United States, an alien commuter cannot satisfy the residence requirements of the naturalization laws and cannot qualify for any benefits under the immigration laws on his or her own behalf or on behalf of his or her relatives other than as specified in paragraph (a) of this section. When an alien commuter takes up residence in the United States, he or she shall no longer be regarded as a commuter. He or she may facilitate proof of having taken up such residence by notifying the Service as soon as possible, preferably at the time of his or her first reentry for that purpose. Application for issuance of a new Permanent Resident Card to show that he or she has taken up residence in the United States shall be made in accordance with 8 CFR 264.5.

[62 FR 10346, Mar. 6, 1997, as amended at 63 FR 70315, Dec. 21, 1998; 76 FR 53786, Aug. 29, 2011]

PART 212—DOCUMENTARY REQUIREMENTS: NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

Sec.

AUTHORITY: 6 U.S.C. 111, 202(4) and 271; 8 U.S.C. 1101 and note, 1102, 1103, 1182 and note, 1184, 1187, 1223, 1225, 1226, 1227, 1255, 1359; section 7209 of Pub. L. 108–458 (8 U.S.C. 1185 note); Title VII of Pub. L. 110–229 (8 U.S.C. 1185 note); 8 CFR part 2; Pub. L. 115–218.

Section 212.1(q) also issued under section 702, Pub. L. 110–229, 122 Stat. 754, 854.

SOURCE: 17 FR 11484, Dec. 19, 1952, unless otherwise noted.

§ 212.0 Definitions.

For purposes of § 212.1 and § 235.1 of this chapter:

Adjacent islands means Bermuda and the islands located in the Caribbean Sea, except Cuba.

Cruise ship means a passenger vessel over 100 gross tons, carrying more than 12 passengers for hire, making a voyage lasting more than 24 hours any part of which is on the high seas, and for which passengers are embarked or disembarked in the United States or its territories.

Ferry means any vessel operating on a pre-determined fixed schedule and route, which is being used solely to provide transportation between places that are no more than 300 miles apart and which is being used to transport passengers, vehicles, and/or railroad cars.

Pleasure vessel means a vessel that is used exclusively for recreational or personal purposes and not to transport passengers or property for hire.

United States means ''United States'' as defined in section 215(c) of the Immigration and Nationality Act of 1952, as amended (8 U.S.C. 1185(c)).

U.S. citizen means a United States citizen or a U.S. non-citizen national.

United States qualifying tribal entity means a tribe, band, or other group of Native Americans formally recognized

by the United States Government which agrees to meet WHTI document standards.

[73 FR 18415, Apr. 3, 2008]

§ 212.1 Documentary requirements for nonimmigrants.

A valid unexpired visa that meets the requirements of part 215, subpart B, of this chapter, if applicable, and an unexpired passport, shall be presented by each arriving nonimmigrant alien except that the passport validity period for an applicant for admission who is a member of a class described in section 102 of the Act is not required to extend beyond the date of his application for admission if so admitted, and except as otherwise provided in the Act, this chapter, and for the following classes:

(a) *Citizens of Canada or Bermuda, Bahamian nationals or British subjects resident in certain islands*—(1) *Canadian citizens.* A visa is generally not required for Canadian citizens, except those Canadians that fall under nonimmigrant visa categories E, K, S, or V as provided in paragraphs (h), (l), and (m) of this section and 22 CFR 41.2. A valid unexpired passport is required for Canadian citizens arriving in the United States, except when meeting one of the following requirements:

(i) *NEXUS Program.* A Canadian citizen who is traveling as a participant in the NEXUS program, and who is not otherwise required to present a passport and visa as provided in paragraphs (h), (l), and (m) of this section and 22 CFR 41.2, may present a valid unexpired NEXUS program card when using a NEXUS Air kiosk or when entering the United States from contiguous territory or adjacent islands at a land or sea port-of-entry. A Canadian citizen who enters the United States by pleasure vessel from Canada under the remote inspection system may present a valid unexpired NEXUS program card.

(ii) *FAST Program.* A Canadian citizen who is traveling as a participant in the FAST program, and who is not otherwise required to present a passport and visa as provided in paragraphs (h), (l), and (m) of this section and 22 CFR 41.2, may present a valid unexpired FAST card at a land or sea port-of-entry prior to entering the United States from contiguous territory or adjacent islands.

(iii) *SENTRI Program.* A Canadian citizen who is traveling as a participant in the SENTRI program, and who is not otherwise required to present a passport and visa as provided in paragraphs (h), (l), and (m) of this section and 22 CFR 41.2, may present a valid unexpired SENTRI card at a land or sea port-of-entry prior to entering the United States from contiguous territory or adjacent islands.

(iv) *Canadian Indians.* If designated by the Secretary of Homeland Security, a Canadian citizen holder of a Indian and Northern Affairs Canada (''INAC'') card issued by the Canadian Department of Indian Affairs and North Development, Director of Land and Trust Services (''LTS'') in conformance with security standards agreed upon by the Governments of Canada and the United States, and containing a machine readable zone and who is arriving from Canada may present the card prior to entering the United States at a land port-of-entry.

(v) *Children.* A child who is a Canadian citizen arriving from contiguous territory may present for admission to the United States at sea or land ports-of-entry certain other documents if the arrival meets the requirements described below.

(A) *Children Under Age 16.* A Canadian citizen who is under the age of 16 is permitted to present an original or a copy of his or her birth certificate, a Canadian Citizenship Card, or a Canadian Naturalization Certificate when arriving in the United States from contiguous territory at land or sea ports-of-entry.

(B) *Groups of Children Under Age 19.* A Canadian citizen, under age 19 who is traveling with a public or private school group, religious group, social or cultural organization, or team associated with a youth sport organization is permitted to present an original or a copy of his or her birth certificate, a Canadian Citizenship Card, or a Canadian Naturalization Certificate when arriving in the United States from contiguous territory at land or sea ports-of-entry, when the group, organization or team is under the supervision of an adult affiliated with the organization

and when the child has parental or legal guardian consent to travel. For purposes of this paragraph, an adult is considered to be a person who is age 19 or older. The following requirements will apply:

(*1*) The group, organization, or team must provide to CBP upon crossing the border, on organizational letterhead:

(*i*) The name of the group, organization or team, and the name of the supervising adult;

(*ii*) A trip itinerary, including the stated purpose of the trip, the location of the destination, and the length of stay;

(*iii*) A list of the children on the trip;

(*iv*) For each child, the primary address, primary phone number, date of birth, place of birth, and name of a parent or legal guardian.

(*2*) The adult leading the group, organization, or team must demonstrate parental or legal guardian consent by certifying in the writing submitted in paragraph (a)(1)(v)(B)(1) of this section that he or she has obtained for each child the consent of at least one parent or legal guardian.

(*3*) The inspection procedure described in this paragraph is limited to members of the group, organization, or team who are under age 19. Other members of the group, organization, or team must comply with other applicable document and/or inspection requirements found in this part or parts 211 or 235 of this subchapter.

(2) *Citizens of the British Overseas Territory of Bermuda.* A visa is generally not required for Citizens of the British Overseas Territory of Bermuda, except those Bermudians that fall under nonimmigrant visa categories E, K, S, or V as provided in paragraphs (h), (l), and (m) of this section and 22 CFR 41.2. A passport is required for Citizens of the British Overseas Territory of Bermuda arriving in the United States.

(3) *Bahamian nationals or British subjects resident in the Bahamas.* A passport is required. A visa required of such an alien unless, prior to or at the time of embarkation for the United States on a vessel or aircraft, the alien satisfied the examining U.S. immigration officer at the Bahamas, that he or she is clearly and beyond a doubt entitled to admission, under section 212(a) of the Immigration and Nationality Act, in all other respects.

(4) *British subjects resident in the Cayman Islands or in the Turks and Caicos Islands.* A passport is required. A visa is required of such an alien unless he or she arrives directly from the Cayman Islands or the Turks and Caicos Islands and presents a current certificate from the Clerk of Court of the Cayman Islands or the Turks and Caicos Islands indicating no criminal record.

(b) *Nationals of the British Virgin Islands.* A visa is not required of a national of the British Virgin Islands who has his or her residence in the British Virgin Islands, if:

(1) The alien is seeking admission solely to visit the Virgin Islands of the United States; or

(2) At the time of embarking on an aircraft at St. Thomas, U.S. Virgin Islands, the alien meets each of the following requirements:

(i) The alien is traveling to any other part of the United States by aircraft as a nonimmigrant visitor for business or pleasure (as described in section 101(a)(15)(B) of the Act);

(ii) The alien satisfies the examining U.S. immigration officer at the port-of-entry that he or she is clearly and beyond doubt entitled to admission in all other respects; and

(iii) The alien presents a current certificate issued by the Royal Virgin Islands Police Force indicating that he or she has no criminal record.

(c) *Mexican nationals.* (1) A visa and a passport are not required of a Mexican national who:

(i) Is applying for admission as a temporary visitor for business or pleasure from Mexico at a land port-of-entry, or arriving by pleasure vessel or ferry, if the national is in possession of a Form DSP–150, B–1/B–2 Visa and Border Crossing Card issued by the Department of State, containing a machine-readable biometric identifier; or.

(ii) Is applying for admission from contiguous territory or adjacent islands at a land or sea port-of-entry, if the national is a member of the Texas Band of Kickapoo Indians or Kickapoo Tribe of Oklahoma who is in possession of a Form I–872 American Indian Card.

(2) A visa shall not be required of a Mexican national who:

(i) Is in possession of a Form DSP–150, with a biometric identifier, issued by the DOS, and a passport, and is applying for admission as a temporary visitor for business or pleasure from other than contiguous territory;

(ii) Is a crew member employed on an aircraft belonging to a Mexican company owned carrier authorized to engage in commercial transportation into the United States; or

(iii) Bears a Mexican diplomatic or official passport and who is a military or civilian official of the Federal Government of Mexico entering the United States for 6 months or less for a purpose other than on assignment as a permanent employee to an office of the Mexican Federal Government in the United States, and the official's spouse or any of the official's dependent family members under 19 years of age, bearing diplomatic or official passports, who are in the actual company of such official at the time of admission into the United States. This provision does not apply to the spouse or any of the official's family members classifiable under section 101(a)(15)(F) or (M) of the Act.

(3) A Mexican national who presents a BCC at a POE must present the DOS-issued DSP–150 containing a machine-readable biometric identifier. The alien will not be permitted to cross the border into the United States unless the biometric identifier contained on the card matches the appropriate biometric characteristic of the alien.

(4) Mexican nationals presenting a combination B–1/B–2 nonimmigrant visa and border crossing card (or similar stamp in a passport), issued by DOS prior to April 1, 1998, that does not contain a machine-readable biometric identifier, may be admitted on the basis of the nonimmigrant visa only, provided it has not expired and the alien remains admissible. A passport is also required.

(5) *Aliens entering pursuant to International Boundary and Water Commission Treaty.* A visa and a passport are not required of an alien employed either directly or indirectly on the construction, operation, or maintenance of works in the United States undertaken in accordance with the treaty concluded on February 3, 1944, between the United States and Mexico regarding the functions of the International Boundary and Water Commission, and entering the United States temporarily in connection with such employment.

(d) *Citizens of the Freely Associated States, formerly Trust Territory of the Pacific Islands.* Citizens of the Republic of the Marshall Islands and the Federated States of Micronesia may enter into, lawfully engage in employment, and establish residence in the United States and its territories and possessions without regard to paragraphs (14), (20) and (26) of section 212(a) of the Act pursuant to the terms of Pub. L. 99–239. Pending issuance by the aforementioned governments of travel documents to eligible citizens, travel documents previously issued by the Trust Territory of the Pacific Islands will continue to be accepted for purposes of identification and to establish eligibility for admission into the United States, its territories and possessions.

(e) *Aliens entering Guam pursuant to section 14 of Pub. L. 99–396, ''Omnibus Territories Act.''* (1) Until November 28, 2009, a visa is not required of an alien who is a citizen of a country enumerated in paragraph (e)(3) of this section who:

(i) Is classifiable as a vistor for business or pleasure;

(ii) Is solely entering and staying on Guam for a period not to exceed fifteen days;

(iii) Is in possession of a round-trip nonrefundable and nontransferable transportation ticket bearing a confirmed departure date not exceeding fifteen days from the date of admission to Guam;

(iv) Is in possession of a completed and signed Visa Waiver Information Form (Form I–736);

(v) Waives any right to review or appeal the immigration officer's determination of admissibility at the port of entry at Guam; and

(vi) Waives any right to contest any action for deportation, other than on the basis of a request for asylum.

(2) An alien is eligible for the waiver provision if all of the eligibility criteria in paragraph (e)(1) of this section have been met prior to embarkation and the alien is a citizen of a country that:

(i) Has a visa refusal rate of 16.9% or less, or a country whose visa refusal rate exceeds 16.9% and has an established preinspection or preclearance program, pursuant to a bilateral agreement with the United States under which its citizens traveling to Guam without a valid United States visa are inspected by the Immigration and Naturalization Service prior to departure from that country;

(ii) Is within geographical proximity to Guam, unless the country has a substantial volume of nonimmigrant admissions to Guam as determined by the Commissioner and extends reciprocal privileges to citizens of the United States;

(iii) Is not designated by the Department of State as being of special humanitarian concern; and

(iv) Poses no threat to the welfare, safety or security of the United States, its territories, or commonwealths.

Any potential threats to the welfare, safety, or security of the United States, its territories, or commonwealths will be dealt with on a country by country basis, and a determination by the Commissioner of the Immigration and Naturalization Service that a threat exists will result in the immediate deletion of that country from the listing in paragraph (e)(3) of this section.

(3)(i) The following geographic areas meet the eligibility criteria as stated in paragraph (e)(2) of this section: Australia, Brunei, Indonesia, Japan, Malaysia, Nauru, New Zealand, Papua New Guinea, Republic of Korea, Singapore, Solomon Islands, Taiwan (residents thereof who begin their travel in Taiwan and who travel on direct flights from Taiwan to Guam without an intermediate layover or stop except that the flights may stop in a territory of the United States enroute), the United Kingdom (including the citizens of the colony of Hong Kong), Vanuatu, and Western Samoa. The provision that flights transporting residents of Taiwan to Guam may stop at a territory of the United States enroute may be rescinded whenever the number of inadmissible passengers arriving in Guam who have transited a territory of the United States enroute to Guam exceeds 20 percent of all the inadmissible passengers arriving in Guam within any consecutive two-month period. Such rescission will be published in the FEDERAL REGISTER.

(ii) For the purposes of this section, the term *citizen of a country* as used in 8 CFR 212.1(e)(1) when applied to Taiwan refers only to residents of Taiwan who are in possession of Taiwan National Identity Cards and a valid Taiwan passport with a valid re-entry permit issued by the Taiwan Ministry of Foreign Affairs. It does not refer to any other holder of a Taiwan passport or a passport issued by the People's Republic of China.

(4) Admission under this section renders an alien ineligible for:

(i) Adjustment of status to that of a temporary resident or, except as provided by section 245(i) of the Act or as an immediate relative as defined in section 201(b) of the Act, to that of a lawful permanent resident.

(ii) Change of nonimmigrant status; or

(iii) Extension of stay.

(5) A transportation line bringing any alien to Guam pursuant to this section shall:

(i) Enter into a contract on Form I–760, made by the Commissioner of the Immigration and Naturalization Service in behalf of the government;

(ii) Transport only an alien who is a citizen and in possession of a valid passport of a country enumerated in paragraph (e)(3) of this section;

(iii) Transport only an alien in possession of a round-trip, nontransferable transportation ticket:

(A) Bearing a confirmed departure date not exceeding fifteen days from the date of admission to Guam,

(B) Valid for a period of not less than one year,

(C) Nonrefundable except in the country in which issued or in the country of the alien's nationality or residence,

(D) Issued by a carrier which has entered into an agreement described in part (5)(i) of this section, and

(E) Which the carrier will unconditionally honor when presented for return passage; and

(iv) Transport only an alien in possession of a completed and signed Visa Waiver Information Form I–736.

(f) *Direct transits.* (1)–(2) [Reserved]

(3) *Foreign government officials in transit.* If an alien is of the class described in section 212(d)(8) of the Act, only a valid unexpired visa and a travel document valid for entry into a foreign country for at least 30 days from the date of admission to the United States are required.

(g) *Unforeseen emergency.* A nonimmigrant seeking admission to the United States must present an unexpired visa and passport valid for the amount of time set forth in section 212(a)(7)(B)(i) of the Act, 8 U.S.C. 1182(a)(7)(B)(i), or a valid biometric border crossing card issued by the DOS on Form DSP–150, at the time of application for admission, unless the nonimmigrant satisfies the requirements described in one or more of paragraphs (a) through (f) or (i), (o), or (p) of this section. Upon a nonimmigrant's application on Form I–193, or successor form, ''Application for Waiver of Passport and/or Visa,'' a district director may, in the exercise of its discretion, on a case-by-case basis, waive either or both of the documentary requirements of section 212(a)(7)(B)(i) if satisfied that the nonimmigrant cannot present the required documents because of an unforeseen emergency. The district director may at any time revoke a waiver previously authorized pursuant to this paragraph and notify the nonimmigrant in writing to that effect.

(h) *Nonimmigrant spouses, fiancées, fiancés, and children of U.S. citizens.* Notwithstanding any of the provisions of this part, an alien seeking admission as a spouse, fiancée, fiancé, or child of a U.S. citizen, or as a child of the spouse, fiané, or finacée of a U.S. citizen, pursuant to section 101(a)(15)(K) of the Act shall be in possession of an unexpired nonimmigrant visa issued by an American consular officer classifying the alien under that section, or be inadmissible under section 212(a)(7)(B) of the Act.

(i) *Visa Waiver Program.* A visa is not required of any alien who is eligible to apply for admission to the United States as a Visa Waiver Program applicant pursuant to the provisions of section 217 of the Act and part 217 of this chapter if such alien is a national of a country designated under the Visa Waiver Program, who seeks admission to the United States for a period of 90 days or less as a visitor for business or pleasure.

(j) *Officers authorized to act upon recommendations of United States consular officers for waiver of visa and passport requirements.* All district directors, the officers in charge are authorized to act upon recommendations made by United States consular officers or by officers of the Visa Office, Department of State, pursuant to the provisions of 22 CFR 41.7 for waiver of visa and passport requirements under the provisions of section 212(d)(4)(A) of the Act. The District Director at Washington, DC, has jurisdiction in such cases recommended to the Service at the seat of Government level by the Department of State. Neither an application nor fee are required if the concurrence in a passport or visa waiver is requested by a U.S. consular officer or by an officer of the Visa Office. The district director or the Deputy Commissioner, may at any time revoke a waiver previously authorized pursuant to this paragraph and notify the nonimmigrant alien in writing to that effect.

(k) *Cancellation of nonimmigrant visas by immigration officers.* Upon receipt of advice from the Department of State that a nonimmigrant visa has been revoked or invalidated, and request by that Department for such action, immigration officers shall place an appropriate endorsement thereon.

(l) *Treaty traders and investors.* Notwithstanding any of the provisions of this part, an alien seeking admission as a treaty trader or investor under the provisions of Chapter 16 of the Agreement Between the United States of America, the United Mexican States, and Canada (USMCA) pursuant to section 101(a)(15)(E) of the Act, shall be in possession of a nonimmigrant visa issued by an American consular officer classifying the alien under that section.

(m) *Aliens in S classification.* Notwithstanding any of the provisions of this part, an alien seeking admission pursuant to section 101(a)(15)(S) of the Act must be in possession of appropriate documents issued by a United States consular officer classifying the alien under that section.

(n) [Reserved]

(o) *Alien in T–2 through T–6 classification.* USCIS may apply paragraph (g) of this section to individuals seeking T–2, T–3, T–4, T–5, or T–6 nonimmigrant status upon request by the applicant.

(Secs. 103, 104, 212 of the Immigration and Nationality Act, as amended (8 U.S.C. 1103, 1104, 1132))

(p) *Alien in U–1 through U–5 classification.* Individuals seeking U–1 through U–5 nonimmigrant status may avail themselves of the provisions of paragraph (g) of this section, except that the authority to waive documentary requirements resides with the director of the USCIS office having jurisdiction over the adjudication of Form I–918, ''Petition for U Nonimmigrant Status.''

(q) *Aliens admissible under the Guam-CNMI Visa Waiver Program*—(1) *Eligibility for Program.* In accordance with Public Law 110–229, beginning November 28, 2009, the Secretary, in consultation with the Secretaries of the Departments of Interior and State, may waive the visa requirement in the case of a nonimmigrant alien who seeks admission to Guam or to the Commonwealth of the Northern Mariana Islands (CNMI) under the Guam-CNMI Visa Waiver Program. To be admissible under the Guam-CNMI Visa Waiver Program, prior to embarking on a carrier for travel to Guam or the CNMI, each nonimmigrant alien must:

(i) Be a national of a country or geographic area listed in paragraph (q)(2) of this section;

(ii) Be classifiable as a visitor for business or pleasure;

(iii) Be solely entering and staying on Guam or the CNMI for a period not to exceed forty-five days;

(iv) Be in possession of a round trip ticket that is nonrefundable and nontransferable and bears a confirmed departure date not exceeding forty-five days from the date of admission to Guam or the CNMI. ''Round trip ticket'' includes any return trip transportation ticket issued by a participating carrier, electronic ticket record, airline employee passes indicating return passage, individual vouchers for return passage, group vouchers for return passage for charter flights, or military travel orders which include military dependents for return to duty stations outside the United States on U.S. military flights;

(v) Be in possession of a completed and signed Guam-CNMI Visa Waiver Information Form (CBP Form I–736);

(vi) Be in possession of a completed and signed I–94 (see §1.4), Arrival-Departure Record (CBP Form I–94);

(vii) Be in possession of a valid unexpired ICAO compliant, machine readable passport issued by a country that meets the eligibility requirements of paragraph (q)(2) of this section;

(viii) Have not previously violated the terms of any prior admissions. Prior admissions include those under the Guam-CNMI Visa Waiver Program, the prior Guam Visa Waiver Program, the Visa Waiver Program as described in section 217(a) of the Act and admissions pursuant to any immigrant or nonimmigrant visa;

(ix) Waive any right to review or appeal an immigration officer's determination of admissibility at the port of entry into Guam or the CNMI;

(x) Waive any right to contest any action for deportation or removal, other than on the basis of: An application for withholding of removal under section 241(b)(3) of the INA; withholding or deferral of removal under the regulations implementing Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; or, an application for asylum if permitted under section 208 of the Act; and

(xi) If a resident of Taiwan, possess a Taiwan National Identity Card and a valid Taiwan passport with a valid reentry permit issued by the Taiwan Ministry of Foreign Affairs.

(2) *Program Countries and Geographic Areas*—(i) *General Eligibility Criteria.* (A) A country or geographic area may not participate in the Guam-CNMI Visa Waiver Program if the country or geographic area poses a threat to the welfare, safety or security of the United States, its territories, or commonwealths;

(B) A country or geographic area may not participate in the Guam-CNMI Visa Waiver Program if it has been designated a Country of Particular Concern under the International Religious

Freedom Act of 1998 by the Department of State, or identified by the Department of State as a source country of refugees designated of special humanitarian concern to the United States;

(C) A country or geographic area may not participate in the Guam-CNMI Visa Waiver Program if that country, not later than three weeks after the issuance of a final order of removal, does not accept for repatriation any citizen, former citizen, or national of the country against whom a final executable order of removal is issued. Nothing in this subparagraph creates any duty for the United States or any right for any alien with respect to removal or release. Nothing in this subparagraph gives rise to any cause of action or claim under this paragraph or any other law against any official of the United States or of any State to compel the release, removal or reconsideration for release or removal of any alien.

(D) DHS may make a determination regarding a country's eligibility based on other factors including, but not limited to, rate of refusal for nonimmigrant visas, rate of overstays, cooperation in information exchange with the United States, electronic travel authorizations, and any other factors deemed relevant by DHS.

(ii) *Eligible Countries and Geographic Areas.* Nationals of the following countries are eligible to participate in the Guam-CNMI Visa Waiver Program for purposes of admission to both Guam and the CNMI: Australia, Brunei, Japan, Malaysia, Nauru, New Zealand, Papua New Guinea, Republic of Korea, Singapore, and the United Kingdom. Travelers with a connection to one of the following geographic areas—the Hong Kong Special Administrative Region (Hong Kong) or Taiwan—may also be eligible to participate in the Guam-CNMI Visa Waiver Program for purposes of admission to both Guam and the CNMI, *see* paragraphs (q)(2)(ii)(A) and (q)(2)(ii)(B) respectively.

(A) *Hong Kong Special Administrative Region (Hong Kong).* To be eligible to participate in the program as a result of a connection to Hong Kong, the following documentation is required: A Hong Kong Special Administrative Region (SAR) passport with a Hong Kong identification card; or a British National (Overseas) (BN(O)) passport with a Hong Kong identification card.

(B) *Taiwan.* To be eligible to participate in the program as a result of a connection to Taiwan, one must be a resident of Taiwan who begins his or her travel in Taiwan and who travels on direct flights from Taiwan to Guam or the CNMI without an intermediate layover or stop, except that the flights may stop in a territory of the United States en route.

(iii) *Significant Economic Benefit Criteria.* If, in addition to the considerations enumerated under paragraph (q)(2)(i) of this section, DHS determines that the CNMI has received a significant economic benefit from the number of visitors for pleasure from particular countries during the period of May 8, 2007 through May 8, 2008, those countries are eligible to participate in the Guam-CNMI Visa Waiver Program unless the Secretary of Homeland Security determines that such country's inclusion in the Guam-CNMI Visa Waiver Program would represent a threat to the welfare, safety, or security of the United States and its territories.

(iv) *Additional Eligible Countries or Geographic Areas Based on Significant Economic Benefit.* [Reserved]

(3) *Suspension of Program Countries or Geographic Areas.* (i) Suspension of a country or geographic area from the Guam-CNMI Visa Waiver Program may be made on a country-by-country basis for good cause including, but not limited to if: The admissions of visitors from a country have resulted in an unacceptable number of visitors from a country remaining unlawfully in Guam or the CNMI, unlawfully obtaining entry to other parts of the United States, or seeking withholding of removal or seeking asylum; or that visitors from a country pose a risk to law enforcement or security interests, including the enforcement of immigration laws of Guam, the CNMI, or the United States.

(ii) A country or geographic area may be suspended from the Guam-CNMI Visa Waiver Program if that country or geographic area is designated as a Country of Particular Concern under the International Religious

Freedom Act of 1998 by the Department of State, or identified by the Department of State as a source country of refugees designated of special humanitarian concern to the United States, pending an evaluation and determination by the Secretary.

(iii) A country or geographic area may be suspended from the Guam-CNMI Visa Waiver Program by the Secretary of Homeland Security, in consultation with the Secretary of the Interior and the Secretary of State, based on the evaluation of all factors the Secretary deems relevant including, but not limited to, electronic travel authorization, procedures for reporting lost and stolen passports, repatriation of aliens, rates of refusal for nonimmigrant visitor visas, overstays, exit systems and information exchange.

(4) Admission under this section renders an alien ineligible for:

(i) Adjustment of status to that of a temporary resident or, except as provided by section 245(i) of the Act or as an immediate relative as defined in section 201(b) of the Act, to that of a lawful permanent resident.

(ii) Change of nonimmigrant status; or

(iii) Extension of stay.

(5) *Requirements for transportation lines.* A transportation line bringing any alien to Guam or the CNMI pursuant to this section must:

(i) Enter into a contract on CBP Form I–760, made by the Commissioner of Customs and Border Protection on behalf of the government;

(ii) Transport an alien who is a citizen or national and in possession of a valid unexpired ICAO compliant, machine readable passport of a country enumerated in paragraph (q)(2) of this section;

(iii) Transport an alien only if the alien is in possession of a round trip ticket as defined in paragraph (q)(1)(iv) of this section bearing a confirmed departure date not exceeding forty-five days from the date of admission to Guam or the CNMI which the carrier will unconditionally honor when presented for return passage. This ticket must be:

(A) Valid for a period of not less than one year,

(B) Nonrefundable except in the country in which issued or in the country of the alien's nationality or residence, and

(C) Issued by a carrier which has entered into an agreement described in paragraph (q)(5) of this section.

(iv) Transport an alien in possession of a completed and signed Guam-CNMI Visa Waiver Information Form (CBP Form I–736), and

(v) Transport an alien in possession of completed I–94, Arrival-Departure Record (CBP Form I–94).

(6) *Bonding.* The Secretary may require a bond on behalf of an alien seeking admission under the Guam-CNMI Visa Waiver Program, in addition to the requirements enumerated in this section, when the Secretary deems it appropriate. Such bonds may be required of an individual alien or of an identified subset of participants.

(7) *Maintenance of status*—(i) *Satisfactory departure.* If an emergency prevents an alien admitted under the Guam-CNMI Visa Waiver Program, as set forth in this paragraph (q), from departing from Guam or the CNMI within his or her period of authorized stay, an immigration officer having jurisdiction over the place of the alien's temporary stay may, in his or her discretion, grant a period of satisfactory departure not to exceed 15 days. If departure is accomplished during that period, the alien is to be regarded as having satisfactorily accomplished the visit without overstaying the allotted time.

(8) *Inadmissibility and Deportability*—(i) *Determinations of inadmissibility.* (A) An alien who applies for admission under the provisions of the Guam-CNMI Visa Waiver Program, who is determined by an immigration officer to be inadmissible to Guam or the CNMI under one or more of the grounds of inadmissibility listed in section 212 of the Act (other than for lack of a visa), or who is in possession of and presents fraudulent or counterfeit travel documents, will be refused admission into Guam or the CNMI and removed. Such refusal and removal shall be effected without referral of the alien to an immigration judge for further inquiry, examination, or hearing, except that an alien who presents himself or herself as an applicant for admission to Guam

under the Guam-CNMI Visa Waiver Program, who applies for asylum, withholding of removal under section 241(b)(3) of the INA or withholding or deferral of removal under the regulations implementing Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment must be issued a Form I–863, Notice of Referral to Immigration Judge, for a proceeding in accordance with 8 CFR 208.2(c)(1) and (2). The provisions of 8 CFR subpart 208 subpart A shall not apply to an alien present or arriving in the CNMI seeking to apply for asylum prior to January 1, 2030. No application for asylum may be filed pursuant to section 208 of the Act by an alien present or arriving in the CNMI prior to January 1, 2030; however, aliens physically present in the CNMI during the transition period who express a fear of persecution or torture only may establish eligibility for withholding of removal pursuant to INA 241(b)(3) or pursuant to the regulations implementing Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

(B) The removal of an alien under this section may be deferred if the alien is paroled into the custody of a Federal, State, or local law enforcement agency for criminal prosecution or punishment. This section in no way diminishes the discretionary authority of the Secretary enumerated in section 212(d) of the Act.

(C) Refusal of admission under this paragraph shall not constitute removal for purposes of the Act.

(ii) *Determination of deportability.* (A) An alien who has been admitted to either Guam or the CNMI under the provisions of this section who is determined by an immigration officer to be deportable from either Guam or the CNMI under one or more of the grounds of deportability listed in section 237 of the Act, shall be removed from either Guam or the CNMI to his or her country of nationality or last residence. Such removal will be determined by DHS authority that has jurisdiction over the place where the alien is found, and will be effected without referral of the alien to an immigration judge for a determination of deportability, except that an alien admitted to Guam under the Guam-CNMI Visa Waiver Program who applies for asylum or other form of protection from persecution or torture must be issued a Form I–863 for a proceeding in accordance with 8 CFR 208.2(c)(1) and (2). The provisions of 8 CFR part 208 subpart A shall not apply to an alien present or arriving in the CNMI seeking to apply for asylum prior to January 1, 2030. No application for asylum may be filed pursuant to section 208 of the INA by an alien present or arriving in the CNMI prior to January 1, 2030; however, aliens physically present or arriving in the CNMI prior to January 1, 2030, may apply for withholding of removal under section 241(b)(3) of the Act and withholding and deferral of removal under the regulations implementing Article 3 of the United Nations Convention Against Torture, Inhuman or Degrading Treatment or Punishment.

(B) Removal by DHS under paragraph (b)(1) of this section is equivalent in all respects and has the same consequences as removal after proceedings conducted under section 240 of the Act.

(iii) *Removal of inadmissible aliens who arrived by air or sea.* Removal of an alien from Guam or the CNMI under this section may be effected using the return portion of the round trip passage presented by the alien at the time of entry to Guam and the CNMI. Such removal shall be on the first available means of transportation to the alien's point of embarkation to Guam or the CNMI. Nothing in this part absolves the carrier of the responsibility to remove any inadmissible or deportable alien at carrier expense, as provided in the carrier agreement.

[26 FR 12066, Dec. 16, 1961]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 212.1, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.govinfo.gov*.

§ 212.2 Consent to reapply for admission after deportation, removal or departure at Government expense.

(a) *Evidence.* Any alien who has been deported or removed from the United States is inadmissible to the United States unless the alien has remained

outside of the United States for five consecutive years since the date of deportation or removal. If the alien has been convicted of an aggravated felony, he or she must remain outside of the United States for twenty consecutive years from the deportation date before he or she is eligible to re-enter the United States. Any alien who has been deported or removed from the United States and is applying for a visa, admission to the United States, or adjustment of status, must present proof that he or she has remained outside of the United States for the time period required for re-entry after deportation or removal. The examining consular or immigration officer must be satisfied that since the alien's deportation or removal, the alien has remained outside the United States for more than five consecutive years, or twenty consecutive years in the case of an alien convicted of an aggravated felony as defined in section 101(a)(43) of the Act. Any alien who does not satisfactorily present proof of absence from the United States for more than five consecutive years, or twenty consecutive years in the case of an alien convicted of an aggravated felony, to the consular or immigration officer, and any alien who is seeking to enter the United States prior to the completion of the requisite five- or twenty-year absence, must apply for permission to reapply for admission to the United States as provided under this part. A temporary stay in the United States under section 212(d)(3) of the Act does not interrupt the five or twenty consecutive year absence requirement.

(b) *Alien applying to consular officer for nonimmigrant visa or nonresident alien border crossing card.* (1) An alien who is applying to a consular officer for a nonimmigrant visa or a nonresident alien border crossing card, must request permission to reapply for admission to the United States if five years, or twenty years if the alien's deportation was based upon a conviction for an aggravated felony, have not elapsed since the date of deportation or removal. This permission shall be requested in the manner prescribed through the consular officer, and may be granted only in accordance with sections 212(a)(9)(A) and 212(d)(3)(A) of the Act and 8 CFR 212.4. However, the alien may apply for such permission by submitting an application on the form designated by USCIS with the fee prescribed in 8 CFR 106.2, in accordance with the form instructions, to the consular officer if that officer is willing to accept the application, and recommends to the district director that the alien be permitted to apply.

(2) The consular officer shall forward the application to the district director with jurisdiction over the place where the deportation or removal proceedings were held.

(c) *Special provisions for an applicant for nonimmigrant visa under section 101(a)(15)(K) of the Act.* (1) An applicant for a nonimmigrant visa under section 101(a)(15)(K) must:

(i) Be the beneficiary of a valid visa petition approved by the Service; and

(ii) File the application on the form designated by USCIS with the fee prescribed in 8 CFR 106.2, in accordance with the form instructions with the consular officer for permission to reapply for admission to the United States after deportation or removal.

(2) The consular officer must forward the application to the designated USCIS office. If the alien is ineligible on grounds which, upon the applicant's marriage to the United States citizen petitioner, may be waived under section 212 (g), (h), or (i) of the Act, the consular officer must also forward a recommendation as to whether the waiver should be granted.

(d) *Applicant for immigrant visa.* Except as provided in paragraph (g)(2) of this section, an applicant for an immigrant visa who is not physically present in the United States and who requires permission to reapply must file the waiver request on the form designated by USCIS. Except as provided in paragraph (g)(2) of this section, if the applicant also requires a waiver under section 212(g), (h), or (i) of the Act, he or she must file both waiver requests simultaneously on the forms designated by USCIS with the fees prescribed in 8 CFR 106.2 and in accordance with the form instructions.

(e) *Applicant for adjustment of status.* An applicant for adjustment of status under section 245 of the Act and part

245 of this chapter must request permission to reapply for entry in conjunction with his or her application for adjustment of status. This request is made by filing the application on the form designated by USCIS. If the application under section 245 of the Act has been initiated, renewed, or is pending in a proceeding before an immigration judge, the district director must refer the application to the immigration judge for adjudication.

(f) *Applicant for admission at port of entry.* An alien may request permission at a port of entry to reapply for admission to the United States within 5 years of the deportation or removal, or 20 years in the case of an alien deported, or removed 2 or more times, or at any time after deportation or removal in the case of an alien convicted of an aggravated felony. The alien must file the , where required, with the DHS officer having jurisdiction over the port of entry.

(g) *Other applicants.* (1) Any applicant for permission to reapply for admission under circumstances other than those described in paragraphs (b) through (f) of this section must apply on the form designated by USCIS with the fee prescribed in 8 CFR 106.2 and in accordance with the form instructions.

(2) An alien who is an applicant for parole authorization under 8 CFR 245.15(t)(2) or 8 CFR 245.13(k)(2) and requires consent to reapply for admission after deportation, removal, or departure at Government expense, or a waiver under section 212(g), 212(h), or 212(i) of the Act, must file the requisite waiver form concurrently with the parole request.

(h) *Decision.* An applicant who has submitted a request for consent to reapply for admission after deportation or removal must be notified of the decision. If the application is denied, the applicant must be notified of the reasons for the denial and of his or her right to appeal as provided in part 103 of this chapter. Except in the case of an applicant seeking to be granted advance permission to reapply for admission prior to his or her departure from the United States, the denial of the application shall be without prejudice to the renewal of the application in the course of proceedings before an immigration judge under section 242 of the Act and this chapter.

(i) *Retroactive approval.* (1) If the alien filed the application when seeking admission at a port of entry, the approval of the application shall be retroactive to either:

(i) The date on which the alien embarked or reembarked at a place outside the United States; or

(ii) The date on which the alien attempted to be admitted from foreign contiguous territory.

(2) If the alien filed Form I–212 in conjunction with an application for adjustment of status under section 245 of the Act, the approval of the application shall be retroactive to the date on which the alien embarked or reembarked at a place outside the United States.

(j) *Advance approval.* An alien whose departure will execute an order of deportation shall receive a conditional approval depending upon his or her satisfactory departure. However, the grant of permission to reapply does not waive inadmissibility under section 212(a)(9)(A) of the Act resulting from exclusion, deportation, or removal proceedings which are instituted subsequent to the date permission to reapply is granted.

[56 FR 23212, May 21, 1991, as amended at 64 FR 25766, May 12, 1999; 65 FR 15854, Mar. 24, 2000; 74 FR 26937, June 5, 2009; 76 FR 53787, Aug. 29, 2011; 85 FR 46922, Aug. 3, 2020]

§ 212.3 Application for the exercise of discretion under section 212(c).

(a) *Jurisdiction.* An application for the exercise of discretion under section 212(c) of the Act must be submitted on the form designated by USCIS with the fee prescribed in 8 CFR 106.2 and in accordance with the form instructions. If the application is made in the course of proceedings under sections 235, 236, or 242 of the Act, the application shall be made to the Immigration Court.

(b) *Filing of application.* The application may be filed prior to, at the time of, or at any time after the applicant's departure from or arrival into the United States. All material facts and/or circumstances which the applicant knows or believes apply to the grounds of excludability or deportability must be described. The applicant must also

submit all available documentation relating to such grounds.

(c) *Decision of the District Director.* A district director may grant or deny an application for advance permission to return to an unrelinquished domicile under section 212(c) of the Act, in the exercise of discretion, unless otherwise prohibited by paragraph (f) of this section. The applicant shall be notified of the decision and, if the application is denied, of the reason(s) for denial. No appeal shall lie from denial of the application, but the application may be renewed before an Immigration Judge as provided in paragraph (e) of this section.

(d) *Validity.* Once an application is approved, that approval is valid indefinitely. However, the approval covers only those specific grounds of excludability or deportability that were described in the application. An application who failed to describe any other grounds of excludability or deportability, or failed to disclose material facts existing at the time of the approval of the application, remains excludable or deportable under the previously unidentified grounds. If at a later date, the applicant becomes subject to exclusion or deportation based upon these previously unidentified grounds or upon new ground(s), a new application must be filed.

(e) *Filing or renewal of applications before an Immigration Judge.* (1) An application for the exercise of discretion under section 212(c) of the Act may be renewed or submitted in proceedings before an Immigration Judge under sections 235, 236, or 242 of the Act, and under this chapter. Such application shall be adjudicated by the Immigration Judge, without regard to whether the applicant previously has made application to the district director.

(2) The Immigration Judge may grant or deny an application for advance permission to return to an unrelinquished domicile under section 212(c) of the Act, in the exercise of discretion, unless otherwise prohibited by paragraph (f) of this section.

(3) An alien otherwise entitled to appeal to the Board of Immigration Appeals may appeal the denial by the Immigration Judge of this application in accordance with the provisions of §3.36 of this chapter.

(f) Limitations on discretion to grant an application under section 212(c) of the Act. An application for advance permission to enter under section 212 of the Act shall be denied if:

(1) The alien has not been lawfully admitted for permanent residence;

(2) The alien has not maintained lawful domicile in the United States, as either a lawful permanent resident or a lawful temporary resident pursuant to section 245A or section 210 of the Act, for at least seven consecutive years immediately preceding the filing of the application;

(3) The alien is subject to exclusion from the United States under paragraphs (3)(A), (3)(B), (3)(C), or (3)(E) of section 212(a) of the Act;

(4) The alien has been convicted of an aggravated felony, as defined by section 101(a)(43) of the Act, and has served a term of imprisonment of at least five years for such conviction; or

(5) The alien applies for relief under section 212(c) within five years of the barring act as enumerated in one or more sections of section 242B(e) (1) through (4) of the Act.

(g) *Relief for certain aliens who were in deportation proceedings before April 24, 1996.* Section 440(d) of Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) shall not apply to any applicant for relief under this section whose deportation proceedings were commenced before the Immigration Court before April 24, 1996.

[56 FR 50034, Oct. 3, 1991, as amended at 60 FR 34090, June 30, 1995; 61 FR 59825, Nov. 25, 1996; 66 FR 6446, Jan. 22, 2001; 74 FR 26938, June 5, 2009; 76 FR 53787, Aug. 29, 2011; 85 FR 46922, Aug. 3, 2020]

§ 212.4 Applications for the exercise of discretion under section 212(d)(1) and 212(d)(3).

(a) *Applications under section 212(d)(3)(A)*—(1) *General.* District directors and officers in charge outside the United States in the districts of Bangkok, Thailand; Mexico City, Mexico; and Rome, Italy are authorized to act upon recommendations made by consular officers for the exercise of discretion under section 212(d)(3)(A) of the

Act. The District Director, Washington, DC, has jurisdiction in such cases recommended to the Service at the seat-of-government level by the Department of State. When a consular officer or other State Department official recommends that the benefits of section 212(d)(3)(A) of the Act be accorded an alien, neither an application nor fee shall be required. The recommendation shall specify:

(i) The reasons for inadmissibility and each section of law under which the alien is inadmissible;

(ii) Each intended date of arrival;

(iii) The length of each proposed stay in the United States;

(iv) The purpose of each stay;

(v) The number of entries which the alien intends to make; and

(vi) The justification for exercising the authority contained in section 212(d)(3) of the Act.

If the alien desires to make multiple entries and the consular officer or other State Department official believes that the circumstances justify the issuance of a visa valid for multiple entries rather than for a specified number of entries, and recommends that the alien be accorded an authorization valid for multiple entries, the information required by items (ii) and (iii) shall be furnished only with respect to the initial entry. Item (ii) does not apply to a bona fide crewman. The consular officer or other State Department official shall be notified of the decision on his recommendation. No appeal by the alien shall lie from an adverse decision made by a Service officer on the recommendation of a consular officer or other State Department official.

(2) *Authority of consular officers to approve section 212(d)(3)(A) recommendations pertaining to aliens inadmissible under section 212(a)(28)(C).* In certain categories of visa cases defined by the Secretary of State, United States consular officers assigned to visa-issuing posts abroad may, on behalf of the Attorney General pursuant to section 212(d)(3)(A) of the Act, approve a recommendation by another consular officer that an alien be admitted temporarily despite visa ineligibility solely because the alien is of the class of aliens defined at section 212(a)(28)(C) of the Act, as a result of presumed or actual membership in, or affiliation with, an organization described in that section. Authorizations for temporary admission granted by consular officers shall be subject to the terms specified in § 212.4(c) of this chapter. Any recommendation which is not clearly approvable shall, and any recommendation may, be presented to the appropriate official of the Immigration and Naturalization Service for a determination.

(b) *Applications under section 212(d)(3)(B).* An application for the exercise of discretion under section 212(d)(3)(B) of the Act shall be submitted on the form designated by USCIS with the fee prescribed in 8 CFR 106.2, and in accordance with the form instructions. (For Department of State procedure when a visa is required, see 22 CFR 41.95 and paragraph (a) of this section.) If the application is made because the applicant may be inadmissible due to present or past membership in or affiliation with any Communist or other totalitarian party or organization, there shall be attached to the application a written statement of the history of the applicant's membership or affiliation, including the period of such membership or affiliation, whether the applicant held any office in the organization, and whether his membership or affiliation was voluntary or involuntary. If the applicant alleges that his membership or affiliation was involuntary, the statement shall include the basis for that allegation. When the application is made because the applicant may be inadmissible due to disease, mental or physical defect, or disability of any kind, the application shall describe the disease, defect, or disability. If the purpose of seeking admission to the United States is for treatment, there shall be attached to the application statements in writing to establish that satisfactory treatment cannot be obtained outside the United States; that arrangements have been completed for treatment, and where and from whom treatment will be received; what financial arrangements for payment of expenses incurred in connection with the treatment have been made, and that a bond will be available if required. When the

application is made because the applicant may be inadmissible due to the conviction of one or more crimes, the designation of each crime, the date and place of its commission and of the conviction thereof, and the sentence or other judgment of the court shall be stated in the application; in such a case the application shall be supplemented by the official record of each conviction, and any other documents relating to commutation of sentence, parole, probation, or pardon. If the application is made at the time of the applicant's arrival to the district director at a port of entry, the applicant shall establish that he was not aware of the ground of inadmissibility and that it could not have been ascertained by the exercise of reasonable diligence, and he shall be in possession of a passport and visa, if required, or have been granted a waiver thereof. The applicant shall be notified of the decision and if the application is denied of the reasons therefor and of his right to appeal to the Board within 15 days after the mailing of the notification of decision in accordance with the Provisions of part 3 of this chapter. If denied, the denial shall be without prejudice to renewal of the application in the course of proceedings before a special inquiry officer under sections 235 and 236 of the Act and this chapter. When an appeal may not be taken from a decision of a special inquiry officer excluding an alien but the alien has applied for the exercise of discretion under section 212(d)(3)(B) of the Act, the alien may appeal to the Board from a denial of such application in accordance with the provisions of § 236.5(b) of this chapter.

(c) *Terms of authorization*—(1) *General.* Except as provided in paragraph (c)(2) of this section, each authorization under section 212(d)(3)(A) or (B) of the Act shall specify:

(i) Each section of law under which the alien is inadmissible;

(ii) The intended date of each arrival, unless the applicant is a bona fide crewman. However, if the authorization is valid for multiple entries rather than for a specified number of entries, this information shall be specified only with respect to the initial entry;

(iii) The length of each stay authorized in the United States, which shall not exceed the period justified and shall be subject to limitations specified in 8 CFR part 214. However, if the authorization is valid for multiple entries rather than for a specified number of entries, this information shall be specified only with respect to the initial entry;

(iv) The purpose of each stay;

(v) The number of entries for which the authorization is valid;

(vi) Subject to the conditions set forth in paragraph (c)(2) of this section, the dates on or between which each application for admission at POEs in the United States is valid;

(vii) The justification for exercising the authority contained in section 212(d)(3) of the Act; and

(viii) That the authorization is subject to revocation at any time.

(2) *Conditions of admission.* (i) For aliens issued an authorization for temporary admission in accordance with this section, admissions pursuant to section 212(d)(3) of the Act shall be subject to the terms and conditions set forth in the authorization.

(ii) The period for which the alien's admission is authorized pursuant to this section shall not exceed the period justified, or the limitations specified, in 8 CFR part 214 for each class of nonimmigrant, whichever is less.

(3) *Validity.* (i) Authorizations granted to crew members may be valid for a maximum period of 2 years for application for admission at U.S. POEs and may be valid for multiple entries.

(ii) An authorization issued in conjunction with an application for a Form DSP–150, B–1/B–2 Visa and Border Crossing Card, issued by the DOS shall be valid for a period not to exceed the validity of the biometric BCC for applications for admission at U.S. POEs and shall be valid for multiple entries.

(iii) A multiple entry authorization for a person other than a crew member or applicant for a Form DSP–150 may be made valid for a maximum period of 5 years for applications for admission at U.S. POEs.

(iv) An authorization that was previously issued in conjunction with Form I–185, Nonresident Alien Canadian Border Crossing Card, and that is noted on the card may remain valid. Although the waiver may remain valid,

the non-biometric border crossing card portion of this document is not valid after that date. This waiver authorization shall cease if otherwise revoked or voided.

(v) A single-entry authorization to apply for admission at a U.S. POE shall not be valid for more than 6 months from the date the authorization is issued.

(vi) An authorization may not be revalidated. Upon expiration of the authorization, a new application and authorization are required.

(d) *Admission of groups inadmissible under section 212(a)(28) for attendance at international conferences.* When the Secretary of State recommends that a group of nonimmigrant aliens and their accompanying family members be admitted to attend international conferences notwithstanding their inadmissibility under section 212(a)(28) of the Act, the Deputy Commissioner, may enter an order pursuant to the authority contained in section 212(d)(3)(A) of the Act specifying the terms and conditions of their admission and stay.

(e) *Inadmissibility under section 212(a)(1)(A)(iii).* Pursuant to the authority contained in section 212(d)(3) of the Act, the temporary admission of a nonimmigrant visitor is authorized notwithstanding inadmissibility under section 212(a)(1)(A)(iii)(I) or (II) of the Act due to a mental disorder and associated threatening or harmful behavior, if such alien is accompanied by a member of his/her family, or a guardian who will be responsible for him/her during the period of admission authorized.

(f) *Inadmissibility under section 212(a)(1) for aliens inadmissible due to HIV*—(1) *General.* Pursuant to the authority in section 212(d)(3)(A)(i) of the Act, any alien who is inadmissible under section 212(a)(1)(A)(i) of the Act due to infection with the etiologic agent for acquired immune deficiency syndrome (HIV infection) may be issued a B–1 (business visitor) or B–2 (visitor for pleasure) nonimmigrant visa by a consular officer or the Secretary of State, and be authorized for temporary admission into the United States for a period not to exceed 30 days, subject to authorization of an additional period or periods under paragraph (f)(5) of this section, provided that the authorization is granted in accordance with paragraphs (f)(2) through (f)(7) of this section. Application under this paragraph (f) may not be combined with any other waiver of inadmissibility.

(2) *Conditions.* An alien who is HIV-positive who applies for a nonimmigrant visa before a consular officer may be issued a B–1 (business visitor) or B–2 (visitor for pleasure) nonimmigrant visa and admitted to the United States for a period not to exceed 30 days, provided that the applicant establishes that:

(i) The applicant has tested positive for HIV;

(ii) The applicant is not currently exhibiting symptoms indicative of an active, contagious infection associated with acquired immune deficiency syndrome;

(iii) The applicant is aware of, has been counseled on, and understands the nature, severity, and the communicability of his or her medical condition;

(iv) The applicant's admission poses a minimal risk of danger to the public health in the United States and poses a minimal risk of danger of transmission of the infection to any other person in the United States;

(v) The applicant will have in his or her possession, or will have access to, as medically appropriate, an adequate supply of antiretroviral drugs for the anticipated stay in the United States and possesses sufficient assets, such as insurance that is accepted in the United States, to cover any medical care that the applicant may require in the event of illness at any time while in the United States;

(vi) The applicant's admission will not create any cost to the United States, or a state or local government, or any agency thereof, without the prior written consent of the agency;

(vii) The applicant is seeking admission solely for activities that are consistent with the B–1 (business visitor) or B–2 (visitor for pleasure) nonimmigrant classification;

(viii) The applicant is aware that no single admission to the United States will be for a period that exceeds 30 days

(subject to paragraph (f)(5) of this section);

(ix) The applicant is otherwise admissible to the United States and no other ground of inadmissibility applies;

(x) The applicant is aware that he or she cannot be admitted under section 217 of the Act (Visa Waiver Program);

(xi) The applicant is aware that any failure to comply with any condition of admission set forth under this paragraph (f) will thereafter make him or her ineligible for authorization under this paragraph; and

(xii) The applicant, for the purpose of admission pursuant to authorization under this paragraph (f), waives any opportunity to apply for an extension of nonimmigrant stay (except as provided in paragraph (f)(5) of this section), a change of nonimmigrant status, or adjustment of status to that of permanent resident.

(A) Nothing in this paragraph (f) precludes an alien admitted under this paragraph (f) from applying for asylum pursuant to section 208 of the Act.

(B) Any alien admitted under this paragraph (f) who applies for adjustment of status under section 209 of the Act after being granted asylum must establish his or her eligibility to adjust status under all applicable provisions of the Act and 8 CFR part 209. Any applicable ground of inadmissibility must be waived by approval of an appropriate waiver(s) under section 209(c) of the Act and 8 CFR 209.2(b).

(C) Nothing within this paragraph (f) constitutes a waiver of inadmissibility under section 209 of the Act or 8 CFR part 209.

(3) *Nonimmigrant visa.* A nonimmigrant visa issued to the applicant for purposes of temporary admission under section 212(d)(3)(A)(i) of the Act and this paragraph (f) may not be valid for more than 12 months or for more than two applications for admission during the 12-month period. The authorized period of stay will be for 30 calendar days calculated from the initial admission under this visa.

(4) *Application at U.S. port.* If otherwise admissible, a holder of the nonimmigrant visa issued under section 212(d)(3)(A)(i) of the Act and this paragraph (f) is authorized to apply for admission at a United States port of entry at any time during the period of validity of the visa in only the B–1 (business visitor) or B–2 (visitor for pleasure) nonimmigrant categories.

(5) *Admission limited; satisfactory departure.* Notwithstanding any other provision of this chapter, no single period of admission under section 212(d)(3)(A)(i) of the Act and this paragraph (f) may be authorized for more than 30 days; if an emergency prevents a nonimmigrant alien admitted under this paragraph (f) from departing from the United States within his or her period of authorized stay, the director (or other appropriate official) having jurisdiction over the place of the alien's temporary stay may, in his or her discretion, grant an additional period (or periods) of satisfactory departure, each such period not to exceed 30 days. If departure is accomplished during that period, the alien is to be regarded as having satisfactorily accomplished the visit without overstaying the allotted time.

(6) *Failure to comply.* No authorization under section 212(d)(3)(A)(i) of the Act and this paragraph (f) may be provided to any alien who has previously failed to comply with any condition of an admission authorized under this paragraph.

(7) *Additional limitations.* The Secretary of Homeland Security or the Secretary of State may require additional evidence or impose additional conditions on granting authorization for temporary admissions under this paragraph (f) as international (or other relevant) conditions may indicate.

(8) *Option for case-by-case determination.* If the applicant does not meet the criteria under this paragraph (f), or does not wish to agree to the conditions for the streamlined 30-day visa under this paragraph (f), the applicant may elect to utilize the process described in either paragraph (a) or (b) of this section, as applicable.

(g) *Action upon alien's arrival.* Upon admitting an alien who has been granted the benefits of section 212(d)(3)(A) of the Act, the immigration officer shall be guided by the conditions and limitations imposed in the authorization and noted by the consular officer in the alien's passport. When admitting any alien who has been granted the benefits

of section 212(d)(3)(B) of the Act, the Immigration officer shall note on the arrival-departure record, Form I–94 (see §1.4), or crewman's landing permit, Form I–95, issued to the alien, the conditions and limitations imposed in the authorization.

(h) *Authorizations issued to crewmen without limitation as to period of validity.* When a crewman who has a valid section 212(d)(3) authorization without any time limitation comes to the attention of the Service, his travel document shall be endorsed to show that the validity of his section 212(d)(3) authorization expires as of a date six months thereafter, and any previously-issued Form I–184 shall be lifted and Form I–95 shall be issued in its place and similarly endorsed.

(i) *Revocation.* The Deputy Commissioner or the district director may at any time revoke a waiver previously authorized under section 212(d)(3) of the Act and shall notify the nonimmigrant in writing to that effect.

(j) *Alien witnesses and informants*—(1) *Waivers under section 212(d)(1) of the Act.* Upon the application of a federal or state law enforcement authority (''LEA''), which shall include a state or federal court or United States Attorney's Office, pursuant to the filing for nonimmigrant classification described in section 101(a)(15)(S) of the Act, USCIS will determine whether a ground of exclusion exists with respect to the alien for whom classification is sought and, if so, whether it is in the national interest to exercise the discretion to waive the ground of excludability, other than section 212(a)(3)(E) of the Act. USCIS may at any time revoke a waiver previously authorized under section 212(d)(1) of the Act. In the event USCIS decides to revoke a previously authorized waiver for an S nonimmigrant, the Assistant Attorney General, Criminal Division, and the relevant LEA shall be notified in writing to that effect. The Assistant Attorney General, Criminal Division, shall concur in or object to the decision. Unless the Assistant Attorney General, Criminal Division, objects within 7 days, he or she shall be deemed to have concurred in the decision. In the event of an objection by the Assistant Attorney General, Criminal Division, the matter will be expeditiously referred to the Deputy Attorney General for a final resolution. In no circumstances shall the alien or the relevant LEA have a right of appeal from any decision to revoke.

(2) *Grounds of removal.* Nothing shall prohibit the Service from removing from the United States an alien classified pursuant to section 101(a)(15)(S) of the Act for conduct committed after the alien has been admitted to the United States as an S nonimmigrant, or after the alien's change to S classification, or for conduct or a condition undisclosed to the Attorney General prior to the alien's admission in, or change to, S classification, unless such conduct or condition is waived prior to admission and classification. In the event USCIS decides to remove an S nonimmigrant from the United States, the Assistant Attorney General, Criminal Division, and the relevant LEA shall be notified in writing to that effect. The Assistant Attorney General, Criminal Division, shall concur in or object to that decision. Unless the Assistant Attorney General, Criminal Division, objects within 7 days, he or she shall be deemed to have concurred in the decision. In the event of an objection by the Assistant Attorney General, Criminal Division, the matter will be expeditiously referred to the Deputy Attorney General for a final resolution. In no circumstances shall the alien or the relevant LEA have a right of appeal from any decision to remove.

[29 FR 15252, Nov. 13, 1964, as amended at 30 FR 12330, Sept. 28, 1965; 31 FR 10413, Aug. 3, 1966; 32 FR 15469, Nov. 7, 1967; 35 FR 3065, Feb. 17, 1970; 35 FR 7637, May 16, 1970; 40 FR 30470, July 21, 1975; 51 FR 32295, Sept. 10, 1986; 53 FR 40867, Oct. 19, 1988; 60 FR 44264, Aug. 25, 1995; 60 FR 52248, Oct. 5, 1995; 67 FR 71448, Dec. 2, 2002; 73 FR 58030, Oct. 6, 2008; 76 FR 53787, Aug. 29, 2011; 78 FR 18472, Mar. 27, 2013; 85 FR 46923, Aug. 3, 2020]

§ 212.5 Parole of aliens into the United States.

(a) The authority of the Secretary to continue an alien in custody or grant parole under section 212(d)(5)(A) of the Act shall be exercised by the Assistant Commissioner, Office of Field Operations; Director, Detention and Removal; directors of field operations; port directors; special agents in charge;

deputy special agents in charge; associate special agents in charge; assistant special agents in charge; resident agents in charge; field office directors; deputy field office directors; chief patrol agents; district directors for services; and those other officials as may be designated in writing, subject to the parole and detention authority of the Secretary or his designees. The Secretary or his designees may invoke, in the exercise of discretion, the authority under section 212(d)(5)(A) of the Act.

(b) *Parole from custody.* The parole of aliens within the following groups who have been or are detained in accordance with §235.3(b) or (c) of this chapter would generally be justified only on a case-by-case basis for ''urgent humanitarian reasons'' or ''significant public benefit,'' provided the aliens present neither a security risk nor a risk of absconding:

(1) Aliens who have serious medical conditions in which continued detention would not be appropriate;

(2) Women who have been medically certified as pregnant;

(3) Aliens who are defined as minors in §236.3(b) of this chapter and are in DHS custody. The Executive Assistant Director, Enforcement and Removal Operations; directors of field operations; field office directors, deputy field office directors; or chief patrol agents shall follow the guidelines set forth in §236.3(j) of this chapter and paragraphs (b)(3)(i) through (ii) of this section in determining under what conditions a minor should be paroled from detention:

(i) Minors may be released to a parent, legal guardian, or adult relative (brother, sister, aunt, uncle, or grandparent) not in detention.

(ii) Minors may be released with an accompanying parent or legal guardian who is in detention.

(iii) If the Service cannot locate a relative in or out of detention to sponsor the minor, but the minor has identified a non-relative in detention who accompanied him or her on arrival, the question of releasing the minor and the accompanying non-relative adult shall be addressed on a case-by-case basis;

(4) Aliens who will be witnesses in proceedings being, or to be, conducted by judicial, administrative, or legislative bodies in the United States; or

(5) Aliens whose continued detention is not in the public interest as determined by those officials identified in paragraph (a) of this section.

(c) In the case of all other arriving aliens, except those detained under §235.3(b) or (c) of this chapter and paragraph (b) of this section, those officials listed in paragraph (a) of this section may, after review of the individual case, parole into the United States temporarily in accordance with section 212(d)(5)(A) of the Act, any alien applicant for admission, under such terms and conditions, including those set forth in paragraph (d) of this section, as he or she may deem appropriate. An alien who arrives at a port-of-entry and applies for parole into the United States for the sole purpose of seeking adjustment of status under section 245A of the Act, without benefit of advance authorization as described in paragraph (f) of this section shall be denied parole and detained for removal in accordance with the provisions of §235.3(b) or (c) of this chapter. An alien seeking to enter the United States for the sole purpose of applying for adjustment of status under section 210 of the Act shall be denied parole and detained for removal under §235.3(b) or (c) of this chapter, unless the alien has been recommended for approval of such application for adjustment by a consular officer at an Overseas Processing Office.

(d) *Conditions.* In any case where an alien is paroled under paragraph (b) or (c) of this section, those officials listed in paragraph (a) of this section may require reasonable assurances that the alien will appear at all hearings and/or depart the United States when required to do so. Not all factors listed need be present for parole to be exercised. Those officials should apply reasonable discretion. The consideration of all relevant factors includes:

(1) The giving of an undertaking by the applicant, counsel, or a sponsor to ensure appearances or departure, and a bond may be required on Form I–352 in such amount as may be deemed appropriate;

(2) Community ties such as close relatives with known addresses; and

(3) Agreement to reasonable conditions (such as periodic reporting of whereabouts).

(e) *Termination of parole*—(1) *Automatic.* Parole shall be automatically terminated without written notice (i) upon the departure from the United States of the alien, or, (ii) if not departed, at the expiration of the time for which parole was authorized, and in the latter case the alien shall be processed in accordance with paragraph (e)(2) of this section except that no written notice shall be required.

(2)(i) *On notice.* In cases not covered by paragraph (e)(1) of this section, upon accomplishment of the purpose for which parole was authorized or when in the opinion of one of the officials listed in paragraph (a) of this section, neither humanitarian reasons nor public benefit warrants the continued presence of the alien in the United States, parole shall be terminated upon written notice to the alien and he or she shall be restored to the status that he or she had at the time of parole. When a charging document is served on the alien, the charging document will constitute written notice of termination of parole, unless otherwise specified. Any further inspection or hearing shall be conducted under section 235 or 240 of the Act and this chapter, or any order of exclusion, deportation, or removal previously entered shall be executed. If the exclusion, deportation, or removal order cannot be executed within a reasonable time, the alien shall again be released on parole unless in the opinion of the official listed in paragraph (a) of this section the public interest requires that the alien be continued in custody.

(ii) An alien who is granted parole into the United States after enactment of the Immigration Reform and Control Act of 1986 for other than the specific purpose of applying for adjustment of status under section 245A of the Act shall not be permitted to avail him or herself of the privilege of adjustment thereunder. Failure to abide by this provision through making such an application will subject the alien to termination of parole status and institution of proceedings under sections 235 and 236 of the Act without the written notice of termination required by § 212.5(e)(2)(i) of this chapter.

(iii) Any alien granted parole into the United States so that he or she may transit through the United States in the course of removal from Canada shall have his or her parole status terminated upon notice, as specified in 8 CFR 212.5(e)(2)(i), if he or she makes known to an immigration officer of the United States a fear of persecution or an intention to apply for asylum. Upon termination of parole, any such alien shall be regarded as an arriving alien, and processed accordingly by the Department of Homeland Security.

(f) *Advance authorization.* When parole is authorized for an alien who will travel to the United States without a visa, the alien shall be issued an appropriate document authorizing travel.

(g) *Parole for certain Cuban nationals.* Notwithstanding any other provision respecting parole, the determination whether to release on parole, or to revoke the parole of, a native of Cuba who last came to the United States between April 15, 1980, and October 20, 1980, shall be governed by the terms of § 212.12.

(h) *Effect of parole of Cuban and Haitian nationals.* (1) Except as provided in paragraph (h)(2) of this section, any national of Cuba or Haiti who was paroled into the United States on or after October 10, 1980, shall be considered to have been paroled in the special status for nationals of Cuba or Haiti, referred to in section 501(e)(1) of the Refugee Education Assistance Act of 1980, Public Law 96–422, as amended (8 U.S.C. 1522 note).

(2) A national of Cuba or Haiti shall not be considered to have been paroled in the special status for nationals of Cuba or Haiti, referred to in section 501(e)(1) of the Refugee Education Assistance Act of 1980, Public Law 96–422, as amended, if the individual was paroled into the United States:

(i) In the custody of a Federal, State or local law enforcement or prosecutorial authority, for purposes of criminal prosecution in the United States; or

(ii) Solely to testify as a witness in proceedings before a judicial, administrative, or legislative body in the United States.

[47 FR 30045, July 9, 1982, as amended at 47 FR 46494, Oct. 19, 1982; 52 FR 16194, May 1, 1987; 52 FR 48802, Dec. 28, 1987; 53 FR 17450, May 17, 1988; 61 FR 36611, July 12, 1996; 62 FR 10348, Mar. 6, 1997; 65 FR 80294, Dec. 21, 2000; 65 FR 82255, Dec. 28, 2000; 67 FR 39257, June 7, 2002; 68 FR 35152, June 12, 2003; 69 FR 69489, Nov. 29, 2004; 76 FR 53787, Aug. 29, 2011; 84 FR 44525, Aug. 23, 2019; 87 FR 18220, Mar. 29, 2022]

§ 212.6 Border crossing identification cards.

(a) *Application for Form DSP–150, B–1/B–2 Visa and Border Crossing Card, issued by the Department of State.* A citizen of Mexico, who seeks to travel temporarily to the United States for business or pleasure without a visa and passport, must apply to the DOS on Form DS–156, Visitor Visa Application, to obtain a Form DSP–150 in accordance with the applicable DOS regulations at 22 CFR 41.32 and/or instructions.

(b) *Use*—(1) *Application for admission with Non-resident Canadian Border Crossing Card, Form I–185, containing separate waiver authorization; Canadian residents bearing DOS-issued combination B–1/B–2 visa and border crossing card (or similar stamp in a passport).* (i) A Canadian citizen or other person sharing common nationality with Canada and residing in Canada who presents a Form I–185 that contains a separate notation of a waiver authorization issued pursuant to § 212.4 may be admitted on the basis of the waiver, provided the waiver has not expired or otherwise been revoked or voided. Although the waiver may remain valid on or after October 1, 2002, the non-biometric border crossing card portion of the document is not valid after that date.

(ii) A Canadian resident who presents a combination B–1/B–2 visa and border crossing card (or similar stamp in a passport) issued by the DOS prior to April 1, 1998, that does not contain a machine-readable biometric identifier, may be admitted on the basis of the nonimmigrant visa only, provided it has not expired and the alien remains otherwise admissible.

(2) *Application for admission by a national of Mexico—Form DSP–150 issued by the DOS; DOS-issued combination B–1/B–2 visa and border crossing card (or similar stamp in a passport).* (i) The rightful holder of a Form DSP–150 issued by the DOS may be admitted under § 235.1(f) of this chapter if found otherwise admissible and if the biometric identifier contained on the card matches the appropriate biometric characteristic of the alien.

(ii) The bearer of a combination B–1/B–2 nonimmigrant visa and border crossing card (or similar stamp in a passport) issued by DOS prior to April 1, 1998, that does not contain a machine-readable biometric identifier, may be admitted on the basis of the nonimmigrant visa only, provided it has not expired and the alien remains otherwise admissible. A passport is also required.

(iii) Any alien seeking admission as a visitor for business or pleasure, must also present a valid passport with his or her border crossing card, and shall be issued a Form I–94 (see § 1.4) if the alien is applying for admission from:

(A) A country other than Mexico or Canada, or

(B) Canada if the alien has been in a country other than the United States or Canada since leaving Mexico.

(c) *Validity.* Forms I–185, I–186, and I–586 are invalid on or after October 1, 2002. If presented on or after that date, these documents will be voided at the POE.

(d) *Voidance for reasons other than expiration of the validity of the form*—(1) *At a POE.* (i) In accordance with 22 CFR 41.122, a Form DSP–150 or combined B–1/B–2 visitor visa and non-biometric border crossing identification card or (a similar stamp in a passport), issued by the DOS, may be physically cancelled and voided by a supervisory immigration officer at a POE if it is considered void pursuant to section 222(g) of the Act when presented at the time of application for admission, or as the alien departs the United States. If the card is considered void and if the applicant for admission is not otherwise subject to expedited removal in accordance with 8 CFR part 235, the applicant shall be advised in writing that he or she may request a hearing before an immigration judge. The purpose of the hearing shall be to determine his/her

admissibility in accordance with § 235.6 of this chapter. The applicant may be represented at this hearing by an attorney of his/her own choice at no expense to the Government. He or she shall also be advised of the availability of free legal services provided by organizations and attorneys qualified under 8 CFR part 3, and organizations recognized under § 292.2 of this chapter located in the district where the removal hearing is to be held. If the applicant requests a hearing, the Form DSP–150 or combined B–1/B–2 visitor visa and non-biometric border crossing identification card (or similar stamp in a passport), issued by the DOS, shall be held by the Service for presentation to the immigration judge.

(ii) If the applicant chooses not to have a hearing, the Form DSP–150 or combined B–1/B–2 visitor visa and non-biometric BCC (or similar stamp in a passport) issued by the DOS, shall be voided and physically cancelled. The alien to whom the card or stamp was issued by the DOS shall be notified of the action taken and the reasons for such action by means of Form I–275, Withdrawal of Application for Admission/Consular Notification, delivered in person or by mailing the Form I–275 to the last known address. The DOS shall be notified of the cancellation of the biometric Form DSP–150 or combined B–1/B–2 visitor visa and non-biometric BCC (or similar stamp in a passport) issued by DOS, by means of a copy of the original Form I–275. Nothing in this paragraph limits the Service's ability to remove an alien pursuant to 8 CFR part 235 where applicable.

(2) *Within the United States.* In accordance with former section 242 of the Act (before amended by section 306 of the IIRIRA of 1996, Div. C, Public Law 104–208, 110 Stat. 3009 (Sept. 30, 1996,) or current sections 235(b), 238, and 240 of the Act, if the holder of a Form DSP–150, or other combined B–1/B–2 visa and BCC, or (similar stamp in a passport) issued by the DOS, is placed under removal proceedings, no action to cancel the card or stamp shall be taken pending the outcome of the hearing. If the alien is ordered removed or granted voluntary departure, the card or stamp shall be physically cancelled and voided by an immigration officer. In the case of an alien holder of a BCC who is granted voluntary departure without a hearing, the card shall be declared void and physically cancelled by an immigration officer who is authorized to issue a Notice to Appear or to grant voluntary departure.

(3) *In Mexico or Canada.* Forms I–185, I–186 or I–586 issued by the Service and which are now invalid, or a Form DSP–150 or combined B–1/B–2 visitor visa and non-biometric BCC, or (similar stamp in a passport) issued by the DOS may be declared void by United States consular officers or United States immigration officers in Mexico or Canada.

(4) *Grounds.* Grounds for voidance of a Form I–185, I–186, I–586, a DOS-issued non-biometric BCC, or the biometric Form DSP–150 shall be that the holder has violated the immigration laws; that he/she is inadmissible to the United States; that he/she has abandoned his/her residence in the country upon which the card was granted; or if the BCC is presented for admission on or after October 1, 2002, it does not contain a machine-readable biometric identifier corresponding to the bearer and is invalid on or after October 1, 2002.

(e) *Replacement.* If a valid Border Crossing Card (Forms I–185, I–186, or I–586) previously issued by the Service, a non-biometric border crossing card issued by the DOS before April 1998, or a Form DSP–150 issued by the DOS has been lost, stolen, mutilated, or destroyed, the person to whom the card was issued may apply for a new card as provided for in the DOS regulations found at 22 CFR 41.32 and 22 CFR 41.103.

[67 FR 71448, Dec. 2, 2002, as amended at 78 FR 18472, Mar. 27, 2013]

§ 212.7 Waiver of certain grounds of inadmissibility.

(a)(1) *Application.* Except as provided by 8 CFR 212.7(e), an applicant for an immigrant visa, adjustment of status, or a K or V nonimmigrant visa who is inadmissible under any provision of section 212(a) of the Act for which a waiver is available under section 212 of the Act may apply for the related waiver by filing the form designated by USCIS, with the fee prescribed in 8 CFR 106.2, and in accordance with the

form instructions. Certain immigrants may apply for a provisional unlawful presence waiver of inadmissibility as specified in 8 CFR 212.7(e).

(2) *Termination of application for lack of prosecution.* An applicant may withdraw the application at any time prior to the final decision, whereupon the case will be closed and the consulate notified. If the applicant fails to prosecute the application within a reasonable time either before or after interview the applicant shall be notified that if he or she fails to prosecute the application within 30 days the case will be closed subject to being reopened at the applicant's request. If no action has been taken within the 30-day period immediately thereafter, the case will be closed and the appropriate consul notified.

(3) *Decision.* If the waiver application is denied, USCIS will provide a written decision and notify the applicant and his or her attorney or accredited representative and will advise the applicant of appeal procedures, if any, in accordance with 8 CFR 103.3. The denial of a provisional unlawful presence waiver is governed by 8 CFR 212.7(e).

(4) *Validity.* (i) A provisional unlawful presence waiver granted according to paragraph (e) of this section is valid subject to the terms and conditions as specified in paragraph (e) of this section. In any other case, approval of an immigrant waiver of inadmissibility under this section applies only to the grounds of inadmissibility, and the related crimes, events, or incidents that are specified in the application for waiver.

(ii) Except for K–1 and K–2 nonimmigrants and aliens lawfully admitted for permanent residence on a conditional basis, an immigrant waiver of inadmissibility is valid indefinitely, even if the applicant later abandons or otherwise loses lawful permanent resident status.

(iii) For a K–1 or K–2 nonimmigrant, approval of the waiver is conditioned on the K–1 nonimmigrant marrying the petitioner; if the K–1 nonimmigrant marries the K nonimmigrant petitioner, the waiver becomes valid indefinitely, subject to paragraph (a)(4)(iv) of this section, even if the applicant later abandons or otherwise loses lawful permanent resident status. If the K–1 does not marry the K nonimmigrant petitioner, the K–1 and K–2 nonimmigrants remain inadmissible for purposes of any application for a benefit on any basis other than the proposed marriage between the K–1 and the K nonimmigrant petitioner.

(iv) For an alien lawfully admitted for permanent residence on a conditional basis under section 216 of the Act, removal of the conditions on the alien's status renders the waiver valid indefinitely, even if the applicant later abandons or otherwise loses lawful permanent resident status. Termination of the alien's status as an alien lawfully admitted for permanent residence on a conditional basis also terminates the validity of a waiver of inadmissibility based on sections 212(h) or 212(i) of the Act that was granted to the alien. Separate notification of the termination of the waiver is not required when an alien is notified of the termination of residence under section 216 of the Act, and no appeal will lie from the decision to terminate the waiver on this basis. If the alien challenges the termination in removal proceedings, and the removal proceedings end in the restoration of the alien's status, the waiver will become effective again.

(v) Nothing in this subsection precludes USCIS from reopening and reconsidering a decision if the decision is determined to have been made in error.

(b) *Section 212(g) waivers for certain medical conditions*—(1) *Application.* Any alien who is inadmissible under section 212(a)(1)(A)(i), (ii), or (iii) of the Act and who is eligible for a waiver under section 212(g) of the Act may file an application as described in paragraph (a)(1) of this section. The family member specified in section 212(g) of the Act may file the waiver application for the applicant if the applicant is incompetent to file the waiver personally.

(2) *Section 212(a) (1) or (3) (certain mental conditions)*—(i) *Arrangements for submission of medical report.* If the alien is excludable under section 212(a)(1)(A)(iii) of the Act he or his sponsoring family member shall submit a waiver request with a statement that arrangements have been made for the submission to that office of a medical report. The medical report shall

contain a complete medical history of the alien, including details of any hospitalization or institutional care or treatment for any physical or mental condition; findings as to the current physical condition of the alien, including reports of chest X-ray examination and of serologic test for syphilis if the alien is 15 years of age or over, and other pertinent diagnostic tests; and findings as to the current mental condition of the alien, with information as to prognosis and life expectancy and with a report of a psychiatric examination conducted by a psychiatrist who shall, in case of mental retardation, also provide an evaluation of the alien's intelligence. For an alien with a past history of mental illness, the medical report shall also contain available information on which the U.S. Public Health Service can base a finding as to whether the alien has been free of such mental illness for a period of time sufficient in the light of such history to demonstrate recovery.

(ii) *Submission of statement.* Upon being notified that the medical report has been reviewed by the U.S. Public Health Service and determined to be acceptable, the alien or the alien's sponsoring family member shall submit a statement to the consular or Service office. The statement must be from a clinic, hospital, institution, specialized facility, or specialist in the United States approved by the U.S. Public Health Service. The alien or alien's sponsor may be referred to the mental retardation or mental health agency of the state of proposed residence for guidance in selecting a post-arrival medical examining authority who will complete the evaluation and provide an evaluation report to the Centers for Disease Control. The statement must specify the name and address of the specialized facility, or specialist, and must affirm that:

(A) The specified facility or specialist agrees to evaluate the alien's mental status and prepare a complete report of the findings of such evaluation.

(B) The alien, the alien's sponsoring family member, or another responsible person has made complete financial arrangements for payment of any charges that may be incurred after arrival for studies, care, training and service;

(C) The Director, Division of Quarantine, Center for Prevention Services, Centers for Disease Control, Atlanta, GA. 30333 shall be furnished:

(*1*) The report evaluating the alien's mental status within 30 days after the alien's arrival; and

(*2*) Prompt notification of the alien's failure to report to the facility or specialist within 30 days after being notified by the U.S. Public Health Service that the alien has arrived in the United States.

(D) The alien shall be in an outpatient, inpatient, study, or other specified status as determined by the responsible local physician or specialist during the initial evaluation.

(3) *Assurances: Bonds.* In all cases under paragraph (b) of this section the alien or his or her sponsoring family member shall also submit an assurance that the alien will comply with any special travel requirements as may be specified by the U.S. Public Health Service and that, upon the admission of the alien into the United States, he or she will proceed directly to the facility or specialist specified for the initial evaluation, and will submit to such further examinations or treatment as may be required, whether in an outpatient, inpatient, or other status. The alien, his or her sponsoring family member, or other responsible person shall provide such assurances or bond as may be required to assure that the necessary expenses of the alien will be met and that he or she will not become a public charge. For procedures relating to cancellation or breaching of bonds, see part 103 of this chapter.

(c) *Section 212(e).* (1) An alien who was admitted to the United States as an exchange visitor, or who acquired that status after admission, is subject to the foreign residence requirement of section 212(e) of the Act if his or her participation in an exchange program was financed in whole or in part, directly or indirectly, by a United States government agency or by the government of the country of his or her nationality or last foreign residence.

(2) An alien is also subject to the foreign residence requirement of section

212(e) of the Act if at the time of admission to the United States as an exchange visitor or at the time of acquisition of exchange visitor status after admission to the United States, the alien was a national or lawful permanent resident of a country which the Director of the United States Information Agency had designated, through public notice in the FEDERAL REGISTER, as clearly requiring the services of persons engaged in the field of specialized knowledge or skill in which the alien was to engage in his or her exchange visitor program.

(3) An alien is also subject to the foreign residence requirement of section 212(e) of the Act if he or she was admitted to the United States as an exchange visitor on or after January 10, 1977 to receive graduate medical education or training, or following admission, acquired such status on or after that date for that purpose. However, an exchange visitor already participating in an exchange program of graduate medical education or training as of January 9, 1977 who was not then subject to the foreign residence requirement of section 212(e) and who proceeds or has proceeded abroad temporarily and is returning to the United States to participate in the same program, continues to be exempt from the foreign residence requirement.

(4) A spouse or child admitted to the United States or accorded status under section 101(a)(15)(J) of the Act to accompany or follow to join an exchange visitor who is subject to the foreign residence requirement of section 212(e) of the Act is also subject to that requirement.

(5) An alien who is subject to the foreign residence requirement and who believes that compliance therewith would impose exceptional hardship upon his/her spouse or child who is a citizen of the United States or a lawful permanent resident alien, or that he or she cannot return to the country of his or her nationality or last residence because he or she will be subject to persecution on account of race, religion, or political opinion, may apply for a waiver on the form designated by USCIS. The alien's spouse and minor children, if also subject to the foreign residence requirement, may be included in the application, provided the spouse has not been a participant in an exchange program.

(6) Each application based upon a claim to exceptional hardship must be accompanied by the certificate of marriage between the applicant and his or her spouse and proof of legal termination of all previous marriages of the applicant and spouse; the birth certificate of any child who is a United States citizen or lawful permanent resident alien, if the application is based upon a claim of exceptional hardship to a child, and evidence of the United States citizenship of the applicant's spouse or child, when the application is based upon a claim of exceptional hardship to a spouse or child who is a citizen of the United States.

(7) Evidence of United States citizenship and of status as a lawful permanent resident shall be in the form provided in part 204 of this chapter. An application based upon exceptional hardship shall be supported by a statement, dated and signed by the applicant, giving a detailed explanation of the basis for his or her belief that his or her compliance with the foreign residence requirement of section 212(e) of the Act, as amended, would impose exceptional hardship upon his or her spouse or child who is a citizen of the United States or a lawful permanent resident thereof. The statement shall include all pertinent information concerning the incomes and savings of the applicant and spouse. If exceptional hardship is claimed upon medical grounds, the applicant shall submit a medical certificate from a qualified physician setting forth in terms understandable to a layman the nature and effect of the illness and prognosis as to the period of time the spouse or child will require care or treatment.

(8) An application based upon the applicant's belief that he or she cannot return to the country of his or her nationality or last residence because the applicant would be subject to persecution on account of race, religion, or political opinion, must be supported by a statement, dated and signed by the applicant, setting forth in detail why the applicant believes he or she would be subject to persecution.

(9) *Waivers under Pub. L. 103–416 based on a request by a State Department of Public Health (or equivalent).* In accordance with section 220 of Pub. L. 103–416, an alien admitted to the United States as a nonimmigrant under section 101(a)(15)(J) of the Act, or who acquired status under section 101(a)(15)(J) of the Act after admission to the United States, to participate in an exchange program of graduate medical education or training (as of January 9, 1977), may apply for a waiver of the 2-year home country residence and physical presence requirement (the ''2-year requirement'') under section 212(e)(iii) of the Act based on a request by a State Department of Public Health, or its equivalent. To initiate the application for a waiver under Pub. L. 103–416, the Department of Public Health, or its equivalent, or the State in which the foreign medical graduate seeks to practice medicine, must request the Director of USIA to recommend a waiver to the Service. The waiver may be granted only if the Director of USIA provides the Service with a favorable waiver recommendation. Only the Service, however, may grant or deny the waiver application. If granted, such a waiver shall be subject to the terms and conditions imposed under section 214(l) of the Act (as redesignated by section 671(a)(3)(A) of Pub. L. 104–208). Although the alien is not required to submit a separate waiver application to the Service, the burden rests on the alien to establish eligibility for the waiver. If the Service approves a waiver request made under Pub. L. 103–416, the foreign medical graduate (and accompanying dependents) may apply for change of nonimmigrant status, from J–1 to H–1B and, in the case of dependents of such a foreign medical graduate, from J–2 to H–4. Aliens receiving waivers under section 220 of Pub. L. 103–416 are subject, in all cases, to the provisions of section 214(g)(1)(A) of the Act.

(i) *Eligiblity criteria.* J–1 foreign medical graduates (with accompanying J–2 dependents) are eligible to apply for a waiver of the 2-year requirement under Pub. L. 103–416 based on a request by a State Department of Public Health (or its equivalent) if:

(A) They were admitted to the United States under section 101(a)(15)(J) of the Act, or acquired J nonimmigrant status before June 1, 2002, to pursue graduate medical education or training in the United States.

(B) They have entered into a bona fide, full-time employment contract for 3 years to practice medicine at a health care facility located in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals (''HHS-designated shortage area'');

(C) They agree to commence employment within 90 days of receipt of the waiver under this section and agree to practice medicine for 3 years at the facility named in the waiver application and only in HHS-designated shortage areas. The health care facility named in the waiver application may be operated by:

(*1*) An agency of the Government of the United States or of the State in which it is located; or

(*2*) A charitable, educational, or other not-for-profit organization; or

(*3*) Private medical practitioners.

(D) The Department of Public Health, or its equivalent, in the State where the health care facility is located has requested the Director, USIA, to recommend the waiver, and the Director, USIA, submits a favorable waiver recommendation to the Service; and

(E) Approval of the waiver will not cause the number of waivers granted pursuant to Pub. L. 103–416 and this section to foreign medical graduates who will practice medicine in the same state to exceed 20 during the current fiscal year.

(ii) *Decision on waivers under Pub. L. 103–416 and notification to the alien*—(A) *Approval.* If the Director of USIA submits a favorable waiver recommendation on behalf of a foreign medical graduate pursuant to Pub. L. 103–416, and the Service grants the waiver, the alien shall be notified of the approval on Form I–797 (or I–797A or I–797B, as appropriate). The approval notice shall clearly state the terms and conditions imposed on the waiver, and the Service's records shall be noted accordingly.

(B) *Denial.* If the Director of USIA issues a favorable waiver recommendation under Pub. L. 103–416 and the Service denies the waiver, the alien shall be notified of the decision and of the right to appeal under 8 CFR part 103. However, no appeal shall lie where the basis for denial is that the number of waivers granted to the State in which the foreign medical graduate will be employed would exceed 20 for that fiscal year.

(iii) *Conditions.* The foreign medical graduate must agree to commence employment for the health care facility specified in the waiver application within 90 days of receipt of the waiver under Pub. L. 103–416. The foreign medical graduate may only fulfill the requisite 3-year employment contract as an H–1B nonimmigrant. A foreign medical graduate who receives a waiver under Pub. L. 103–416 based on a request by a State Department of Public Health (or equivalent), and changes his or her nonimmigrant classification from J–1 to H–1B, may not apply for permanent residence or for any other change of nonimmigrant classification unless he or she has fulfilled the 3-year employment contract with the health care facility and in the specified HHS-designated shortage area named in the waiver application.

(iv) *Failure to fulfill the three-year employment contract due to extenuating circumstances.* A foreign medical graduate who fails to meet the terms and conditions imposed on the waiver under section 214(l) of the Act and this paragraph will once again become subject to the 2-year requirement under section 212(e) of the Act.

Under section 214(l)(1)(B) of the Act, however, the Service, in the exercise of discretion, may excuse early termination of the foreign medical graduate's 3-year period of employment with the health care facility named in the waiver application due to extenuating circumstances. Extenuating circumstances may include, but are not limited to, closure of the health care facility or hardship to the alien. In determining whether to excuse such early termination of employment, the Service shall base its decision on the specific facts of each case. In all cases, the burden of establishing eligibility for a favorable exercise of discretion rests with the foreign medical graduate. Depending on the circumstances, closure of the health care facility named in the waiver application may, but need not, be considered an extenuating circumstance excusing early termination of employment. Under no circumstances will a foreign medical graduate be eligible to apply for change of status to another nonimmigrant category, for an immigrant visa or for status as a lawful permanent resident prior to completing the requisite 3-year period of employment for a health care facility located in an HHS-designated shortage area.

(v) *Required evidence.* A foreign medical graduate who seeks to have early termination of employment excused due to extenuating circumstances shall submit documentary evidence establishing such a claim. In all cases, the foreign medical graduate shall submit an employment contract with another health care facility located in an HHS-designated shortage area for the balance of the required 3-year period of employment. A foreign medical graduate claiming extenuating circumstances based on hardship shall also submit evidence establishing that such hardship was caused by unforeseen circumstances beyond his or her control. A foreign medical graduate claiming extenuating circumstances based on closure of the health care facility named in the waiver application shall also submit evidence that the facility has closed or is about to be closed.

(vi) *Notification requirements.* A J–1 foreign medical graduate who has been granted a waiver of the 2-year requirement pursuant to Pub. L. 103–416, is required to comply with the terms and conditions specified in section 214(l) of the Act and the implementing regulations in this section. If the foreign medical graduate subsequently applies for and receives H–1B status, he or she must also comply with the terms and conditions of that nonimmigrant status. Such compliance shall also include notifying USCIS of any material change in the terms and conditions of the H–1B employment, by filing either an amended or a new H–1B petition, as required, under §§ 214.2(h)(2)(i)(D),

214.2(h)(2)(i)(E), and 214.2(h)(11) of this chapter.

(A) *Amended H–1B petitions.* The health care facility named in the waiver application and H–1B petition shall file an amended H–1B petition, as required under §214.2(h)(2)(i)(E) of this chapter, if there are any material changes in the terms and conditions of the beneficiary's employment or eligibility as specified in the waiver application filed under Pub. L. 103–416 and in the subsequent H–1B petition. In such a case, an amended H–1B petition shall be accompanied by evidence that the alien will continue practicing medicine with the original employer in an HHS-designated shortage area.

(B) *New H–1B petitions.* A health care facility seeking to employ a foreign medical graduate who has been granted a waiver under Pub. L. 103–416 (prior to the time the alien has completed his or her 3-year contract with the facility named in the waiver application and original H–1B petition), shall file a new H–1B petition, as required under §§214.2(h)(2)(i) (D) and (E) of this chapter. Although a new waiver application need not be filed, the new H–1B petition shall be accompanied by the documentary evidence generally required under §214.2(h) of this chapter, and the following additional documents:

(*1*) A copy of the USCIS approval notice relating to the waiver and nonimmigrant H status granted under Pub. L. 103–416;

(*2*) An explanation from the foreign medical graduate, with supporting evidence, establishing that extenuating circumstances necessitate a change in employment;

(*3*) An employment contract establishing that the foreign medical graduate will practice medicine at the health care facility named in the new H–1B petition for the balance of the required 3-year period; and

(*4*) Evidence that the geographic area or areas of intended employment indicated in the new H–1B petition are in HHS-designated shortage areas.

(C) *Review of amended and new H–1B petitions for foreign medical graduates granted waivers under Pub. L. 103–416 and who seek to have early termination of employment excused due to extenuating circumstances—*(*1*) *Amended H–1B petitions.* The waiver granted under Pub. L. 103–416 may be affirmed, and the amended H–1B petition may be approved, if the petitioning health care facility establishes that the foreign medical graduate otherwise remains eligible for H–1B classification and that he or she will continue practicing medicine in an HHS-designated shortage area.

(*2*) *New H–1B petitions.* The Service shall review a new H–1B petition filed on behalf of a foreign medical graduate who has not yet fulfilled the required 3-year period of employment with the health care facility named in the waiver application and in the original H–1B petition to determine whether extenuating circumstances exist which warrant a change in employment, and whether the waiver granted under Pub. L. 103–416 should be affirmed. In conducting such a review, the Service shall determine whether the foreign medical graduate will continue practicing medicine in an HHS-designated shortage area, and whether the new H–1B petitioner and the foreign medical graduate have satisfied the remaining H–1B eligibility criteria described under section 101(a)(15)(H) of the Act and §214.2(h) of this chapter. If these criteria have been satisfied, the waiver granted to the foreign medical graduate under Pub. L. 103–416 may be affirmed, and the new H1–B petition may be approved in the exercise of discretion, thereby permitting the foreign medical graduate to serve the balance of the requisite 3-year employment period at the health care facility named in the new H–1B petition.

(D) *Failure to notify the Service of any material changes in employment.* Foreign medical graduates who have been granted a waiver of the 2-year requirement and who have obtained H–1B status under Pub. L. 103–416 but fail to: Properly notify the Service of any material change in the terms and conditions of their H–1B employment, by having their employer file an amended or a new H–1B petition in accordance with this section and §214.2(h) of this chapter; or establish continued eligibility for the waiver and H–1B status, shall (together with their dependents)

again become subject to the 2-year requirement. Such foreign medical graduates and their accompanying H–4 dependents also become subject to deportation under section 241(a)(1)(C)(i) of the Act.

(10) The applicant and his or her spouse may be interviewed by an immigration officer in connection with the application and consultation may be had with the Director, United States Information Agency and the sponsor of any exchange program in which the applicant has been a participant.

(11) The applicant shall be notified of the decision, and if the application is denied, of the reasons therefor and of the right of appeal in accordance with the provisions of part 103 of this chapter. However, no appeal shall lie from the denial of an application for lack of a favorable recommendation from the Secretary of State. When an interested United States Government agency requests a waiver of the two-year foreign-residence requirement and the Director, United States Information Agency had made a favorable recommendation, the interested agency shall be notified of the decision on its request and, if the request is denied, of the reasons thereof, and of the right of appeal. If the foreign country of the alien's nationality or last residence has furnished statement in writing that it has no objection to his/her being granted a waiver of the foreign residence requirement and the Director, United States Information Agency has made a favorable recommendation, the Director shall be notified of the decision and, if the foreign residence requirement is not waived, of the reasons therefor and of the foregoing right of appeal. However, this ''no objection'' provision is not applicable to the exchange visitor admitted to the United States on or after January 10, 1977 to receive graduate medical education or training, or who acquired such status on or after that date for such purpose; except that the alien who commenced a program before January 10, 1977 and who was readmitted to the United States on or after that date to continue participation in the same program, is eligible for the ''no objection'' waiver.

(d) *Criminal grounds of inadmissibility involving violent or dangerous crimes.* The Attorney General, in general, will not favorably exercise discretion under section 212(h)(2) of the Act (8 U.S.C. 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

(e) *Provisional unlawful presence waivers of inadmissibility.* The provisions of this paragraph (e) apply to certain aliens who are pursuing consular immigrant visa processing.

(1) *Jurisdiction.* USCIS has exclusive jurisdiction to grant a provisional unlawful presence waiver under this paragraph (e). An alien applying for a provisional unlawful presence waiver must file with USCIS the form designated by USCIS, with the fees prescribed in 8 CFR 106.2, and in accordance with the form instructions.

(2) *Provisional unlawful presence waiver; in general.* (i) USCIS may adjudicate applications for a provisional unlawful presence waiver of inadmissibility based on section 212(a)(9)(B)(v) of the Act filed by eligible aliens described in paragraph (e)(3) of this section. USCIS will only approve such provisional unlawful presence waiver applications in accordance with the conditions outlined in paragraph (e) of this section. Consistent with section 212(a)(9)(B)(v) of the Act, the decision whether to approve a provisional unlawful presence waiver application is discretionary. A pending or approved provisional unlawful presence waiver does not constitute

a grant of a lawful immigration status or a period of stay authorized by the Secretary.

(ii) A pending or an approved provisional unlawful presence waiver does not support the filing of any application for interim immigration benefits, such as employment authorization or an advance parole document. Any application for an advance parole document or employment authorization that is submitted in connection with a provisional unlawful presence waiver application will be rejected.

(3) *Eligible aliens.* Except as provided in paragraph (e)(4) of this section, an alien may be eligible to apply for and receive a provisional unlawful presence waiver for the grounds of inadmissibility under section 212(a)(9)(B)(i)(I) or (II) of the Act if he or she meets the requirements in this paragraph. An alien may be eligible to apply for and receive a waiver if he or she:

(i) Is present in the United States at the time of filing the application for a provisional unlawful presence waiver;

(ii) Provides biometrics to USCIS at a location in the United States designated by USCIS;

(iii) Upon departure, would be inadmissible only under section 212(a)(9)(B)(i) of the Act at the time of the immigrant visa interview;

(iv) Has a case pending with the Department of State, based on:

(A) An approved immigrant visa petition, for which the Department of State immigrant visa processing fee has been paid; or

(B) Selection by the Department of State to participate in the Diversity Visa Program under section 203(c) of the Act for the fiscal year for which the alien registered;

(v) Will depart from the United States to obtain the immigrant visa; and

(vi) Meets the requirements for a waiver provided in section 212(a)(9)(B)(v) of the Act.

(4) *Ineligible aliens.* Notwithstanding paragraph (e)(3) of this section, an alien is ineligible for a provisional unlawful presence waiver under paragraph (e) of this section if:

(i) The alien is under the age of 17;

(ii) The alien does not have a case pending with the Department of State, based on:

(A) An approved immigrant visa petition, for which the Department of State immigrant visa processing fee has been paid; or

(B) Selection by the Department of State to participate in the Diversity Visa program under section 203(c) of the Act for the fiscal year for which the alien registered;

(iii) The alien is in removal proceedings, in which no final order has been entered, unless the removal proceedings are administratively closed and have not been recalendared at the time of filing the application for a provisional unlawful presence waiver;

(iv) The alien is subject to an administratively final order of removal, deportation, or exclusion under any provision of law (including an *in absentia* order under section 240(b)(5) of the Act), unless the alien has already filed and USCIS has already granted, before the alien applies for a provisional unlawful presence waiver under 8 CFR 212.7(e), an application for consent to reapply for admission under section 212(a)(9)(A)(iii) of the Act and 8 CFR 212.2(j);

(v) CBP or ICE, after service of notice under 8 CFR 241.8, has reinstated a prior order of removal under section 241(a)(5) of the Act, either before the filing of the provisional unlawful presence waiver application or while the provisional unlawful presence waiver application is pending; or

(vi) The alien has a pending application with USCIS for lawful permanent resident status.

(5) *Filing.* (i) An alien must file an application for a provisional unlawful presence waiver of the unlawful presence inadmissibility bars under section 212(a)(9)(B)(i)(I) or (II) of the Act on the form designated by USCIS, in accordance with the form instructions, with the fee prescribed in 8 CFR 106.2, and with the evidence required by the form instructions.

(ii) An application for a provisional unlawful presence waiver will be rejected and the fee and package returned to the alien if the alien:

(A) Fails to pay the required filing fee or correct filing fee for the provisional unlawful presence waiver application;

(B) Fails to sign the provisional unlawful presence waiver application;

(C) Fails to provide his or her family name, domestic home address, and date of birth;

(D) Is under the age of 17;

(E) Does not include evidence of:

(*1*) An approved immigrant visa petition;

(*2*) Selection by the Department of State to participate in the Diversity Visa Program under section 203(c) of the Act for the fiscal year for which the alien registered; or

(*3*) Eligibility as a derivative beneficiary of an approved immigrant visa petition or of an alien selected for participation in the Diversity Visa Program as provided in this section and outlined in section 203(d) of the Act.

(F) Fails to include documentation evidencing:

(*1*) That the alien has paid the immigrant visa processing fee to the Department of State for the immigrant visa application upon which the alien's approved immigrant visa petition is based; or

(*2*) In the case of a diversity immigrant, that the Department of State selected the alien to participate in the Diversity Visa Program for the fiscal year for which the alien registered.

(6) *Biometrics.* (i) All aliens who apply for a provisional unlawful presence waiver under this section will be required to provide biometrics in accordance with 8 CFR 103.16 and 103.17, as specified on the form instructions.

(ii) *Failure to appear for biometric services.* If an alien fails to appear for a biometric services appointment or fails to provide biometrics in the United States as directed by USCIS, a provisional unlawful presence waiver application will be considered abandoned and denied under 8 CFR 103.2(b)(13). The alien may not appeal or file a motion to reopen or reconsider an abandonment denial under 8 CFR 103.5.

(7) *Burden and standard of proof.* The alien has the burden to establish, by a preponderance of the evidence, eligibility for a provisional unlawful presence waiver as described in this paragraph, and under section 212(a)(9)(B)(v) of the Act, including that the alien merits a favorable exercise of discretion.

(8) *Adjudication.* USCIS will adjudicate a provisional unlawful presence waiver application in accordance with this paragraph and section 212(a)(9)(B)(v) of the Act. If USCIS finds that the alien is not eligible for a provisional unlawful presence waiver, or if USCIS determines in its discretion that a waiver is not warranted, USCIS will deny the waiver application. Notwithstanding 8 CFR 103.2(b)(16), USCIS may deny an application for a provisional unlawful presence waiver without prior issuance of a request for evidence or notice of intent to deny.

(9) *Notice of decision.* (i) USCIS will notify the alien and the alien's attorney of record or accredited representative of the decision in accordance with 8 CFR 103.2(b)(19). USCIS may notify the Department of State of the denial of an application for a provisional unlawful presence waiver. A denial is without prejudice to the alien's filing another provisional unlawful presence waiver application under this paragraph (e), provided the alien meets all of the requirements in this part, including that the alien's case must be pending with the Department of State. An alien also may elect to file a waiver application under paragraph (a)(1) of this section after departing the United States, appearing for his or her immigrant visa interview at the U.S. Embassy or consulate abroad, and after the Department of State determines the alien's admissibility and eligibility for an immigrant visa.

(ii) Denial of an application for a provisional unlawful presence waiver is not a final agency action for purposes of section 10(c) of the Administrative Procedure Act, 5 U.S.C. 704.

(10) *Withdrawal of waiver applications.* An alien may withdraw his or her application for a provisional unlawful presence waiver at any time before USCIS makes a final decision. Once the case is withdrawn, USCIS will close the case and notify the alien and his or her attorney or accredited representative. The alien may file a new application for a provisional unlawful presence

waiver, in accordance with the form instructions and required fees, provided that the alien meets all of the requirements included in this paragraph (e).

(11) *Appeals and motions to reopen.* There is no administrative appeal from a denial of a request for a provisional unlawful presence waiver under this section. The alien may not file, pursuant to 8 CFR 103.5, a motion to reopen or reconsider a denial of a provisional unlawful presence waiver application under this section.

(12) *Approval and conditions.* A provisional unlawful presence waiver granted under this section:

(i) Does not take effect unless, and until, the alien who applied for and obtained the provisional unlawful presence waiver:

(A) Departs from the United States;

(B) Appears for an immigrant visa interview at a U.S. Embassy or consulate; and

(C) Is determined to be otherwise eligible for an immigrant visa by the Department of State in light of the approved provisional unlawful presence waiver.

(ii) Waives, upon satisfaction of the conditions described in paragraph (e)(12)(i), the alien's inadmissibility under section 212(a)(9)(B) of the Act only for purposes of the application for an immigrant visa and admission to the United States as an immigrant based on the approved immigrant visa petition upon which a provisional unlawful presence waiver application is based or selection by the Department of State to participate in the Diversity Visa Program under section 203(c) of the Act for the fiscal year for which the alien registered, with such selection being the basis for the alien's provisional unlawful presence waiver application;

(iii) Does not waive any ground of inadmissibility other than, upon satisfaction of the conditions described in paragraph (e)(12)(i), the grounds of inadmissibility under section 212(a)(9)(B)(i)(I) or (II) of the Act.

(13) *Validity.* Until the provisional unlawful presence waiver takes full effect as provided in paragraph (e)(12) of this section, USCIS may reopen and reconsider its decision at any time. Once a provisional unlawful presence waiver takes full effect as defined in paragraph (e)(12) of this section, the period of unlawful presence for which the provisional unlawful presence waiver is granted is waived indefinitely, in accordance with and subject to paragraph (a)(4) of this section.

(14) *Automatic revocation.* The approval of a provisional unlawful presence waiver is revoked automatically if:

(i) The Department of State denies the immigrant visa application after completion of the immigrant visa interview based on a finding that the alien is ineligible to receive an immigrant visa for any reason other than inadmissibility under section 212(a)(9)(B)(i)(I) or (II) of the Act. This automatic revocation does not prevent the alien from applying for a waiver of inadmissibility for unlawful presence under section 212(a)(9)(B)(v) of the Act and 8 CFR 212.7(a) or for any other relief from inadmissibility on any other ground for which a waiver is available and for which the alien may be eligible;

(ii) The immigrant visa petition approval associated with the provisional unlawful presence waiver is at any time revoked, withdrawn, or rendered invalid but not otherwise reinstated for humanitarian reasons or converted to a widow or widower petition;

(iii) The immigrant visa registration is terminated in accordance with section 203(g) of the Act, and has not been reinstated in accordance with section 203(g) of the Act; or

(iv) The alien enters or attempts to reenter the United States without inspection and admission or parole at any time after the alien files the provisional unlawful presence waiver application and before the approval of the provisional unlawful presence waiver takes effect in accordance with paragraph (e)(12) of this section.

(Secs. 103, 203, 212 of the Immigration and Nationality Act, as amended by secs. 4, 5, 18 of Pub. L. 97–116, 95 Stat. 1611, 1620, (8 U.S.C. 1103, 1153, 1182)

[29 FR 12584, Sept. 4, 1964]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 212.7, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.govinfo.gov*.

§§ 212.8–212.9 [Reserved]

§ 212.10 Section 212(k) waiver.

Any applicant for admission who is in possession of an immigrant visa, and who is inadmissible under section 212(a)(5)(A) or 212(a)(7)(A)(i) of the Act, may apply at the port of entry for a waiver under section 212(k) of the Act. If the application for waiver is denied, the application may be renewed in removal proceedings before an immigration judge as provided in 8 CFR part 1240.

[76 FR 53787, Aug. 29, 2011]

§ 212.11 [Reserved]

§ 212.12 Parole determinations and revocations respecting Mariel Cubans.

(a) *Scope.* This section applies to any native of Cuba who last came to the United States between April 15, 1980, and October 20, 1980 (hereinafter referred to as *Mariel Cuban*) and who is being detained by the Immigration and Naturalization Service (hereinafter referred to as the *Service*) pending his or her exclusion hearing, or pending his or her return to Cuba or to another country. It covers Mariel Cubans who have never been paroled as well as those Mariel Cubans whose previous parole has been revoked by the Service. It also applies to any Mariel Cuban, detained under the authority of the Immigration and Nationality Act in any facility, who has not been approved for release or who is currently awaiting movement to a Service or Bureau Of Prisons (BOP) facility. In addition, it covers the revocation of parole for those Mariel Cubans who have been released on parole at any time.

(b) *Parole authority and decision.* The authority to grant parole under section 212(d)(5) of the Act to a detained Mariel Cuban shall be exercised by the Commissioner, acting through the Associate Commissioner for Enforcement, as follows:

(1) *Parole decisions.* The Associate Commissioner for Enforcement may, in the exercise of discretion, grant parole to a detained Mariel Cuban for emergent reasons or for reasons deemed strictly in the public interest. A decision to retain in custody shall briefly set forth the reasons for the continued detention. A decision to release on parole may contain such special conditions as are considered appropriate. A copy of any decision to parole or to detain, with an attached copy translated into Spanish, shall be provided to the detainee. Parole documentation for Mariel Cubans shall be issued by the district director having jurisdiction over the alien, in accordance with the parole determination made by the Associate Commissioner for Enforcement.

(2) *Additional delegation of authority.* All references to the Commissioner and Associate Commissioner for Enforcement in this section shall be deemed to include any person or persons (including a committee) designated in writing by the Commissioner or Associate Commissioner for Enforcement to exercise powers under this section.

(c) *Review Plan Director.* The Associate Commissioner for Enforcement shall appoint a Director of the Cuban Review Plan. The Director shall have authority to establish and maintain appropriate files respecting each Mariel Cuban to be reviewed for possible parole, to determine the order in which the cases shall be reviewed, and to coordinate activities associated with these reviews.

(d) *Recommendations to the Associate Commissioner for Enforcement.* Parole recommendations for detained Mariel Cubans shall be developed in accordance with the following procedures.

(1) *Review Panels.* The Director shall designate a panel or panels to make parole recommendations to the Associate Commissioner for Enforcement. A Cuban Review Panel shall, except as otherwise provided, consist of two persons. Members of a Review Panel shall be selected from the professional staff of the Service. All recommendations by a two-member Panel shall be unanimous. If the vote of a two-member Panel is split, it shall adjourn its deliberations concerning that particular detainee until a third Panel member is added. A recommendation by a three-member Panel shall be by majority vote. The third member of any Panel shall be the Director of the Cuban Review Plan or his designee.

(2) *Criteria for Review.* Before making any recommendation that a detainee

be granted parole, a majority of the Cuban Review Panel members, or the Director in case of a record review, must conclude that:

(i) The detainee is presently a nonviolent person;

(ii) The detainee is likely to remain nonviolent;

(iii) The detainee is not likely to pose a threat to the community following his release; and

(iv) The detainee is not likely to violate the conditions of his parole.

(3) *Factors for consideration.* The following factors should be weighed in considering whether to recommend further detention or release on parole of a detainee:

(i) The nature and number of disciplinary infractions or incident reports received while in custody;

(ii) The detainee's past history of criminal behavior;

(iii) Any psychiatric and psychological reports pertaining to the detainee's mental health;

(iv) Institutional progress relating to participation in work, educational and vocational programs;

(v) His ties to the United States, such as the number of close relatives residing lawfully here;

(vi) The likelihood that he may abscond, such as from any sponsorship program; and

(vii) Any other information which is probative of whether the detainee is likely to adjust to life in a community, is likely to engage in future acts of violence, is likely to engage in future criminal activity, or is likely to violate the conditions of his parole.

(4) *Procedure for review.* The following procedures will govern the review process:

(i) *Record review.* Initially, the Director or a Panel shall review the detainee's file. Upon completion of this record review, the Director or the Panel shall issue a written recommendation that the detainee be released on parole or scheduled for a personal interview.

(ii) *Personal interview.* If a recommendation to grant parole after only a record review is not accepted or if the detainee is not recommended for release, a Panel shall personally interview the detainee. The scheduling of such interviews shall be at the discretion of the Director. The detainee may be accompanied during the interview by a person of his choice, who is able to attend at the time of the scheduled interview, to assist in answering any questions. The detainee may submit to the Panel any information, either orally or in writing, which he believes presents a basis for release on parole.

(iii) *Panel recommendation.* Following completion of the interview and its deliberations, the Panel shall issue a written recommendation that the detainee be released on parole or remain in custody pending deportation or pending further observation and subsequent review. This written recommendation shall include a brief statement of the factors which the Panel deems material to its recommendation. The recommendation and appropriate file material shall be forwarded to the Associate Commissioner for Enforcement, to be considered in the exercise of discretion pursuant to § 212.12(b).

(e) *Withdrawal of parole approval.* The Associate Commissioner for Enforcement may, in his or her discretion, withdraw approval for parole of any detainee prior to release when, in his or her opinion, the conduct of the detainee, or any other circumstance, indicates that parole would no longer be appropriate.

(f) *Sponsorship.* No detainee may be released on parole until suitable sponsorship or placement has been found for the detainee. The paroled detainee must abide by the parole conditions specified by the Service in relation to his sponsorship or placement. The following sponsorships and placements are suitable:

(1) Placement by the Public Health Service in an approved halfway house or mental health project;

(2) Placement by the Community Relations Service in an approved halfway house or community project; and

(3) Placement with a close relative such as a parent, spouse, child, or sibling who is a lawful permanent resident or a citizen of the United States.

(g) *Timing of reviews.* The timing of review shall be in accordance with the following guidelines.

(1) *Parole revocation cases.* The Director shall schedule the review process in the case of a new or returning detainee whose previous immigration parole has been revoked. The review process will commence with a scheduling of a file review, which will ordinarily be expected to occur within approximately three months after parole is revoked. In the case of a Mariel Cuban who is in the custody of the Service, the Cuban Review Plan Director may, in his or her discretion, suspend or postpone the parole review process if such detainee's prompt deportation is practicable and proper.

(2) *Continued detention cases.* A subsequent review shall be commenced for any detainee within one year of a refusal to grant parole under §212.12(b), unless a shorter interval is specified by the Director.

(3) *Discretionary reviews.* The Cuban Review Plan Director, in his discretion, may schedule a review of a detainee at any time when the Director deems such a review to be warranted.

(h) *Revocation of parole.* The Associate Commissioner for Enforcement shall have authority, in the exercise of discretion, to revoke parole in respect to Mariel Cubans. A district director may also revoke parole when, in the district director's opinion, revocation is in the public interest and circumstances do not reasonably permit referral of the case to the Associate Commissioner. Parole may be revoked in the exercise of discretion when, in the opinion of the revoking official:

(1) The purposes of parole have been served;

(2) The Mariel Cuban violates any condition of parole;

(3) It is appropriate to enforce an order of exclusion or to commence proceedings against a Mariel Cuban; or

(4) The period of parole has expired without being renewed.

[52 FR 48802, Dec. 28, 1987, as amended at 59 FR 13870, Mar. 24, 1994; 65 FR 80294, Dec. 21, 2000]

§ 212.13 [Reserved]

§ 212.14 Parole determinations for alien witnesses and informants for whom a law enforcement authority ("LEA") will request S classification.

(a) *Parole authority.* Parole authorization under section 212(d)(5) of the Act for aliens whom LEAs seek to bring to the United States as witnesses or informants in criminal/counter terrorism matters and to apply for S classification shall be exercised as follows:

(1) *Grounds of eligibility.* The Commissioner may, in the exercise of discretion, grant parole to an alien (and the alien's family members) needed for law enforcement purposes provided that a state or federal LEA:

(i) Establishes its intention to file, within 30 days after the alien's arrival in the United States, an application for S nonimmigrant status on the form designated for such purposes, with the Assistant Attorney General, Criminal Division, Department of Justice, in accordance with the instructions on or attached to the form, which will include the names of qualified family members for whom parole is sought;

(ii) Specifies the particular operational reasons and basis for the request, and agrees to assume responsibility for the alien during the period of the alien's temporary stay in the United States, including maintaining control and supervision of the alien and the alien's whereabouts and activities, and further specifies any other terms and conditions specified by the Service during the period for which the parole is authorized;

(iii) Agrees to advise the Service of the alien's failure to report quarterly any criminal conduct by the alien, or any other activity or behavior on the alien's part that may constitute a ground of excludability or deportability;

(iv) Assumes responsibility for ensuring the alien's departure on the date of termination of the authorized parole (unless the alien has been admitted in S nonimmigrant classification pursuant to the terms of paragraph (a)(2) of this section), provides any and all assistance needed by the Service, if necessary, to ensure departure, and

verifies departure in a manner acceptable to the Service;

(v) Provide LEA seat-of-government certification that parole of the alien is essential to an investigation or prosecution, is in the national interest, and is requested pursuant to the terms and authority of section 212(d)(5) of the Act;

(vi) Agrees that no promises may be, have been, or will be made by the LEA to the alien that the alien will or may:

(A) Remain in the United States in parole status or any other nonimmigrant classification;

(B) Adjust status to that of lawful permanent resident; or

(C) Otherwise attempt to remain beyond the authorized parole. The alien (and any family member of the alien who is 18 years of age or older) shall sign a statement acknowledging an awareness that parole only authorizes a temporary stay in the United States and does not convey the benefits of S nonimmigrant classification, any other nonimmigrant classification, or any entitlement to further benefits under the Act; and

(vii) Provides, in the case of a request for the release of an alien from Service custody, certification that the alien is eligible for parole pursuant to §235.3 of this chapter.

(2) *Authorization.* (i) Upon approval of the request for parole, the Commissioner shall notify the Assistant Attorney General, Criminal Division, of the approval.

(ii) Upon notification of approval of a request for parole, the LEA will advise the Commissioner of the date, time, and place of the arrival of the alien. The Commissioner will coordinate the arrival of the alien in parole status with the port director prior to the time of arrival.

(iii) Parole will be authorized for a period of thirty (30) days to commence upon the alien's arrival in the United States in order for the LEA to submit the completed application to the Assistant Attorney General, Criminal Division. Upon the submission to the Assistant Attorney General of the completed application for S classification, the period of parole will be automatically extended while the request is being reviewed. The Assistant Attorney General, Criminal Division, will notify the Commissioner of the submission of the application.

(b) *Termination of parole*—(1) *General.* The Commissioner may terminate parole for any alien (including a member of the alien's family) in parole status under this section where termination is in the public interest. A district director may also terminate parole when, in the district director's opinion, termination is in the public interest and circumstances do not reasonably permit referral of the case to the Commissioner. In such a case, the Commissioner shall be notified immediately. In the event the Commissioner, or in the appropriate case, a district director, decides to terminate the parole of an alien witness or informant authorized under the terms of this paragraph, the Assistant Attorney General, Criminal Division, and the relevant LEA shall be notified in writing to that effect. The Assistant Attorney General, Criminal Division, shall concur in or object to that decision. Unless the Assistant Attorney General, Criminal Division, objects within 7 days, he or she shall be deemed to have concurred in the decision. In the event of an objection by the Assistant Attorney General, Criminal Division, the matter will be expeditiously referred to the Deputy Attorney General for a final resolution. In no circumstances shall the alien or the relevant LEA have a right of appeal from any decision to terminate parole.

(2) *Termination of parole and admission in S classification.* When an LEA has filed a request for an alien in authorized parole status to be admitted in S nonimmigrant classification and that request has been approved by the Commissioner pursuant to the procedures outlines in 8 CFR 214.2(t), the Commissioner may, in the exercise of discretion:

(i) Terminate the alien's parole status;

(ii) Determine eligibility for waivers; and

(iii) Admit the alien in S nonimmigrant classification pursuant to the terms and conditions of section 101(a)(15(S) of the Act and 8 CFR 214.2(t).

(c) *Departure.* If the alien's parole has been terminated and the alien has been

ordered excluded from the United States, the LEA shall ensure departure from the United States and so inform the district director in whose jurisdiction the alien has last resided. The district director, if necessary, shall oversee the alien's departure from the United States and, in any event, shall notify the Commissioner of the alien's departure. The Commissioner shall be notified in writing of the failure of any alien authorized parole under this paragraph to depart in accordance with an order of exclusion and deportation entered after parole authorized under this paragraph has been terminated.

(d) *Failure to comply with procedures.* Any failure to adhere to the parole procedures contained in this section shall immediately be brought to the attention of the Commissioner, who will notify the Attorney General.

[60 FR 44265, Aug. 25, 1995, as amended at 76 FR 53787, Aug. 29, 2011]

§ 212.15 Certificates for foreign health care workers.

(a) *General certification requirements.* (1) Except as provided in paragraph (b) or paragraph (d)(1) of this section, any alien who seeks admission to the United States as an immigrant or as a nonimmigrant for the primary purpose of performing labor in a health care occupation listed in paragraph (c) of this section is inadmissible unless the alien presents a certificate from a credentialing organization, listed in paragraph (e) of this section.

(2) In the alternative, an eligible alien who seeks to enter the United States for the primary purpose of performing labor as a nurse may present a certified statement as provided in paragraph (h) of this section.

(3) A certificate or certified statement described in this section does not constitute professional authorization to practice in that health care occupation.

(b) *Inapplicability of the ground of inadmissibility.* This section does not apply to:

(1) Physicians;

(2) Aliens seeking admission to the United States to perform services in a non-clinical health care occupation. A non-clinical care occupation is one in which the alien is not required to perform direct or indirect patient care. Occupations which are considered to be non-clinical include, but are not limited to, medical teachers, medical researchers, and managers of health care facilities;

(3) Aliens coming to the United States to receive training as an H–3 nonimmigrant, or receiving training as part of an F or J nonimmigrant program.

(4) The spouse and dependent children of any immigrant or nonimmigrant alien;

(5) Any alien applying for adjustment of status to that of a permanent resident under any provision of law other than under section 245 of the Act, or any alien who is seeking adjustment of status under section 245 of the Act on the basis of a relative visa petition approved under section 203(a) of the Act, or any alien seeking adjustment of status under section 245 of the Act on the basis of an employment-based petition approved pursuant to section 203(b) of the Act for employment that does not fall under one of the covered health care occupations listed in paragraph (c) of this section.

(c) *Covered health care occupations.* With the exception of the aliens described in paragraph (b) of this section, this paragraph (c) applies to any alien seeking admission to the United States to perform labor in one of the following health care occupations, regardless of where he or she received his or her education or training:

(1) Licensed Practical Nurses, Licensed Vocational Nurses, and Registered Nurses.

(2) Occupational Therapists.

(3) Physical Therapists.

(4) Speech Language Pathologists and Audiologists.

(5) Medical Technologists (Clinical Laboratory Scientists).

(6) Physician Assistants.

(7) Medical Technicians (Clinical Laboratory Technicians)

(d) *Presentation of certificate or certified statements*—(1) *Aliens required to obtain visas.* Except as provided in paragraph (n) of this section, if 8 CFR 212.1 requires an alien who is described in paragraph (a) of this section and who is applying for admission as a nonimmigrant seeking to perform labor in

a health care occupation as described in this section to obtain a nonimmigrant visa, the alien must present a certificate or certified statement to a consular officer at the time of visa issuance and to the Department of Homeland Security (DHS) at the time of admission. The certificate or certified statement must be valid at the time of visa issuance and admission at a port-of-entry. An alien who has previously presented a foreign health care worker certification or certified statement for a particular health care occupation will be required to present it again at the time of visa issuance or each admission to the United States.

(2) *Aliens not requiring a nonimmigrant visa.* Except as provided in paragraph (n) of this section, an alien described in paragraph (a) of this section who, pursuant to 8 CFR 212.1, is not required to obtain a nonimmigrant visa to apply for admission to the United States must present a certificate or certified statement as provided in this section to an immigration officer at the time of initial application for admission to the United States to perform labor in a particular health care occupation. An alien who has previously presented a foreign health care worker certification or certified statement for a particular health care occupation will be required to present it again at the time of each application for admission.

(e) *Approved credentialing organizations for health care workers.* An alien may present a certificate from any credentialing organization listed in this paragraph (e) with respect to a particular health care field. In addition to paragraphs (e)(1) through (e)(3) of this section, the DHS will notify the public of additional credentialing organizations through the publication of notices in the FEDERAL REGISTER.

(1) The Commission on Graduates of Foreign Nursing Schools (CGFNS) is authorized to issue certificates under section 212(a)(5)(C) of the Act for nurses, physical therapists, occupational therapists, speech-language pathologists and audiologists, medical technologists (also known as clinical laboratory scientists), medical technicians (also known as clinical laboratory technicians), and physician assistants.

(2) The National Board for Certification in Occupational Therapy (NBCOT) is authorized to issue certificates in the field of occupational therapy pending final adjudication of its credentialing status under this part.

(3) The Foreign Credentialing Commission on Physical Therapy (FCCPT) is authorized to issue certificates in the field of physical therapy pending final adjudication of its credentialing status under this part.

(f) *Requirements for issuance of health care certification.* (1) Prior to issuing a certification to an alien, the organization must verify the following:

(i) That the alien's education, training, license, and experience are comparable with that required for an American health care worker of the same type;

(ii) That the alien's education, training, license, and experience are authentic and, in the case of a license, unencumbered;

(iii) That the alien's education, training, license, and experience meet all applicable statutory and regulatory requirements for admission into the United States. This verification is not binding on the DHS; and

(iv) Either that the alien has passed a test predicting success on the occupation's licensing or certification examination, provided such a test is recognized by a majority of states licensing the occupation for which the certification is issued, or that the alien has passed the occupation's licensing or certification examination.

(2) A certificate issued under section 212(a)(5)(C) of the Act must contain the following:

(i) The name, address, and telephone number of the credentialing organization, and a point of contact to verify the validity of the certificate;

(ii) The date the certificate was issued;

(iii) The health care occupation for which the certificate was issued; and

(iv) The alien's name, and date and place of birth.

(g) *English language requirements.* (1) With the exception of those aliens described in paragraph (g)(2) of this section, every alien must meet certain English language requirements in order to obtain a certificate. The Secretary

of HHS has sole authority to set standards for these English language requirements, and has determined that an alien must have a passing score on one of the three tests listed in paragraph (g)(3) of this section before he or she can be granted a certificate. HHS will notify The Department of Homeland Security of additions or deletions to this list, and The Department of Homeland Security will publish such changes in the FEDERAL REGISTER.

(2) The following aliens are exempt from the English language requirements:

(i) Alien nurses who are presenting a certified statement under section 212(r) of the Act; and

(ii) Aliens who have graduated from a college, university, or professional training school located in Australia, Canada (except Quebec), Ireland, New Zealand, the United Kingdom, or the United States.

(3) The following English testing services have been approved by the Secretary of HHS:

(i) Educational Testing Service (ETS).

(ii) Test of English in International Communication (TOEIC) Service International.

(iii) International English Language Testing System (IELTS).

(4) Passing English test scores for various occupations.

(i) *Occupational and physical therapists.* An alien seeking to perform labor in the United States as an occupational or physical therapist must obtain the following scores on the English tests administered by ETS: Test Of English as a Foreign Language (TOEFL): Paper-Based 560, Computer-Based 220; Test of Written English (TWE): 4.5; Test of Spoken English (TSE): 50. The certifying organizations shall not accept the results of the TOEIC, or the IELTS for the occupation of occupational therapy or physical therapy.

(ii) *Registered nurses and other health care workers requiring the attainment of a baccalaureate degree.* An alien coming to the United States to perform labor as a registered nurse (other than a nurse presenting a certified statement under section 212(r) of the Act) or to perform labor in another health care occupation requiring a baccalaureate degree (other than occupational or physical therapy) must obtain one of the following combinations of scores to obtain a certificate:

(A) ETS: TOEFL: Paper-Based 540, Computer-Based 207; TWE: 4.0; TSE: 50;

(B) TOEIC Service International: TOEIC: 725; plus TWE: 4.0 and TSE: 50; or

(C) IELTS: 6.5 overall with a spoken band score of 7.0. This would require the Academic module.

(iii) *Occupations requiring less than a baccalaureate degree.* An alien coming to the United States to perform labor in a health care occupation that does not require a baccalaureate degree must obtain one of the following combinations of scores to obtain a certificate:

(A) ETS: TOEFL: Paper-Based 530, Computer-Based 197; TWE: 4.0; TSE: 50;

(B) TOEIC Service International: TOEIC: 700; plus TWE 4.0 and TSE: 50; or

(C) IELTS: 6.0 overall with a spoken band score of 7.0. This would allow either the Academic or the General module.

(h) *Alternative certified statement for certain nurses.* (1) CGFNS is authorized to issue certified statements under section 212(r) of the Act for aliens seeking to enter the United States to perform labor as nurses. The DHS will notify the public of new organizations that are approved to issue certified statements through notices published in the FEDERAL REGISTER.

(2) An approved credentialing organization may issue a certified statement to an alien if each of the following requirements is satisfied:

(i) The alien has a valid and unrestricted license as a nurse in a state where the alien intends to be employed and such state verifies that the foreign licenses of alien nurses are authentic and unencumbered;

(ii) The alien has passed the National Council Licensure Examination for registered nurses (NCLEX-RN);

(iii) The alien is a graduate of a nursing program in which the language of instruction was English;

(iv) The nursing program was located in Australia, Canada (except Quebec), Ireland, New Zealand, South Africa, the United Kingdom, or the United

States; or in any other country designated by unanimous agreement of CGFNS and any equivalent credentialing organizations which have been approved for the certification of nurses and which are listed at paragraph (e) of this section; and

(v) The nursing program was in operation on or before November 12, 1999, or has been approved by unanimous agreement of CGFNS and any equivalent credentialing organizations that have been approved for the certification of nurses.

(3) An individual who obtains a certified statement need not comply with the certificate requirements of paragraph (f) or the English language requirements of paragraph (g) of this section.

(4) A certified statement issued to a nurse under section 212(r) of the Act must contain the following information:

(i) The name, address, and telephone number of the credentialing organization, and a point of contact to verify the validity of the certified statement;

(ii) The date the certified statement was issued; and

(iii) The alien's name, and date and place of birth.

(i) *Streamlined certification process*—(1) *Nurses.* An alien nurse who has graduated from an entry level program accredited by the National League for Nursing Accreditation Commission (NLNAC) or the Commission on Collegiate Nursing Education (CCNE) is exempt from the educational comparability review and English language proficiency testing.

(2) *Occupational Therapists.* An alien occupational therapist who has graduated from a program accredited by the Accreditation Council for Occupational Therapy Education (ACOTE) of the American Occupational Therapy Association (AOTA) is exempt from the educational comparability review and English language proficiency testing.

(3) *Physical therapists.* An alien physical therapist who has graduated from a program accredited by the Commission on Accreditation in Physical Therapy Education (CAPTE) of the American Physical Therapy Association (APTA) is exempt from the educational comparability review and English language proficiency testing.

(4) *Speech language pathologists and audiologists.* An alien speech language pathologists and/or audiologist who has graduated from a program accredited by the Council on Academic Accreditation in Audiology and Speech Language Pathology (CAA) of the American Speech-Language-Hearing Association (ASHA) is exempt from the educational comparability review and English language proficiency testing.

(j) *Application process for credentialing organizations*—(1) *Organizations other than CGFNS.* An organization, other than CGFNS, seeking to obtain approval to issue certificates to health care workers, or certified statements to nurses must apply on the form designated by USCIS in accordance with the form instructions. An organization seeking authorization to issue certificates or certified statements must agree to submit all evidence required by the DHS and, upon request, allow the DHS to review the organization's records related to the certification process. The application must:

(i) Clearly describe and identify the organization seeking authorization to issue certificates;

(ii) List the occupations for which the organization desires to provide certificates;

(iii) Describe how the organization substantially meets the standards described at paragraph (k) of this section;

(iv) Describe the organization's expertise, knowledge, and experience in the health care occupation(s) for which it desires to issue certificates;

(v) Provide a point of contact;

(vi) Describe the verification procedure the organization has designed in order for the DHS to verify the validity of a certificate; and

(vii) Describe how the organization will process and issue in a timely manner the certificates.

(2) *Applications filed by CGFNS.* (i) CGFNS must apply to ensure that it will be in compliance with the regulations governing the issuance and content of certificates to nurses, physical therapists, occupational therapists, speech-language pathologists and audiologists, medical technologists (also

known as clinical laboratory scientists), medical technicians (also known as clinical laboratory technicians), and physician assistants under section 212(a)(5)(C) of the Act, or issuing certified statements to nurses under section 212(r) of the Act.

(ii) Prior to issuing certificates for any other health care occupations, CGFNS must apply on the form designated by USCIS with the fee prescribed in 8 CFR 106.2 and in accordance with the form instructions for authorization to issue such certificates. The DHS will evaluate CGFNS' expertise with respect to the particular health care occupation for which authorization to issue certificates is sought, in light of CGFNS' statutory designation as a credentialing organization.

(3) *Procedure for review of applications by credentialing organizations.* (i) USCIS will, forward a copy of the application and supporting documents to the Secretary of HHS in order to obtain an opinion on the merits of the application. The DHS will not render a decision on the request until the Secretary of HHS provides an opinion. The DHS shall accord the Secretary of HHS' opinion great weight in reaching its decision. The DHS may deny the organization's request notwithstanding the favorable recommendation from the Secretary of HHS, on grounds unrelated to the credentialing of health care occupations or health care services.

(ii) The DHS will notify the organization of the decision on its application in writing and, if the request is denied, of the reasons for the denial. Approval of authorization to issue certificates to foreign health care workers or certified statements to nurses will be made in 5-year increments, subject to the review process described at paragraph (l) of this section.

(iii) If the application is denied, the decision may be appealed pursuant to 8 CFR 103.3.

(k) *Standards for credentialing organizations.* The DHS will evaluate organizations, including CGFNS, seeking to obtain approval from the DHS to issue certificates for health care workers, or certified statements for nurses. Any organization meeting the standards set forth in paragraph (k)(1) of this section can be eligible for authorization to issue certificates. While CGFNS has been specifically listed in the statute as an entity authorized to issue certificates, it is not exempt from governmental oversight. All organizations will be reviewed, including CGFNS, to guarantee that they continue to meet the standards required of all certifying organizations, under the following:

(1) *Structure of the organization.* (i) The organization shall be incorporated as a legal entity.

(ii)(A) The organization shall be independent of any organization that functions as a representative of the occupation or profession in question or serves as or is related to a recruitment/placement organization.

(B) The DHS shall not approve an organization that is unable to render impartial advice regarding an individual's qualifications regarding training, experience, and licensure.

(C) The organization must also be independent in all decision making matters pertaining to evaluations and/or examinations that it develops including, but not limited to: policies and procedures; eligibility requirements and application processing; standards for granting certificates and their renewal; examination content, development, and administration; examination cut-off scores, excluding those pertaining to English language requirements; grievance and disciplinary processes; governing body and committee meeting rules; publications about qualifying for a certificate and its renewal; setting fees for application and all other services provided as part of the screening process; funding, spending, and budget authority related to the operation of the certification organization; ability to enter into contracts and grant arrangements; ability to demonstrate adequate staffing and management resources to conduct the program(s) including the authority to approve selection of, evaluate, and initiate dismissal of the chief staff member.

(D) An organization whose fees are based on whether an applicant receives a visa may not be approved.

(iii) The organization shall include the following representation in the portion of its organization responsible for overseeing certification and, where applicable, examinations:

(A) Individuals from the same health care discipline as the alien health care worker being evaluated who are eligible to practice in the United States; and

(B) At least one voting public member to represent the interests of consumers and protect the interests of the public at large. The public member shall not be a member of the discipline or derive significant income from the discipline, its related organizations, or the organization issuing the certificate.

(iv) The organization must have a balanced representation such that the individuals from the same health care discipline, the voting public members, and any other appointed individuals have an equal say in matters relating to credentialing and/or examinations.

(v) The organization must select representatives of the discipline using one of the following recommended methods, or demonstrate that it has a selection process that meets the intent of these methods:

(A) Be selected directly by members of the discipline eligible to practice in the United States;

(B) Be selected by members of a membership organization representing the discipline or by duly elected representatives of a membership organization; or

(C) Be selected by a membership organization representing the discipline from a list of acceptable candidates supplied by the credentialing body.

(vi) The organization shall use formal procedures for the selection of members of the governing body that prohibit the governing body from selecting a majority of its successors. Not-for-profit corporations which have difficulty meeting this requirement may provide in their applications evidence that the organization is independent, and free of material conflicts of interest regarding whether an alien receives a visa.

(vii) The organization shall be separate from the accreditation and educational functions of the discipline, except for those entities recognized by the Department of Education as having satisfied the requirement of independence.

(viii) The organization shall publish and make available a document which clearly defines the responsibilities of the organization and outlines any other activities, arrangements, or agreements of the organization that are not directly related to the certification of health care workers.

(2) *Resources of the organization.* (i) The organization shall demonstrate that its staff possess the knowledge and skills necessary to accurately assess the education, work experience, licensure of health care workers, and the equivalence of foreign educational institutions, comparable to those of United States-trained health care workers and institutions.

(ii) The organization shall demonstrate the availability of financial and material resources to effectively and thoroughly conduct regular and ongoing evaluations on an international basis.

(iii) If the health care field is one for which a majority of the states require a predictor test, the organization shall demonstrate the ability to conduct examinations in those countries with educational and evaluation systems comparable to the majority of states.

(iv) The organization shall have the resources to publish and make available general descriptive materials on the procedures used to evaluate and validate credentials, including eligibility requirements, determination procedures, examination schedules, locations, fees, reporting of results, and disciplinary and grievance procedures.

(3) *Candidate evaluation and testing mechanisms.* (i) The organization shall publish and make available a comprehensive outline of the information, knowledge, or functions covered by the evaluation/examination process, including information regarding testing for English language competency.

(ii) The organization shall use reliable evaluation/examination mechanisms to evaluate individual credentials and competence that is objective, fair to all candidates, job related, and based on knowledge and skills needed in the discipline.

(iii) The organization shall conduct ongoing studies to substantiate the reliability and validity of the evaluation/examination mechanisms.

(iv) The organization shall implement a formal policy of periodic review of the evaluation/examination mechanism to ensure ongoing relevance of the mechanism with respect to knowledge and skills needed in the discipline.

(v) The organization shall use policies and procedures to ensure that all aspects of the evaluation/examination procedures, as well as the development and administration of any tests, are secure.

(vi) The organization shall institute procedures to protect against falsification of documents and misrepresentation, including a policy to request each applicant's transcript(s) and degree(s) directly from the educational licensing authorities.

(vii) The organization shall establish policies and procedures that govern the length of time the applicant's records must be kept in their original format.

(viii) The organization shall publish and make available, at least annually, a summary of all screening activities for each discipline including, at least, the number of applications received, the number of applicants evaluated, the number receiving certificates, the number who failed, and the number receiving renewals.

(4) *Responsibilities to applicants applying for an initial certificate or renewal.* (i) The organization shall not discriminate among applicants as to age, sex, race, religion, national origin, disability, or marital status and shall include a statement of nondiscrimination in announcements of the evaluation/examination procedures and renewal certification process.

(ii) The organization shall provide all applicants with copies of formalized application procedures for evaluation/examination and shall uniformly follow and enforce such procedures for all applicants. Instructions shall include standards regarding English language requirements.

(iii) The organization shall implement a formal policy for the periodic review of eligibility criteria and application procedures to ensure that they are fair and equitable.

(iv) Where examinations are used, the organization shall provide competently proctored examination sites at least once annually.

(v) The organization shall report examination results to applicants in a uniform and timely fashion.

(vi) The organization shall provide applicants who failed either the evaluation or examination with information on general areas of deficiency.

(vii) The organization shall implement policies and procedures to ensure that each applicant's examination results are held confidential and delineate the circumstances under which the applicant's certification status may be made public.

(viii) The organization shall have a formal policy for renewing the certification if an individual's original certification has expired before the individual first seeks admission to the United States or applies for adjustment of status. Such procedures shall be restricted to updating information on licensure to determine the existence of any adverse actions and the need to reestablish English competency.

(ix) The organization shall publish due process policies and procedures for applicants to question eligibility determinations, examination or evaluation results, and eligibility status.

(x) The organization shall provide all qualified applicants with a certificate in a timely manner.

(5) *Maintenance of comprehensive and current information.* (i) The organization shall maintain comprehensive and current information of the type necessary to evaluate foreign educational institutions and accrediting bodies for purposes of ensuring that the quality of foreign educational programs is equivalent to those training the same occupation in the United States. The organization shall examine, evaluate, and validate the academic and clinical requirements applied to each country's accrediting body or bodies, or in countries not having such bodies, of the educational institution itself.

(ii) The organization shall also evaluate the licensing and credentialing system(s) of each country or licensing jurisdiction to determine which systems are equivalent to that of the majority

of the licensing jurisdictions in the United States.

(6) *Ability to conduct examinations fairly and impartially.* An organization undertaking the administration of a predictor examination, or a licensing or certification examination shall demonstrate the ability to conduct such examination fairly and impartially.

(7) *Criteria for awarding and governing certificate holders.* (i) The organization shall issue a certificate after the education, experience, license, and English language competency have been evaluated and determined to be equivalent to their United States counterparts. In situations where a United States nationally recognized licensure or certification examination, or a test predicting the success on the licensure or certification examination, is offered overseas, the applicant must pass the examination or the predictor test prior to receiving certification. Passage of a test predicting the success on the licensure or certification examination may be accepted only if a majority of states (and Washington, DC) licensing the profession in which the alien intends to work recognize such a test.

(ii) The organization shall have policies and procedures for the revocation of certificates at any time if it is determined that the certificate holder was not eligible to receive the certificate at the time that it was issued. If the organization revokes an individual's certificate, it must notify the DHS, via the Nebraska Service Center, and the appropriate state regulatory authority with jurisdiction over the individual's health care profession. The organization may not reissue a certificate to an individual whose certificate has been revoked.

(8) *Criteria for maintaining accreditation.* (i) The organization shall advise the DHS of any changes in purpose, structure, or activities of the organization or its program(s).

(ii) The organization shall advise the DHS of any major changes in the evaluation of credentials and examination techniques, if any, or in the scope or objectives of such examinations.

(iii) The organization shall, upon the request of the DHS, submit to the DHS, or any organization designated by the DHS, information requested of the organization and its programs for use in investigating allegations of non-compliance with standards and for general purposes of determining continued approval as an independent credentialing organization.

(iv) The organization shall establish performance outcome measures that track the ability of the certificate holders to pass United States licensure or certification examinations. The purpose of the process is to ensure that certificate holders pass United States licensure or certification examinations at the same pass rate as graduates of United States programs. Failure to establish such measures, or having a record showing an inability of persons granted certificates to pass United States licensure examinations at the same rate as graduates of United States programs, may result in a ground for termination of approval. Information regarding the passage rates of certificate holders shall be maintained by the organization and provided to HHS on an annual basis, to the DHS as part of the 5-year reauthorization application, and at any other time upon request by HHS or the DHS.

(v) The organization shall be in ongoing compliance with other policies specified by the DHS.

(l) *DHS review of the performance of certifying organizations.* The DHS will review credentialing organizations every 5 years to ensure continued compliance with the standards described in this section. Such review will occur concurrent with the adjudication of a request for reauthorization to issue health care worker certificates. The DHS will notify the credentialing organization in writing of the results of the review and request for reauthorization. The DHS may conduct a review of the approval of any request for authorization to issue certificates at any time within the 5-year period of authorization for any reason. If at any time the DHS determines that an organization is not complying with the terms of its authorization or if other adverse information relating to eligibility to issue certificates is developed, the DHS may initiate termination proceedings.

(m) *Termination of certifying organizations.* (1) If the DHS determines that an organization has been convicted, or the

directors or officers of an authorized credentialing organization have individually been convicted of the violation of state or federal laws, or other information is developed such that the fitness of the organization to continue to issue certificates or certified statements is called into question, the DHS shall automatically terminate authorization for that organization to issue certificates or certified statements by issuing to the organization a notice of termination of authorization to issue certificates to foreign health care workers. The notice shall reference the specific conviction that is the basis of the automatic termination.

(2) If the DHS determines that an organization is not complying with the terms of its authorization or other adverse information relating to eligibility to issue certificates is uncovered during the course of a review or otherwise brought to the DHS' attention, or if the DHS determines that an organization currently authorized to issue certificates or certified statements has not submitted an application or provided all information required on the request within 6 months of July 25, 2003, the DHS will issue a Notice of Intent to Terminate authorization to issue certificates to the credentialing organization. The Notice shall set forth reasons for the proposed termination.

(i) The credentialing organization shall have 30 days from the date of the Notice of Intent to Terminate authorization to rebut the allegations, or to cure the noncompliance identified in the DHS's notice of intent to terminate.

(ii) DHS will forward to HHS upon receipt any information received in response to a Notice of Intent to Terminate an entity's authorization to issue certificates. Thirty days after the date of the Notice of Intent to Terminate, the DHS shall forward any additional evidence and shall request an opinion from HHS regarding whether the organization's authorization should be terminated. The DHS shall accord HHS' opinion great weight in determining whether the authorization should be terminated. After consideration of the rebuttal evidence, if any, and consideration of HHS' opinion, the DHS will promptly provide the organization with a written decision. If termination of credentialing status is made, the written decision shall set forth the reasons for the termination.

(3) An adverse decision may be appealed pursuant to 8 CFR 103.3 to the Associate Commissioner for Examinations. Termination of credentialing status shall remain in effect until and unless the terminated organization reapplies for credentialing status and is approved, or its appeal of the termination decision is sustained by the Administrative Appeals Office. There is no waiting period for an organization to re-apply for credentialing status.

(n) *Transition*—(1) *One year waiver.* (i) Pursuant to section 212(d)(3) of the Act (and, for cases described in paragraph (d)(1) of this section, upon the recommendation of the Secretary of State), the Secretary has determined that until July 26, 2004 (or until July 26, 2005, in the case of a citizen of Canada or Mexico who, before September 23, 2003, was employed as a TN or TC nonimmigrant health care worker and held a valid license from a U.S. jurisdiction), DHS, subject to the conditions in paragraph (n)(2) of this section, may in its discretion admit, extend the period of authorized stay, or change the nonimmigrant status of an alien described in paragraph (d)(1) or paragraph (d)(2) of this section, despite the alien's inadmissibility under section 212(a)(5)(C) of the Act, provided the alien is not otherwise inadmissible.

(ii) After July 26, 2004 (or, after July 26, 2005, in the case of a citizen of Canada or Mexico, who, before September 23, 2003, was employed as a TN or TC nonimmigrant health care worker and held a valid license from a U.S. jurisdiction), such discretion shall be applied on a case-by-case basis.

(2) *Conditions.* Until July 26, 2004 (or until July 26, 2005, in the case of a citizen of Canada or Mexico, who, before September 23, 2003, was employed as a TN or TC nonimmigrant health care worker and held a valid license from a U.S. jurisdiction), the temporary admission, extension of stay, or change of status of an alien described in 8 CFR part 212(d)(1) or (d)(2) of this section that is provided for under this paragraph (n) is subject to the following conditions:

(i) The admission, extension of stay, or change of status may not be for a period longer than 1 year from the date of the decision, even if the relevant provision of 8 CFR 214.2 would ordinarily permit the alien's admission for a longer period;

(ii) The alien must obtain the certification required by paragraph (a) of this section within 1 year of the date of decision to admit the alien or to extend the alien's stay or change the alien's status; and,

(iii) Any subsequent petition or application to extend the period of the alien's authorized stay or change the alien's nonimmigrant status must include proof that the alien has obtained the certification required by paragraph (a) of this section, if the extension or stay or change of status is sought for the primary purpose of the alien's performing labor in a health care occupation listed in paragraph (c) of this section.

(3) *Immigrant aliens.* An alien described in paragraph (a) of this section, who is coming to the United States as an immigrant or is applying for adjustment of status pursuant to section 245 of the Act (8 U.S.C. 1255), to perform labor in a health care occupation described in paragraph (c) of this section, must submit the certificate or certified statement as provided in this section at the time of visa issuance or adjustment of status.

(4) *Expiration of certificate or certified statement.* The individual's certification or certified statement must be used for any admission into the United States, change of status within the United States, or adjustment of status within 5 years of the date that it is issued.

(5) *Revocation of certificate or certified statement.* When a credentialing organization notifies the DHS, via the Nebraska Service Center, that an individual's certification or certified statement has been revoked, the DHS will take appropriate action, including, but not limited to, revocation of approval of any related petitions, consistent with the Act and DHS regulations at 8 CFR 205.2, 8 CFR 214.2(h)(11)(iii), and 8 CFR 214.6(d)(5)(iii).

[68 FR 43915, July 25, 2003, as amended at 69 FR 43731, July 22, 2004; 74 FR 26938, June 5, 2009; 76 FR 53788, Aug. 29, 2011; 76 FR 73477, Nov. 29, 2011; 85 FR 46923, Aug. 3, 2020]

§ 212.16 Applications for exercise of discretion relating to T nonimmigrant status.

(a) *Requesting the waiver.* An alien requesting a waiver of inadmissibility under section 212(d)(3)(B) or (d)(13) of the Act must submit a waiver form as designated by USCIS in accordance with 8 CFR 103.2.

(b) *Treatment of waiver request.* USCIS, in its discretion, may grant a waiver request based on section 212(d)(13) of the Act of the applicable ground(s) of inadmissibility, except USCIS may not waive a ground of inadmissibility based on sections 212(a)(3), (a)(10)(C), or (a)(10)(E) of the Act. An applicant for T nonimmigrant status is not subject to the ground of inadmissibility based on section 212(a)(4) of the Act (public charge) and is not required to file a waiver form for the public charge ground. Waiver requests are subject to a determination of national interest and connection to victimization as follows.

(1) *National interest.* USCIS, in its discretion, may grant a waiver of inadmissibility request if it determines that it is in the national interest to exercise discretion to waive the applicable ground(s) of inadmissibility.

(2) *Connection to victimization.* An applicant requesting a waiver under section 212(d)(13) of the Act on grounds other than the health-related grounds described in section 212(a)(1) of the Act must establish that the activities rendering him or her inadmissible were caused by, or were incident to, the victimization described in section 101(a)(15)(T)(i)(I) of the Act.

(3) *Criminal grounds.* In exercising its discretion, USCIS will consider the number and seriousness of the criminal offenses and convictions that render an applicant inadmissible under the criminal and related grounds in section 212(a)(2) of the Act. In cases involving violent or dangerous crimes, USCIS will only exercise favorable discretion in extraordinary circumstances, unless

the criminal activities were caused by, or were incident to, the victimization described under section 101(a)(15)(T)(i)(I) of the Act.

(c) *No appeal.* There is no appeal of a decision to deny a waiver request. Nothing in this section is intended to prevent an applicant from re-filing a request for a waiver of a ground of inadmissibility in appropriate cases.

(d) *Revocation.* USCIS, at any time, may revoke a waiver previously authorized under section 212(d) of the Act. There is no appeal of a decision to revoke a waiver.

[81 FR 92304, Dec. 19, 2016]

§ 212.17 Applications for the exercise of discretion relating to U nonimmigrant status.

(a) *Filing the waiver application.* An alien applying for a waiver of inadmissibility under section 212(d)(3)(B) or (d)(14) of the Act (waivers of inadmissibility), 8 U.S.C. 1182(d)(3)(B) or (d)(14), in connection with a petition for U nonimmigrant status being filed pursuant to 8 CFR 214.14, must submit the waiver request and the petition for U nonimmigrant status on the forms designated by USCIS in accordance with the form instructions. An alien in U nonimmigrant status who is seeking a waiver of section 212(a)(9)(B) of the Act, 8 U.S.C. 1182(a)(9)(B) (unlawful presence ground of inadmissibility triggered by departure from the United States), must file the waiver request prior to his or her application for reentry to the United States in accordance with the form instructions.

(b) *Treatment of waiver application.* (1) USCIS, in its discretion, may grant the waiver based on section 212(d)(14) of the Act, 8 U.S.C. 1182(d)(14), if it determines that it is in the public or national interest to exercise discretion to waive the applicable ground(s) of inadmissibility. USCIS may not waive a ground of inadmissibility based upon section 212(a)(3)(E) of the Act, 8 U.S.C. 1182(a)(3)(E). USCIS, in its discretion, may grant the waiver based on section 212(d)(3) of the Act, 8 U.S.C. 1182(d)(3), except where the ground of inadmissibility arises under sections 212(a)(3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), or (3)(E) of the Act, 8 U.S.C. 1182(a)(3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), or (3)(E).

(2) In the case of applicants inadmissible on criminal or related grounds, in exercising its discretion USCIS will consider the number and severity of the offenses of which the applicant has been convicted. In cases involving violent or dangerous crimes or inadmissibility based on the security and related grounds in section 212(a)(3) of the Act, USCIS will only exercise favorable discretion in extraordinary circumstances.

(3) There is no appeal of a decision to deny a waiver. However, nothing in this paragraph is intended to prevent an applicant from re-filing a request for a waiver of ground of inadmissibility in appropriate cases.

(c) *Revocation.* The Secretary of Homeland Security, at any time, may revoke a waiver previously authorized under section 212(d) of the Act, 8 U.S.C. 118(d). Under no circumstances will the alien or any party acting on his or her behalf have a right to appeal from a decision to revoke a waiver.

[72 FR 53035, Sept. 17, 2007, as amended at 76 FR 53788, Aug. 29, 2011]

§ 212.18 Applications for waivers of inadmissibility in connection with an application for adjustment of status by T nonimmigrant status holders.

(a) *Filing the waiver application.* An alien applying for a waiver of inadmissibility under section 245(*l*)(2) of the Act in connection with an application for adjustment of status under 8 CFR 245.23(a) or (b) must submit:

(1) A completed Form I–485 application package;

(2) The appropriate fee in accordance with 8 CFR 106.2 or an application for a fee waiver; and, as applicable,

(3) Form I–601, Application for Waiver of Grounds of Excludability.

(b) *Treatment of waiver application.* (1) USCIS may not waive an applicant's inadmissibility under sections 212(a)(3), 212(a)(10)(C), or 212(a)(10)(E) of the Act.

(2) If an applicant is inadmissible under section 212(a)(1) of the Act, USCIS may waive such inadmissibility if it determines that granting a waiver is in the national interest.

(3) If any other applicable provision of section 212(a) renders the applicant

inadmissible, USCIS may grant a waiver of inadmissibility if the activities rendering the applicant inadmissible were caused by or were incident to the victimization and USCIS determines that it is in the national interest to waive the applicable ground or grounds of inadmissibility.

(c) *Other waivers.* Nothing in this section shall be construed as limiting an alien's ability to apply for any other waivers of inadmissibility for which he or she may be eligible.

(d) *Revocation.* The Secretary of Homeland Security may, at any time, revoke a waiver previously granted through the procedures described in 8 CFR 103.5.

[73 FR 75557, Dec. 12, 2008, as amended at 84 FR 41501, Aug. 14, 2019; 85 FR 46923, Aug. 3, 2020; 86 FR 14227, Mar. 15, 2021; 87 FR 55636, Sept. 9, 2022]

§ 212.19 Parole for entrepreneurs.

(a) *Definitions.* For purposes of this section, the following definitions apply:

(1) *Entrepreneur* means an alien who possesses a substantial ownership interest in a start-up entity and has a central and active role in the operations of that entity, such that the alien is well-positioned, due to his or her knowledge, skills, or experience, to substantially assist the entity with the growth and success of its business. For purposes of this section, an alien may be considered to possess a substantial ownership interest if he or she possesses at least a 10 percent ownership interest in the start-up entity at the time of adjudication of the initial grant of parole and possesses at least a 5 percent ownership interest in the start-up entity at the time of adjudication of a subsequent period of re-parole. During the period of initial parole, the entrepreneur may continue to reduce his or her ownership interest in the start-up entity, but must, at all times during the period of initial parole, maintain at least a 5 percent ownership interest in the entity. During the period of re-parole, the entrepreneur may continue to reduce his or her ownership interest in the start-up entity, but must, at all times during the period of parole, maintain an ownership interest in the entity.

(2) *Start-up entity* means a U.S. business entity that was recently formed, has lawfully done business during any period of operation since its date of formation, and has substantial potential for rapid growth and job creation. An entity that is the basis for a request for parole under this section may be considered recently formed if it was created within the 5 years immediately preceding the filing date of the alien's initial parole request. For purposes of paragraphs (a)(3) and (5) of this section, an entity may be considered recently formed if it was created within the 5 years immediately preceding the receipt of the relevant grant(s), award(s), or investment(s).

(3) *Qualified government award or grant* means an award or grant for economic development, research and development, or job creation (or other similar monetary award typically given to start-up entities) made by a federal, state, or local government entity (not including foreign government entities) that regularly provides such awards or grants to start-up entities. This definition excludes any contractual commitment for goods or services.

(4) *Qualified investment* means an investment made in good faith, and that is not an attempt to circumvent any limitations imposed on investments under this section, of lawfully derived capital in a start-up entity that is a purchase from such entity of its equity, convertible debt, or other security convertible into its equity commonly used in financing transactions within such entity's industry. Such an investment shall not include an investment, directly or indirectly, from the entrepreneur; the parents, spouse, brother, sister, son, or daughter of such entrepreneur; or any corporation, limited liability company, partnership, or other entity in which such entrepreneur or the parents, spouse, brother, sister, son, or daughter of such entrepreneur directly or indirectly has any ownership interest.

(5) *Qualified investor* means an individual who is a U.S. citizen or lawful permanent resident of the United States, or an organization that is located in the United States and operates through a legal entity organized under the laws of the United States or any

state, that is majority owned and controlled, directly and indirectly, by U.S. citizens or lawful permanent residents of the United States, provided such individual or organization regularly makes substantial investments in start-up entities that subsequently exhibit substantial growth in terms of revenue generation or job creation. The term ''qualified investor'' shall not include an individual or organization that has been permanently or temporarily enjoined from participating in the offer or sale of a security or in the provision of services as an investment adviser, broker, dealer, municipal securities dealer, government securities broker, government securities dealer, bank, transfer agent or credit rating agency, barred from association with any entity involved in the offer or sale of securities or provision of such services, or otherwise found to have participated in the offer or sale of securities or provision of such services in violation of law. For purposes of this section, such an individual or organization may be considered a qualified investor if, during the preceding 5 years:

(i) The individual or organization made investments in start-up entities in exchange for equity, convertible debt, or other security convertible into equity commonly used in financing transactions within their respective industries comprising a total in such 5-year period of no less than $633,952; and

(ii) Subsequent to such investment by such individual or organization, at least 2 such entities each created at least 5 qualified jobs or generated at least $528,293 in revenue with average annualized revenue growth of at least 20 percent.

(6) *Qualified job* means full-time employment located in the United States that has been filled for at least 1 year by one or more qualifying employees.

(7) *Qualifying employee* means a U.S. citizen, a lawful permanent resident, or other immigrant lawfully authorized to be employed in the United States, who is not an entrepreneur of the relevant start-up entity or the parent, spouse, brother, sister, son, or daughter of such an entrepreneur. This definition shall not include independent contractors.

(8) *Full-time employment* means paid employment in a position that requires a minimum of 35 working hours per week. This definition does not include combinations of part-time positions even if, when combined, such positions meet the hourly requirement per week.

(9) *U.S. business entity* means any corporation, limited liability company, partnership, or other entity that is organized under federal law or the laws of any state, and that conducts business in the United States, that is not an investment vehicle primarily engaged in the offer, purchase, sale or trading of securities, futures contracts, derivatives or similar instruments.

(10) *Material change* means any change in facts that could reasonably affect the outcome of the determination whether the entrepreneur provides, or continues to provide, a significant public benefit to the United States. Such changes include, but are not limited to, the following: Any criminal charge, conviction, plea of no contest, or other judicial determination in a criminal case concerning the entrepreneur or start-up entity; any complaint, settlement, judgment, or other judicial or administrative determination concerning the entrepreneur or start-up entity in a legal or administrative proceeding brought by a government entity; any settlement, judgment, or other legal determination concerning the entrepreneur or start-up entity in a legal proceeding brought by a private individual or organization other than proceedings primarily involving claims for damages not exceeding 10 percent of the current assets of the entrepreneur or start-up entity; a sale or other disposition of all or substantially all of the start-up entity's assets; the liquidation, dissolution or cessation of operations of the start-up entity; the voluntary or involuntary filing of a bankruptcy petition by or against the start-up entity; a significant change with respect to ownership and control of the start-up entity; and a cessation of the entrepreneur's qualifying ownership interest in the start-up entity or the entrepreneur's central and active role in the operations of that entity.

(b) *Initial parole*—(1) *Filing of initial parole request form.* An alien seeking an initial grant of parole as an entrepreneur of a start-up entity must file

Form I–941, Application for Entrepreneur Parole, with USCIS, with the required fee, and supporting documentary evidence in accordance with this section and the form instructions, demonstrating eligibility as provided in paragraph (b)(2) of this section.

(2) *Criteria for consideration*—(i) *In general.* An alien may be considered for parole under this section if the alien demonstrates that a grant of parole will provide a significant public benefit to the United States based on his or her role as an entrepreneur of a start-up entity.

(ii) *General criteria.* An alien may meet the standard described in paragraph (b)(2)(i) of this section by providing a detailed description, along with supporting evidence:

(A) Demonstrating that the alien is an entrepreneur as defined in paragraph (a)(1) of this section and that his or her entity is a start-up entity as defined in paragraph (a)(2) of this section; and

(B) Establishing that the alien's entity has:

(*1*) Received, within 18 months immediately preceding the filing of an application for initial parole, a qualified investment amount of at least $264,147 from one or more qualified investors; or

(*2*) Received, within 18 months immediately preceding the filing of an application for initial parole, an amount of at least $105,659 through one or more qualified government awards or grants.

(iii) *Alternative criteria.* An alien who satisfies the criteria in paragraph (b)(2)(ii)(A) of this section and partially meets one or both of the criteria in paragraph (b)(2)(ii)(B) of this section may alternatively meet the standard described in paragraph (b)(2)(i) of this section by providing other reliable and compelling evidence of the start-up entity's substantial potential for rapid growth and job creation.

(c) *Additional periods of parole*—(1) *Filing of re-parole request form.* Before expiration of the initial period of parole, an entrepreneur parolee may request an additional period of parole based on the same start-up entity that formed the basis for his or her initial period of parole granted under this section. To request such parole, an entrepreneur parolee must timely file Form I–941, Application for Entrepreneur Parole, with USCIS, with the required fee and supporting documentation in accordance with the form instructions, demonstrating eligibility as provided in paragraph (c)(2) of this section.

(2) *Criteria for consideration*—(i) *In general.* An alien may be considered for re-parole under this section if the alien demonstrates that a grant of parole will continue to provide a significant public benefit to the United States based on his or her role as an entrepreneur of a start-up entity.

(ii) *General criteria.* An alien may meet the standard described in paragraph (c)(2)(i) of this section by providing a detailed description, along with supporting evidence:

(A) Demonstrating that the alien continues to be an entrepreneur as defined in paragraph (a)(1) of this section and that his or her entity continues to be a start-up entity as defined in paragraph (a)(2) of this section; and

(B) Establishing that the alien's entity has:

(*1*) Received at least $528,293 in qualifying investments, qualified government grants or awards, or a combination of such funding, during the initial parole period;

(*2*) Created at least 5 qualified jobs with the start-up entity during the initial parole period; or

(*3*) Reached at least $528,293 in annual revenue in the United States and averaged 20 percent in annual revenue growth during the initial parole period.

(iii) *Alternative criteria.* An alien who satisfies the criteria in paragraph (c)(2)(ii)(A) of this section and partially meets one or more of the criteria in paragraph (c)(2)(ii)(B) of this section may alternatively meet the standard described in paragraph (c)(2)(i) of this section by providing other reliable and compelling evidence of the start-up entity's substantial potential for rapid growth and job creation.

(d) *Discretionary authority; decision; appeals and motions to reopen*—(1) *Discretionary authority.* DHS may grant parole under this section in its sole discretion on a case-by-case basis if the Department determines, based on the totality of the evidence, that an applicant's presence in the United States

will provide a significant public benefit and that he or she otherwise merits a favorable exercise of discretion. In determining whether an alien's presence in the United States will provide a significant public benefit and whether the alien warrants a favorable exercise of discretion, USCIS will consider and weigh all evidence, including any derogatory evidence or information, such as but not limited to, evidence of criminal activity or national security concerns.

(2) *Initial parole.* DHS may grant an initial period of parole based on the start-up entity listed in the request for parole for a period of up to 30 months from the date the individual is initially paroled into the United States. Approval by USCIS of such a request must be obtained before the alien may appear at a port of entry to be granted parole, in lieu of admission.

(3) *Re-parole.* DHS may re-parole an entrepreneur for one additional period of up to 30 months from the date of the expiration of the initial parole period. If the entrepreneur is in the United States at the time that USCIS approves the request for re-parole, such approval shall be considered a grant of re-parole. If the alien is outside the United States at the time that USCIS approves the request for re-parole, the alien must appear at a port of entry to be granted parole, in lieu of admission.

(4) *Appeals and motions to reopen.* There is no appeal from a denial of parole under this section. USCIS will not consider a motion to reopen or reconsider a denial of parole under this section. On its own motion, USCIS may reopen or reconsider a decision to deny the Application for Entrepreneur Parole (Form I–941), in accordance with 8 CFR 103.5(a)(5).

(e) *Collection of biometric information.* An alien seeking an initial grant of parole or re-parole before October 2, 2020 will be required to submit biometric information. An alien seeking an initial grant of parole or re-parole may be required to submit biometric information.

(f) *Limitations.* No more than three entrepreneurs may be granted parole under this section based on the same start-up entity. An alien shall not receive more than one initial grant of entrepreneur parole or more than one additional grant of entrepreneur re-parole based on the same start-up entity, for a maximum period of parole of five years.

(g) *Employment authorization.* An entrepreneur who is paroled into the United States pursuant to this section is authorized for employment with the start-up entity incident to the conditions of his or her parole.

(h) *Spouse and children.* (1) The entrepreneur's spouse and children who are seeking parole as derivatives of such entrepreneur must individually file Form I–131, Application for Travel Document. Such application must also include evidence that the derivative has a qualifying relationship to the entrepreneur and otherwise merits a grant of parole in the exercise of discretion. Such spouse or child will be required to appear for collection of biometrics in accordance with the form instructions or upon request.

(2) The spouse and children of an entrepreneur granted parole under this section may be granted parole under this section for no longer than the period of parole granted to such entrepreneur.

(3) The spouse of the entrepreneur parolee, after being paroled into the United States, may be eligible for employment authorization on the basis of parole under this section. To request employment authorization, an eligible spouse paroled into the United States must file an Application for Employment Authorization (Form I–765), in accordance with 8 CFR 274a.13 and form instructions. An Application for Employment Authorization must be accompanied by documentary evidence establishing eligibility, including evidence of the spousal relationship.

(4) Notwithstanding 8 CFR 274a.12(c)(11), a child of the entrepreneur parolee may not be authorized for and may not accept employment on the basis of parole under this section.

(i) *Conditions on parole.* As a condition of parole under this section, a parolee must maintain household income that is greater than 400 percent of the federal poverty line for his or her household size as defined by the Department of Health and Human Services. USCIS may impose other such

reasonable conditions in its sole discretion with respect to any alien approved for parole under this section, and it may request verification of the parolee's compliance with any such condition at any time. Violation of any condition of parole may lead to termination of the parole in accordance with paragraph (k) of this section or denial of re-parole.

(j) *Reporting of material changes.* An alien granted parole under this section must immediately report any material change(s) to USCIS. If the entrepreneur will continue to be employed by the start-up entity and maintain a qualifying ownership interest in the start-up entity, the entrepreneur must submit a form prescribed by USCIS, with any applicable fee in accordance with the form instructions to notify USCIS of the material change(s). The entrepreneur parolee must immediately notify USCIS in writing if he or she will no longer be employed by the start-up entity or ceases to possess a qualifying ownership stake in the start-up entity.

(k) *Termination of parole*—(1) *In general.* DHS, in its discretion, may terminate parole granted under this section at any time and without prior notice or opportunity to respond if it determines that the alien's continued parole in the United States no longer provides a significant public benefit. Alternatively, DHS, in its discretion, may provide the alien notice and an opportunity to respond prior to terminating the alien's parole under this section.

(2) *Automatic termination.* Parole granted under this section will be automatically terminated without notice upon the expiration of the time for which parole was authorized, unless the alien timely files a non-frivolous application for re-parole. Parole granted under this section may be automatically terminated when USCIS receives written notice from the entrepreneur parolee that he or she will no longer be employed by the start-up entity or ceases to possess a qualifying ownership stake in the start-up entity in accordance with paragraph (j) of this section. Additionally, parole of the spouse or child of the entrepreneur will be automatically terminated without notice if the parole of the entrepreneur has been terminated. If parole is terminated, any employment authorization based on that parole is automatically revoked.

(3) *Termination on notice.* USCIS may terminate on notice or provide the entrepreneur or his or her spouse or children, as applicable, written notice of its intent to terminate parole if USCIS believes that:

(i) The facts or information contained in the request for parole were not true and accurate;

(ii) The alien failed to timely file or otherwise comply with the material change reporting requirements in this section;

(iii) The entrepreneur parolee is no longer employed in a central and active role by the start-up entity or ceases to possess a qualifying ownership stake in the start-up entity;

(iv) The alien otherwise violated the terms and conditions of parole; or

(v) Parole was erroneously granted.

(4) *Notice and decision.* A notice of intent to terminate issued under this paragraph should generally identify the grounds for termination of the parole and provide a period of up to 30 days for the alien's written rebuttal. The alien may submit additional evidence in support of his or her rebuttal, when applicable, and USCIS will consider all relevant evidence presented in deciding whether to terminate the alien's parole. Failure to timely respond to a notice of intent to terminate will result in termination of the parole. When a charging document is served on the alien, the charging document will constitute written notice of termination of parole (if parole has not already been terminated), unless otherwise specified. Any further immigration and removal actions will be conducted in accordance with the Act and this chapter. The decision to terminate parole may not be appealed. USCIS will not consider a motion to reopen or reconsider a decision to terminate parole under this section. On its own motion, USCIS may reopen or reconsider a decision to terminate.

(l) *Increase of investment and revenue amount requirements.* The investment and revenue amounts in this section will be automatically adjusted every 3 years by the Consumer Price Index and posted on the USCIS Web site at

www.uscis.gov. Investment and revenue amounts adjusted under this paragraph will apply to all applications filed on or after the beginning of the fiscal year for which the adjustment is made.

[82 FR 5286, Jan. 17, 2017, as amended at 85 FR 46923, Aug. 3, 2020; 86 FR 50841, Sept. 13, 2021]

§ 212.20 Applicability of public charge inadmissibility.

8 CFR 212.20 through 212.23 address the public charge ground of inadmissibility under section 212(a)(4) of the Act. Unless the alien requesting the immigration benefit or classification has been exempted from section 212(a)(4) of the Act as listed in § 212.23(a), the provisions of §§ 212.20 through 212.23 of this part apply to an applicant for admission or adjustment of status to that of a lawful permanent resident.

[87 FR 55636, Sept. 9, 2022]

§ 212.21 Definitions.

For the purposes of §§ 212.20 through 212.23, the following definitions apply:

(a) *Likely at any time to become a public charge* means likely at any time to become primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or long-term institutionalization at government expense.

(b) *Public cash assistance for income maintenance* means:

(1) Supplemental Security Income (SSI), 42 U.S.C. 1381 *et seq.;*

(2) Cash assistance for income maintenance under the Temporary Assistance for Needy Families (TANF) program, 42 U.S.C. 601 *et seq.;* or

(3) State, Tribal, territorial, or local cash benefit programs for income maintenance (often called ''General Assistance'' in the State context, but which also exist under other names).

(c) *Long-term institutionalization at government expense* means government assistance for long-term institutionalization (in the case of Medicaid, limited to institutional services under section 1905(a) of the Social Security Act) received by a beneficiary, including in a nursing facility or mental health institution. Long-term institutionalization does not include imprisonment for conviction of a crime or institutionalization for short periods for rehabilitation purposes.

(d) *Receipt (of public benefits).* An individual's receipt of public benefits occurs when a public benefit-granting agency provides either public cash assistance for income maintenance or long-term institutionalization at government expense to the individual, where the individual is listed as a beneficiary of such benefits. An individual's application for a public benefit on their own behalf or on behalf of another does not constitute receipt of public benefits by such individual. Approval for future receipt of a public benefit that an individual applied for on their own behalf or on behalf of another does not constitute receipt of public benefits by such an individual. An individual's receipt of public benefits solely on behalf of a third party (including a member of the alien's household as defined in paragraph (f) of this section) does not constitute receipt of public benefits by such individual. The receipt of public benefits solely by a third party (including a member of the alien's household as defined in paragraph (f) of this section), even if an individual assists with the application process, does not constitute receipt for such individual.

(e) *Government* means any Federal, State, Tribal, territorial, or local government entity or entities of the United States.

(f) *Household:* The alien's household includes:

(1) The alien;

(2) The alien's spouse, if physically residing with the alien;

(3) If physically residing with the alien, the alien's parents, the alien's unmarried siblings under 21 years of age, and the alien's children as defined in section 101(b)(1) of the Act;

(4) Any other individuals (including a spouse or child as defined in section 101(b)(1) of the Act not physically residing with the alien) who are listed as dependents on the alien's federal income tax return; and

(5) Any other individual(s) who lists the alien as a dependent on their federal income tax return.

[87 FR 55636, Sept. 9, 2022]

§ 212.22 Public charge inadmissibility determination.

(a) *Factors to consider*—(1) *Consideration of minimum factors:* For purposes of a public charge inadmissibility determination, DHS will consider the alien's:

(i) Age;

(ii) Health, as evidenced by a report of an immigration medical examination performed by a civil surgeon or panel physician where such examination is required (to which DHS will generally defer absent evidence that such report is incomplete);

(iii) Family status, as evidenced by the alien's household size, based on the definition of household in § 212.21(f);

(iv) Assets, resources, and financial status, as evidenced by the alien's household's income, assets, and liabilities (excluding any income from public benefits listed in § 212.21(b) and income or assets from illegal activities or sources such as proceeds from illegal gambling or drug sales); and

(v) Education and skills, as evidenced by the alien's degrees, certifications, licenses, skills obtained through work experience or educational programs, and educational certificates.

(2) *Consideration of affidavit of support.* DHS will favorably consider an Affidavit of Support Under Section 213A of the INA, when required under section 212(a)(4)(C) or (D) of the Act, that meets the requirements of section 213A of the Act and 8 CFR part 213a, in making a public charge inadmissibility determination.

(3) *Consideration of current and/or past receipt of public benefits:* DHS will consider the alien's current and/or past receipt of public cash assistance for income maintenance or long-term institutionalization at government expense (consistent with § 212.21(c)). DHS will consider such receipt in the totality of the circumstances, along with the other factors. DHS will consider the amount and duration of receipt, as well as how recently the alien received the benefits, and for long-term institutionalization at government expense, evidence submitted by the alien that the alien's institutionalization violates federal law, including the Americans with Disabilities Act or the Rehabilitation Act. However, current and/or past receipt of these benefits will not alone be a sufficient basis to determine whether the alien is likely at any time to become a public charge. DHS will not consider receipt of, or certification or approval for future receipt of, public benefits not referenced in § 212.21(b) and (c)), such as Supplemental Nutrition Assistance Program (SNAP) or other nutrition programs, Children's Health Insurance Program (CHIP), Medicaid (other than for long-term use of institutional services under section 1905(a) of the Social Security Act), housing benefits, any benefits related to immunizations or testing for communicable diseases, or other supplemental or special-purpose benefits.

(4) *Disability alone not sufficient.* A finding that an alien has a disability, as defined by Section 504 of the Rehabilitation Act, will not alone be a sufficient basis to determine whether the alien is likely at any time to become a public charge.

(b) *Totality of the circumstances.* The determination of an alien's likelihood of becoming a public charge at any time in the future must be based on the totality of the alien's circumstances. No one factor outlined in paragraph (a) of this section, other than the lack of a sufficient Affidavit of Support Under Section 213A of the INA, if required, should be the sole criterion for determining if an alien is likely to become a public charge. DHS may periodically issue guidance to adjudicators to inform the totality of the circumstances assessment. Such guidance will consider how these factors affect the likelihood that the alien will become a public charge at any time based on an empirical analysis of the best-available data as appropriate.

(c) *Denial Decision.* Every written denial decision issued by USCIS based on the totality of the circumstances set forth in paragraph (b) of this section will reflect consideration of each of the factors outlined in paragraph (a) of this section and specifically articulate the reasons for the officer's determination.

(d) *Receipt of public benefits while an alien is in an immigration category exempt from public charge inadmissibility.* In an adjudication for an immigration benefit for which the public charge ground of inadmissibility applies, DHS

will not consider any public benefits received by an alien during periods in which the alien was present in the United States in an immigration category that is exempt from the public charge ground of inadmissibility, as set forth in § 212.23(a), or for which the alien received a waiver of public charge inadmissibility, as set forth in § 212.23(c).

(e) *Receipt of benefits available to refugees.* DHS will not consider any public benefits that were received by an alien who, while not a refugee admitted under section 207 of the Act, is eligible for resettlement assistance, entitlement programs, and other benefits available to refugees admitted under section 207 of the Act, including services described under section 412(d)(2) of the Act provided to an unaccompanied alien child as defined under 6 U.S.C. 279(g)(2).

[87 FR 55636, Sept. 9, 2022]

§ 212.23 Exemptions and waivers for public charge ground of inadmissibility.

(a) *Exemptions.* The public charge ground of inadmissibility under section 212(a)(4) of the Act does not apply, based on statutory or regulatory authority, to the following categories of aliens:

(1) Refugees at the time of admission under section 207 of the Act and at the time of adjustment of status to lawful permanent resident under section 209 of the Act;

(2) Asylees at the time of grant under section 208 of the Act and at the time of adjustment of status to lawful permanent resident under section 209 of the Act;

(3) Amerasian immigrants at the time of application for admission as described in sections 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1988, Public Law 100–202, 101 Stat. 1329–183, section 101(e) (Dec. 22, 1987), as amended, 8 U.S.C. 1101 note;

(4) Afghan and Iraqi Interpreters, or Afghan or Iraqi nationals employed by or on behalf of the U.S. Government as described in section 1059(a)(2) of the National Defense Authorization Act for Fiscal Year 2006 Public Law 109–163 (Jan. 6, 2006), as amended, and section 602(b) of the Afghan Allies Protection Act of 2009, Public Law 111–8, title VI (Mar. 11, 2009), as amended, 8 U.S.C. 1101 note, and section 1244(g) of the National Defense Authorization Act for Fiscal Year 2008, as amended, Public Law 110–181 (Jan. 28, 2008);

(5) Cuban and Haitian entrants applying for adjustment of status under section 202 of the Immigration Reform and Control Act of 1986 (IRCA), Public Law 99–603, 100 Stat. 3359 (Nov. 6, 1986), as amended, 8 U.S.C. 1255a note;

(6) Aliens applying for adjustment of status under the Cuban Adjustment Act, Public Law 89–732 (Nov. 2, 1966), as amended, 8 U.S.C. 1255 note;

(7) Nicaraguans and other Central Americans applying for adjustment of status under section 202(a) and section 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA), Public Law 105–100, 111 Stat. 2193 (Nov. 19, 1997), as amended, 8 U.S.C. 1255 note;

(8) Haitians applying for adjustment of status under section 902 of the Haitian Refugee Immigration Fairness Act of 1998, Public Law 105–277, 112 Stat. 2681 (Oct. 21, 1998), as amended, 8 U.S.C. 1255 note;

(9) Lautenberg parolees as described in section 599E of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1990, Public Law 101–167, 103 Stat. 1195, title V (Nov. 21, 1989), as amended, 8 U.S.C. 1255 note;

(10) Special immigrant juveniles as described in section 245(h) of the Act;

(11) Aliens who entered the United States prior to January 1, 1972, and who meet the other conditions for being granted lawful permanent residence under section 249 of the Act and 8 CFR part 249 (Registry);

(12) Aliens applying for or reregistering for Temporary Protected Status as described in section 244 of the Act in accordance with section 244(c)(2)(A)(ii) of the Act and 8 CFR 244.3(a);

(13) Nonimmigrants described in section 101(a)(15)(A)(i) and (ii) of the Act (Ambassador, Public Minister, Career Diplomat or Consular Officer, or Immediate Family or Other Foreign Government Official or Employee, or Immediate Family), in accordance with section 102 of the Act and 22 CFR 41.21(d);

(14) Nonimmigrants classifiable as C–2 (alien in transit to U.N. Headquarters) or C–3 (foreign government official), 22 CFR 41.21(d);

(15) Nonimmigrants described in section 101(a)(15)(G)(i), (ii), (iii), and (iv), of the Act (Principal Resident Representative of Recognized Foreign Government to International Organization, and related categories), in accordance with section 102 of the Act and 22 CFR 41.21(d);

(16) Nonimmigrants classifiable as NATO–1, NATO–2, NATO–3, NATO–4 (NATO representatives), and NATO–6 in accordance with 22 CFR 41.21(d);

(17) Applicants for nonimmigrant status under section 101(a)(15)(T) of the Act, in accordance with § 212.16(b);

(18) Except as provided in paragraph (b) of this section, individuals who are seeking an immigration benefit for which admissibility is required, including but not limited to adjustment of status under section 245(a) of the Act and section 245(l) of the Act and who:

(i) Have a pending application that sets forth a prima facie case for eligibility for nonimmigrant status under section 101(a)(15)(T) of the Act, or

(ii) Have been granted nonimmigrant status under section 101(a)(15)(T) of the Act, provided that the individual is in valid T nonimmigrant status at the time the benefit request is properly filed with USCIS and at the time the benefit request is adjudicated;

(19) Except as provided in paragraph (b) of this section:

(i) Petitioners for nonimmigrant status under section 101(a)(15)(U) of the Act, in accordance with section 212(a)(4)(E)(ii) of the Act; or

(ii) Individuals who are granted nonimmigrant status under section 101(a)(15)(U) of the Act in accordance with section 212(a)(4)(E)(ii) of the Act, who are seeking an immigration benefit for which admissibility is required, including, but not limited to, adjustment of status under section 245(a) of the Act, provided that the individuals are in valid U nonimmigrant status at the time the benefit request is properly filed with USCIS and at the time the benefit request is adjudicated;

(20) Except as provided in paragraph (b) of this section, any aliens who are VAWA self-petitioners under section 212(a)(4)(E)(i) of the Act;

(21) Except as provided in paragraph (b) of this section, qualified aliens described in section 431(c) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 8 U.S.C. 1641(c), under section 212(a)(4)(E)(iii) of the Act;

(22) Applicants adjusting status who qualify for a benefit under section 1703 of the National Defense Authorization Act, Public Law 108–136, 117 Stat. 1392 (Nov. 24, 2003), 8 U.S.C. 1151 note (posthumous benefits to surviving spouses, children, and parents);

(23) American Indians born in Canada determined to fall under section 289 of the Act;

(24) Texas Band of Kickapoo Indians of the Kickapoo Tribe of Oklahoma, Public Law 97–429 (Jan. 8, 1983);

(25) Nationals of Vietnam, Cambodia, and Laos applying for adjustment of status under section 586 of Public Law 106–429 under 8 CFR 245.21;

(26) Polish and Hungarian Parolees who were paroled into the United States from November 1, 1989 to December 31, 1991, under section 646(b) of the IIRIRA, Public Law 104–208, Div. C, Title VI, Subtitle D (Sept. 30, 1996), 8 U.S.C. 1255 note;

(27) Applicants adjusting status who qualify for a benefit under Section 7611 of the National Defense Authorization Act for Fiscal Year 2020, *Public Law 116–92,* 113 Stat. 1198, 2309 (December 20, 2019) (Liberian Refugee Immigration Fairness), later extended by Section 901 of Division O, Title IX of the Consolidated Appropriations Act, 2021, Public Law 116–260 (December 27, 2020) (Adjustment of Status for Liberian Nationals Extension);

(28) Certain Syrian nationals adjusting status under Public Law 106–378; and

(29) Any other categories of aliens exempt under any other law from the public charge ground of inadmissibility provisions under section 212(a)(4) of the Act.

(b) *Limited Exemption.* Aliens described in paragraphs (a)(18) through (21) of this section must submit an Affidavit of Support Under Section 213A

of the INA if they are applying for adjustment of status based on an employment-based petition that requires such an affidavit of support as described in section 212(a)(4)(D) of the Act.

(c) *Waivers.* A waiver for the public charge ground of inadmissibility may be authorized based on statutory or regulatory authority, for the following categories of aliens:

(1) Applicants for admission as nonimmigrants under 101(a)(15)(S) of the Act;

(2) Nonimmigrants admitted under section 101(a)(15)(S) of the Act applying for adjustment of status under section 245(j) of the Act (witnesses or informants); and

(3) Any other category of aliens who are eligible to receive a waiver of the public charge ground of inadmissibility.

[87 FR 55636, Sept. 9, 2022]

PART 213—ADMISSION OF ALIENS ON GIVING BOND OR CASH DEPOSIT

AUTHORITY: 8 U.S.C. 1103; 1183; 8 CFR part 2.

§ 213.1 Admission under bond or cash deposit.

(a) *Public charge bonds for adjustment of status applicants.* If, in the course of adjudicating an application for adjustment of status to that of a lawful permanent resident, USCIS determines that the alien is inadmissible only under section 212(a)(4) of the Act, and that the application for adjustment of status is otherwise approvable, USCIS may invite the alien to submit a public charge bond as a condition of approval of the adjustment of status application. Subject to the requirements of paragraph (c) of this section and 8 CFR 103.6, USCIS will set the bond amount and provide instructions for the submission of a public charge bond. Public charge bonds may be in the form of a surety bond or an agreement covering cash deposits.

(b) *Public charge bonds requested by consular officers.* USCIS may accept a public charge bond before the issuance of an immigrant visa to the alien upon receipt of a request directly from a United States consular officer or upon presentation by an interested person of a notification from the consular officer requiring such a bond. The consular officer will set the amount of any such bond subject to paragraph (c) of this section and will provide instructions for the submission of a public charge bond. Upon acceptance of such a bond, USCIS will notify the U.S. consular officer who requested the bond, giving the date and place of acceptance and the amount of the bond.

(c) *Form and amount of public charge bonds.* All bonds and agreements covering cash deposits given as a condition of admission or adjustment of status of an alien under section 213 of the Act must be executed on a form designated by USCIS for that purpose and be in the sum set by USCIS under paragraph (a) of this section for adjustment of status applicants or the consular officer under paragraph (b) of this section for immigrant visa applicants but not less than $1,000. USCIS will provide a receipt to the alien or an interested person acting on the alien's behalf on a form designated by USCIS for such purpose. All public charge bonds are subject to the procedures established in 8 CFR 103.6 relating to bond riders, acceptable sureties, cancellation of bonds, and breach of bonds.

[87 FR 55639, Sept. 9, 2022]

PART 213a—AFFIDAVITS OF SUPPORT ON BEHALF OF IMMIGRANTS

Sec.

AUTHORITY: 8 U.S.C. 1183a; 8 CFR part 2.

SOURCE: 62 FR 54352, Oct. 20, 1997, unless otherwise noted.

§ 213a.1 Definitions.

As used in this part, the term:

Domicile means the place where a sponsor has his or her principal residence, as defined in section 101(a)(33) of