty line, as defined in INA 213A (h), and who is without other adequate financial resources, shall be presumed ineligible under INA 212(a)(4).

[62 FR 67564, Dec. 29, 1997, as amended at 65 FR 78094, Dec. 14, 2000]

§§ 40.42–40.49 [Reserved]

Subpart F—Labor Certification and Qualification for Certain Immigrants

§ 40.51 Labor certification.

(a) *INA 212(a)(5) applicable only to certain immigrant aliens.* INA 212(a)(5)(A) applies only to immigrant aliens described in INA 203(b)(2) or (3) who are seeking to enter the United States for the purpose of engaging in gainful employment.

(b) *Determination of need for alien’s labor skills.* An alien within one of the classes to which INA 212(a)(5) applies as described in §40.51(a) who seeks to enter the United States for the purpose of engaging in gainful employment, shall be ineligible under INA 212(a)(5)(A) to receive a visa unless the Secretary of Labor has certified to the Secretary of Homeland Security and the Secretary of State, that

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(1) There are not sufficient workers in the United States who are able, willing, qualified, (or equally qualified in the case of aliens who are members of the teaching profession or who have exceptional ability in the sciences or the arts) and available at the time of application for a visa and at the place to which the alien is destined to perform such skilled or unskilled labor, and

(2) The employment of such alien will not adversely affect the wages and working conditions of the workers in the United States similarly employed.

(c) *Labor certification not required in certain cases.* A spouse or child accompanying or following to join an alien spouse or parent who is a beneficiary of a petition approved pursuant to INA 203(b)(2) or (3) is not considered to be within the purview of INA 212(a)(5).

[56 FR 30422, July 2, 1991, as amended at 61 FR 1835, Jan. 24, 1996]

§ 40.52 Unqualified physicians.

INA 212(a)(5)(B) applies only to immigrant aliens described in INA 203(b) (2) or (3).

[61 FR 1835, Jan. 24, 1996, as amended at 62 FR 67567, Dec. 29, 1997]

§ 40.53 Uncertified foreign health-care workers.

(a) Subject to paragraph (b) of this section, a consular officer must not issue a visa to any alien seeking admission to the United States for the purpose of performing services in a health care occupation, other than as a physician, unless, in addition to meeting all other requirements of law and regulation, the alien provides to the officer a certification issued by the Commission On Graduates of Foreign Nursing Schools (CGFNS) or another credentialing service that has been approved by the Secretary of Homeland Security for such purpose, which certificate complies with the provisions of sections 212(a)(5)(C) and 212(r) of the Act, 8 U.S.C. 1182(a)(5)(C) and 8 U.S.C. 1182(r), respectively, and the regulations found at 8 CFR 212.15.

(b) Paragraph (a) of this section does not apply to an alien:

(1) Seeking to enter the United States in order to perform services in a

non-clinical health care occupation as described in 8 CFR 212.15(b)(1); or

(2) Who is the immigrant or non-immigrant spouse or child of a foreign health care worker and who is seeking to accompany or follow to join as a derivative applicant the principal alien to whom this section applies; or

(3) Who is applying for an immigrant or a nonimmigrant visa for any purpose other than for the purpose of seeking entry into the United States in order to perform health care services as described in 8 CFR 212.15.

[67 FR 77159, Dec. 17, 2002]

§§ 40.54–40.59 [Reserved]

Subpart G—Illegal Entrants and Immigration Violators

§ 40.61 Aliens present without admission or parole.

INA 212(a)(6)(A)(i) does not apply at the time of visa issuance.

[62 FR 67567, Dec. 29, 1997]

§ 40.62 Failure to attend removal proceedings.

An alien who without reasonable cause failed to attend, or to remain in attendance at, a hearing initiated on or after April 1, 1997, under INA 240 to determine inadmissibility or deportability shall be ineligible for a visa under INA 212(a)(6)(B) for five years following the alien's subsequent departure or removal from the United States.

[62 FR 67567, Dec. 29, 1997]

§ 40.63 Misrepresentation; Falsely claiming citizenship.

(a) *Fraud and misrepresentation and INA 212(a)(6)(C) applicability to certain refugees.* An alien who seeks to procure, or has sought to procure, or has procured a visa, other documentation, or entry into the United States or other benefit provided under the INA by fraud or by willfully misrepresenting a material fact at any time shall be ineligible under INA 212(a)(6)(C); *Provided*, That the provisions of this paragraph are not applicable if the fraud or misrepresentation was committed by an alien at the time the alien sought entry into a country other than the

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United States or obtained travel documents as a bona fide refugee and the refugee was in fear of being repatriated to a former homeland if the facts were disclosed in connection with an application for a visa to enter the United States: *Provided further*, That the fraud or misrepresentation was not committed by such refugee for the purpose of evading the quota or numerical restrictions of the U.S. immigration laws, or investigation of the alien's record at the place of former residence or elsewhere in connection with an application for a visa.

(b) *Misrepresentation in application under Displaced Persons Act or Refugee Relief Act.* Subject to the conditions stated in INA 212(a)(6)(c)(i), an alien who is found by the consular officer to have made a willful misrepresentation within the meaning of section 10 of the Displaced Persons Act of 1948, as amended, for the purpose of gaining admission into the United States as an eligible displaced person, or to have made a material misrepresentation within the meaning of section 11(e) of the Refugee Relief Act of 1953, as amended, for the purpose of gaining admission into the United States as an alien eligible thereunder, shall be considered ineligible under the provisions of INA 212(a)(6)(C).

(c) *Waiver of ineligibility—INA 212(i).* If an immigrant applicant is ineligible under INA 212(a)(6)(C) but is qualified to seek the benefits of INA 212(i), the consular officer shall inform the alien of the procedure for applying to DHS for relief under that provision of law. A visa may not be issued to the alien until the consular officer has received notification from DHS of the approval of the alien's application under INA 212(i).

[56 FR 30422, July 2, 1991, as amended at 61 FR 1835, Jan. 24, 1996]

§ 40.64 Stowaways.

INA 212(a)(6)(D) is not applicable at the time of visa application.

§ 40.65 Smugglers.

(a) *General.* A visa shall not be issued to an alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to

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enter or to try to enter the United States in violation of law.

(b) *Waiver of ineligibility—INA 212(d)(11).* If an immigrant applicant is ineligible under INA 212(a)(6)(E) but is qualified to seek the benefits of INA 212(d)(11), the consular officer shall inform the alien of the procedure for applying to DHS for relief under that provision of law. A visa may not be issued to the alien until the consular officer has received notification from DHS of the approval of the alien's application under INA 212(d)(11).

§ 40.66 Subject of civil penalty.

(a) *General.* An alien who is the subject of a final order imposing a civil penalty for a violation under INA 274C shall be ineligible for a visa under INA 212(a)(6)(F).

(b) *Waiver of ineligibility.* If an applicant is ineligible under paragraph (a) of this section but appears to the consular officer to meet the prerequisites for seeking the benefits of INA 212(d)(12), the consular officer shall inform the alien of the procedure for applying to DHS for relief under that provision of law. A visa may not be issued to the alien until the consular officer has received notification from DHS of the approval of the alien's application under INA 212(d)(12).

[62 FR 67567, Dec. 29, 1997]

§ 40.67 Student visa abusers.

An alien ineligible under the provisions of INA 212(a)(6)(G) shall not be issued a visa unless the alien has complied with the time limitation set forth therein.

[62 FR 67568, Dec. 29, 1997]

§ 40.68 Aliens subject to INA 222(g).

An alien who, under the provisions of INA 222(g), has voided a nonimmigrant visa by remaining in the United States beyond the period of authorized stay is ineligible for a new nonimmigrant visa unless the alien complies with the requirements in 22 CFR 41.101 (b) or (c) regarding the place of application.

[63 FR 671, Jan. 7, 1998]

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§ 40.69 [Reserved]

§§ 40.83–40.89 [Reserved]

Subpart H—Documentation Requirements

Subpart J—Aliens Previously Removed

§ 40.71 Documentation requirements for immigrants.

INA 212(a)(7)(A) is not applicable at the time of visa application. (For waiver of documentary requirements for immigrants see 22 CFR 42.1 and 42.2.)

SOURCE: 61 FR 59184, Nov. 21, 1996, unless otherwise noted.

§ 40.91 Certain aliens previously removed.

§ 40.72 Documentation requirements for nonimmigrants.

A passport which is valid indefinitely for the return of the bearer to the country whose government issued such passport shall be deemed to have the required minimum period of validity as specified in INA 212(a)(7)(B).

(a) *5-year bar.* An alien who has been found inadmissible, whether as a result of a summary determination of inadmissibility at the port of entry under INA 235(b)(1) or of a finding of inadmissibility resulting from proceedings under INA 240 initiated upon the alien's arrival in the United States, shall be ineligible for a visa under INA 212(a)(9)(A)(i) for 5 years following such alien's first removal from the United States.

§§ 40.73–40.79 [Reserved]

Subpart I—Ineligible for Citizenship.

(b) *10-year bar.* An alien who has otherwise been removed from the United States under any provision of law, or who departed while an order of removal was in effect, is ineligible for a visa under INA 212(a)(9)(A)(ii) for 10 years following such removal or departure from the United States.

§ 40.81 Ineligible for citizenship.

An alien will be ineligible to receive an immigrant visa under INA 212(a)(8)(A) if the alien is ineligible for citizenship, including as provided in INA 314 or 315.

(c) *20-year bar.* An alien who has been removed from the United States two or more times shall be ineligible for a visa under INA 212(a)(9)(A)(i) or INA 212(a)(9)(A)(ii), as appropriate, for 20 years following the most recent such removal or departure.

[64 FR 55418, Oct. 13, 1999]

§ 40.82 Alien who departed the United States to avoid service in the armed forces.

(a) *Applicability to immigrants.* INA 212(a)(8)(A) applies to immigrant visa applicants who have departed from or remained outside the United States between September 8, 1939 and September 24, 1978, to avoid or evade training or service in the United States Armed Forces.

(d) *Permanent bar.* If an alien who has been removed has also been convicted of an aggravated felony, the alien is permanently ineligible for a visa under INA 212(a)(9)(A)(i) or 212(a)(9)(A)(ii), as appropriate.

(b) *Applicability to nonimmigrants.* INA 212(a)(8)(B) applies to nonimmigrant visa applicants who have departed from or remained outside the United States between September 8, 1939 and September 24, 1978 to avoid or evade training or service in the U.S. Armed Forces except an alien who held nonimmigrant status at the time of such departure.

(e) *Exceptions.* An alien shall not be ineligible for a visa under INA 212(a)(9)(A)(i) or (ii) if the Secretary of Homeland Security has consented to the alien's application for admission.

[62 FR 67568, Dec. 29, 1997, as amended at 63 FR 64628, Nov. 23, 1998]

§ 40.92 Aliens unlawfully present.

(a) *3-year bar.* An alien described in INA 212(a)(9)(B)(i)(I) shall be ineligible for a visa for 3 years following departure from the United States.

(b) *10-year bar.* An alien described in INA 212(a)(9)(B)(i)(II) shall be ineligible

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for a visa for 10 years following departure from the United States.

(c) *Waiver*. If a visa applicant is inadmissible under paragraph (a) or (b) of this section but appears to the consular officer to meet the prerequisites for seeking the benefits of INA 212(a)(9)(B)(v), the alien shall be informed of the procedure for applying to DHS for relief under that provision of law.

[62 FR 67568, Dec. 29, 1997]

§ 40.93 Aliens unlawfully present after previous immigration violation.

An alien described in INA 212(a)(9)(C)(i) is permanently ineligible for a visa unless the Secretary of Homeland Security consents to the alien's application for readmission not less than 10 years following the alien's last departure from the United States. Such application for readmission shall be made prior to the alien's reembarkation at a place outside the United States.

[62 FR 67568, Dec. 29, 1997]

§§ 40.94–40.99 [Reserved]

Subpart K—Miscellaneous

SOURCE: 56 FR 30422, July 2, 1991, unless otherwise noted. Redesignated at 61 FR 59184, Nov. 21, 1996.

§ 40.101 Practicing polygamists.

An immigrant alien shall be ineligible under INA 212(a)(9)(A) only if the alien is coming to the United States to practice polygamy.

§ 40.102 Guardian required to accompany excluded alien.

INA 212(a)(9)(B) is not applicable at the time of visa application.

§ 40.103 International child abduction.

An alien who would otherwise be ineligible under INA 212(a)(9)(C)(i) shall not be ineligible under such paragraph if the U.S. citizen child in question is physically located in a foreign state which is party to the Hague Convention on the Civil Aspects of International Child Abduction.

[61 FR 1833, Jan. 24, 1996]

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§ 40.104 Unlawful voters.

(a) Subject to paragraph (b) of this section, an alien is ineligible for a visa if the alien has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation.

(b) Such alien shall not be considered to be ineligible under paragraph (a) of this section if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such violation that he or she was a citizen.

[70 FR 35527, June 21, 2005]

§ 40.105 Former citizens who renounced citizenship to avoid taxation.

An alien who is a former citizen of the United States, who on or after September 30, 1996, has officially renounced United States citizenship and who has been determined by the Secretary of Homeland Security to have renounced citizenship to avoid United States taxation, is ineligible for a visa under INA 212(a)(10)(E).

[62 FR 67568, Dec. 29, 1997]

§§ 40.106–40.110 [Reserved]

Subpart L—Failure to Comply with INA

SOURCE: 56 FR 30422, July 2, 1991, unless otherwise noted. Redesignated at 61 FR 59184, Nov. 21, 1996.

§ 40.201 Failure of application to comply with INA.

(a) *Refusal under INA 221(g)*. The consular officer shall refuse an alien's visa application under INA 221(g)(2) as failing to comply with the provisions of INA or the implementing regulations if:

- (1) The applicant fails to furnish information as required by law or regulations;
- (2) The application contains a false or incorrect statement other than one

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which would constitute a ground of ineligibility under INA 212(a)(6)(C);

(3) The application is not supported by the documents required by law or regulations;

(4) The applicant refuses to be fingerprinted as required by regulations;

(5) The necessary fee is not paid for the issuance of the visa or, in the case of an immigrant visa, for the application therefor;

(6) In the case of an immigrant visa application, the alien fails to swear to, or affirm, the application before the consular officer; or

(7) The application otherwise fails to meet specific requirements of law or regulations for reasons for which the alien is responsible.

(b) *Reconsideration of refusals.* A refusal of a visa application under paragraph (a)(1) of this section does not bar reconsideration of the application upon compliance by the applicant with the requirements of INA and the implementing regulations or consideration of a subsequent application submitted by the same applicant.

[56 FR 30422, July 2, 1991, as amended at 61 FR 1835, Jan. 24, 1996. Redesignated at 61 FR 59184, Nov. 21, 1996]

§ 40.202 Certain former exchange visitors.

An alien who was admitted into the United States as an exchange visitor, or who acquired such status after admission, and who is within the purview of INA 212(e) as amended by the Act of April 7, 1970, (84 Stat. 116) and by the Act of October 12, 1976, (90 Stat. 2301), is not eligible to apply for or receive an immigrant visa or a nonimmigrant visa under INA 101(a)(15) (H), (K), or (L), notwithstanding the approval of a petition on the alien's behalf, unless:

(a) It has been established that the alien has resided and has been physically present in the country of the alien's nationality or last residence for an aggregate of at least 2 years following the termination of the alien's exchange visitor status as required by INA 212(e), or

(b) The foreign residence requirement of INA 212(e) has been waived by the Secretary of Homeland Security in the alien's behalf.

§ 40.203 Alien entitled to A, E, or G nonimmigrant classification.

An alien entitled to nonimmigrant classification under INA 101(a)(15) (A), (E), or (G) who is applying for an immigrant visa and who intends to continue the activities required for such nonimmigrant classification in the United States is not eligible to receive an immigrant visa until the alien executes a written waiver of all rights, privileges, exemptions and immunities which would accrue by reason of such occupational status.

§ 40.204 [Reserved]

§ 40.205 Applicant for immigrant visa under INA 203(c).

An alien shall be ineligible to receive a visa under INA 203(c) if the alien does not have a high school education or its equivalent, as defined in 22 CFR 42.33(a)(2), or does not have, within the five years preceding the date of application for such visa, at least two years of work experience in an occupation which requires at least two years of training or experience.

[59 FR 55045, Nov. 3, 1994. Redesignated at 61 FR 59184, Nov. 21, 1996]

§ 40.206 Frivolous applications. [Reserved]

§§ 40.207–40.210 [Reserved]

Subpart M—Waiver of Ground of Ineligibility

SOURCE: 56 FR 30422, July 2, 1991, unless otherwise noted. Redesignated at 61 FR 59184, Nov. 21, 1996]

§ 40.301 Waiver for ineligible nonimmigrants under INA 212(d)(3)(A).

(a) *Report or recommendation to Department.* Except as provided in paragraph (b) of this section, consular officers may, upon their own initiative, and shall, upon the request of the Secretary of State or upon the request of the alien, submit a report to the Department for possible transmission to the Secretary of Homeland Security pursuant to the provisions of INA 212(d)(3)(A) in the case of an alien who is classifiable as a nonimmigrant but

who is known or believed by the consular officer to be ineligible to receive a nonimmigrant visa under the provisions of INA 212(a), other than INA 212(a) (3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), (3)(E)(i), or (3)(E)(ii).

(b) *Recommendation to designated DHS officer abroad.* A consular officer may, in certain categories defined by the Secretary of State, recommend directly to designated DHS officers that the temporary admission of an alien ineligible to receive a visa be authorized under INA 212(d)(3)(A).

(c) *Secretary of Homeland Security may impose conditions.* When the Secretary of Homeland Security authorizes the temporary admission of an ineligible alien as a nonimmigrant and the consular officer is so informed, the consular officer may proceed with the issuance of a nonimmigrant visa to the alien, subject to the conditions, if any, imposed by the Secretary of Homeland Security.

[56 FR 30422, July 2, 1991. Redesignated at 61 FR 59184, Nov. 21, 1996, as amended at 75 FR 82243, Dec. 30, 2010]

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