

9 FAM 40.301 NOTES

(TL:VISA-207; 09-19-2000)

9 FAM 40.301 N1 Department's INA 212(d)(3)(A) Waiver Authority

(TL:VISA-137; 4-1-96)

The Congress, in enacting INA 212(d)(3)(A), conferred upon the Secretary of State and consular officers the important discretionary function of recommending waivers of nonimmigrant visa ineligibility to the Immigration and Naturalization Service for approval. Consular officers should not hesitate to exercise this authority when the alien is entitled to seek waiver relief and is otherwise qualified for a visa, and when the granting of a waiver is not contrary to U.S. interests. The proper use of this authority should serve to further our immigration policy supporting freedom of travel, exchange of ideas, and humanitarian considerations, while at the same time ensuring, through appropriate screening, that our national welfare and security are being safeguarded.

9 FAM 40.301 N2 Criteria for INA 212(d)(3)(A) Waiver Recommendation

(TL:VISA-207; 09-19-2000)

The following conditions must be met before an INA 212(d)(3)(A) waiver can be recommended or granted:

- (1) The applicant is not ineligible under INA 214(b);
- (2) The applicant is not ineligible under INA 212(a)(3)(A)(i)(I), INA 212(a)(3)(A)(ii), INA 212(a)(3)(A)(iii), INA 212(a)(3)(C), or INA 212(a)(3)(E);
- (3) The applicant is not seeking a waiver of the documentary requirements of INA 212(a)(7)(B), which may only be waived under the provisions of INA 212(d)(4). [See 9 FAM 41.1, 9 FAM 41.2, and 9 FAM 41.3]; and
- (4) The applicant is, otherwise, qualified for the nonimmigrant visa he or she is seeking.

9 FAM 40.301 N3 Factors to Consider When Recommending a Waiver

(TL:VISA-207; 09-19-2000)

a. Consular officers may recommend an INA 212(d)(3)(A) waiver for any nonimmigrant whose case meets the criteria of N2 above [see 9 FAM 40.301 N2 *above*] and whose presence would not be harmful to U.S. interests. *Eligibility for a waiver is not conditioned on having some qualifying family relationship, or the passage of some specified amount of time since the commission of the offense, or any other special statutory threshold requirement.* The law does not require that such action be limited to humanitarian or other exceptional cases. While the exercise of discretion and good judgment is essential, consular officers may recommend waivers for any legitimate purpose such as family visits, medical treatment (whether or not available abroad), business conferences, tourism, etc.

b. *Consular officers should* consider the following factors, among others, when deciding whether to recommend a waiver:

- (1) The recency and seriousness of the activity or condition causing the alien's ineligibility;
- (2) The reasons for the proposed travel to the United States; and
- (3) The positive or negative effect, if any, of the planned travel on U.S. public interests.

9 FAM 40.301 N4 Special Processing for Certain Waivers Requested by U.S. Law Enforcement Agencies

(TL:VISA-137; 4-1-96)

Certain INA 212(d)(3)(A) waivers requested at the initiative of interested U.S. Government agencies for law-enforcement purposes require special handling and should be processed in accordance with the guidance provided in 9 FAM Part IV Appendix A.

9 FAM 40.301 N5 Validity of INA 212(d)(3)(A) Waivers

(TL:VISA-207; 074-30-2000)

Unless otherwise specified, an INA 212(d)(3)(A) waiver is valid for one application for entry into the United States during the period of the waiver validity. The limitation indicated in the waiver order is to be noted immediately below the visa stamp.

9 FAM 40.301 N6 Referral of Waiver Recommendations

9 FAM 40.301 N6.1 When to Submit Applications to INS

(TL:VISA-207; 09-19-2000)

With the exception of those cases described in N6.2 below [see 9 FAM 40.301 N6.2], consular officers may refer INA 212(d)(3)(A) waiver recommendations to the INS office abroad having jurisdiction over the consular post [see 9 FAM Part IV Appendix N, Exhibit I]. Such recommendations may be for a maximum period of one year with multiple applications for admission, except as specified in N6.2 below [see 9 FAM 40.301 N6.2]. A written record of all waiver recommendations must be created. If time is a factor in an individual case, waivers may be recommended and granted orally so long as the consular officer promptly follows up with a written recommendation that includes all of the required information [see 9 FAM 40.301 PN1]. *If the post does not believe that a waiver should be granted the case can not be submitted to the INS. If the applicant wishes to pursue the application, the post must submit the case to the Department for an advisory opinion.*

9 FAM 40.301 N6.2 When To Submit Applications To Department for Review

(TL:VISA-207; 09-19-2000)

a. *Counsular offices must provide all relevant information regarding the alien's case when requesting the Department's determination of whether a waiver should be recommended.* The following categories of cases must be referred to the Department for a determination of whether to recommend a waiver of ineligibility to INS:

(1) Any case in which the *consular officer has doubts as to whether an INA 212(d)(3)(A) waiver recommendation is warranted, but knows or has reason to believe that pertinent information not available at post may be known to the Department*;

(2) Any case, regardless of the ground of ineligibility, in which the alien or the alien's representative (e.g., family member, attorney) requests that a waiver be considered, even if the consular officer believes that the waiver is not warranted.

(3) Any case in which the *Department's security advisory opinion via a "VISAS DONKEY" [see 9 FAM Part IV Appendix C 405.4-1] or "VISAS BEAR" telegram is required [see 9 FAM Part IV Appendix C 405.5]*;

(4) Any case in which the Department has previously declined to recommend, or the Attorney General to grant, an INA 212(d)(3)(A) waiver to an alien;

(5) Any case in which the alien's presence or activities in the United States might become a matter of public interest or of foreign relations significance;

(6) Any case in which the consular officer wishes to recommend a waiver valid for more than one year [also see 9 FAM 40.301 N7 below].

b. Consular officers must provide all relevant information regarding the alien's case when requesting the Department's determination of whether a waiver should be recommended.

9 FAM 40.301 N6.2-1 When Consular Officer Does Not Support the Application

(TL:VISA-207; 09-19-2000)

If, after considering the relevant factors, the consular officer does not support a INA 212(d)(3)(A) waiver, the post MUST NOT submit the case to INS. In such cases, the post must submit the application to the Department since INS's authority to approve a waiver requires a favorable recommendation from either the post or the Department. Since the Department has independent authority to submit waiver recommendations, posts are not precluded from passing such requests to the Department without a recommendation. However, posts are generally in a better position to adjudicate waiver requests since posts have direct access to the applicant and are more familiar with the case than the Department. Therefore, a waiver request transmitted to the Department should contain the post's recommendation and any reason for the post's objection to a waiver

9 FAM 40.301 N6.2-2 When Alien Requests Waiver Action

(TL:VISA-207; 09-19-2000)

a. *If an alien who meets the criteria described in 9 FAM 40.301 N2 above wishes to pursue the INA 212(d)(3)(A) waiver application even though the consular believes it is not warranted, the consular officer must submit the application for the Department's review.*

b. *A consular officer may not refuse an alien's request for the Department's review of the officer's decision that a waiver is not justified. The officer, however, may submit a recommendation to the Department against such waiver along with the reasons for his or her objection to the waiver.*

9 FAM 40.301 N6.2-3 When Requesting Multiple Entry Waivers Valid for More Than One Year

(TL:VISA-207; 09-19-2000)

a. If an alien meets the criteria for a waiver as set forth above, a recommendation may be made for a waiver valid for multiple applications for admission for a period of more than one year, but not to exceed ten years, except as specified in 9 FAM 40.301 N6.3 below. In general, requests for waivers of more than one year must be referred to the Department. However, if an alien has received two or more one-year (or longer) waivers, the post may submit the recommendation for a waiver directly to the relevant INS overseas office without referral to the Department, but only if:

(1) The ineligibility is based on an INA 212(a)(6)(C) finding relating to a misrepresentation made more than ten years ago, or

(2) The ineligibility is based on an INA 212(a)(2) finding relating to convictions for:

(a) A non-violent crime involving moral turpitude which is over ten years old and for which the sentence imposed was one year or less; or

(b) Possession of a small amount of drugs for personal use.

b. In all other cases involving waivers of more than one year, consular officers must submit recommendations to INS through the Department and the senior consular officer at the post must approve the recommendation. Recommendations for multiple entry waivers of more than one year shall be reserved for cases of aliens who travel frequently to the United States. and in which the consular officer believes that the admissions will not be prejudicial to the U.S. interests and will contribute to trade and commerce, including tourism, or serve a compassionate or humanitarian purpose. Consular officers must submit all such recommendations to INS through the Department and the senior consular officer at the post must approve the recommendation.

9 FAM 40.301 N6.3 Aliens Not Eligible for Multiple Entry Waiver Recommendations

(TL:VISA-207; 09-19-2000)

A recommendation for waiver of ineligibility valid for multiple applications for admission is not available to an alien who:

- (1) Has a mental or physical disorder;
- (2) Is a narcotic drug addict or a narcotic trafficker;
- (3) Is afflicted with a communicable disease;

(4) Was convicted for committing a serious crime involving moral turpitude such as arson, assault with a dangerous weapon, housebreaking, incest, rape, or voluntary manslaughter and has not been rehabilitated and integrated into society for at least five years since the date of conviction or release from confinement, whichever is later in time; or

(5) Has engaged in prostitution or has procured or attempted to procure or import prostitutes or has received proceeds of prostitution within 10 years immediately preceding the visa application.

9 FAM 40.301 N6.4 Consistency in Requesting a Waiver

(TL:VISA-207; 09-19-2000)

Consular officers must maintain consistency in their waiver recommendations. If a post has requested a waiver for a particular applicant in the past, the post should do so for future applications, unless there is new derogatory information, a material change in the purpose of their trip, or some other material change in circumstances relevant to the factors to be considered under INA 212(d)(3)(A).

9 FAM 40.301 N7 When Processing Waivers for Government Grantees

(TL:VISA-207; 09-19-2000)

Whenever an alien who is ineligible under INA 212(a) is to be recommended for a leader grant, U.S. Government scholarship, or Department sponsored exchange, all required processing, including a waiver of ineligibility must be completed before the nominee is informed that he and/or she is being considered for such a grant. For this reason the required processing must be completed without the normal visa application or personal interview of the alien. Name checks as required, a security advisory opinion, if required, and the waiver recommendation must be processed through the Department.

9 FAM 40.301 N8 INA 212(d)(3)(A) Waiver of INA 212(a)(1)

(TL:VISA-207; 09-19-2000)

For information regarding an INA 212(d)(3)(A) waiver of a medical ground of ineligibility for an alien proceeding to the United States to undergo medical treatment [see 9 FAM 40.11 PN6].

9 FAM 40.301 N9 Posting of Bonds in Certain Cases

(TL:VISA-207; 09-19-2000)

Whenever the posting of a departure bond is required by INS in connection with INA 212(d)(3)(A) action, the bond is to be posted at the time the alien applies for admission into the United States; consular officers shall not require evidence that the bond has been filed as a condition of visa issuance.

9 FAM 40.301 N10 Name Check Requirements

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See 9 FAM Part IV Appendix C