

9 FAM 40.21(a) Procedural Notes

(TL:VISA-342; 01-08-2002)

9 FAM 40.21(a) PN1 Information Pertaining to Advisory Opinions

9 FAM 40.21(a) PN1.1 Submitting Report

(TL:VISA-342; 01-08-2002)

The consular officer shall submit a complete report to CA/VO/L/A, together with certified copies of the items listed below whenever an advisory opinion is deemed necessary because the case involves a criminal conviction. Post must not use Form OF-221, *Two-Way Action and Response* when requesting advisory opinions of a non-security nature. The post shall also include with the request certified copies of:

- (1) The charges forming the basis of the conviction;
- (2) The provisions of law in full on which such charges were predicated;
- (3) The judgment of the court;
- (4) In cases of expungements, a copy of or the citation to the procedural law setting forth the effect of the expungement; and
- (5) Whenever applicable, the consular officer's determination as to the value of the goods involved in the crime if such information is not part of the record of conviction.

9 FAM 40.21(a) PN1.2 Submitting Translation of Documents

(TL:VISA-129; 11-09-1995)

The post shall submit translations of items (1), (2), and (3) of 9 FAM 40.21(a) PN1.1 together with the consular officer's report under subject tag:

VISAS: ADVISORY OPINIONS: Ineligibility
OTHER THAN SECURITY, CA/VO/L/A.

9 FAM 40.21(a) PN2 Waiver of Ineligibility Under INA 212(h)

9 FAM 40.21(a) PN2.1 Making Waiver Requests Directly to INS

(TL:VISA-129; 11-09-1995)

INA 212(h) waiver applications are submitted directly to the Immigration and Naturalization Service without the Department's favorable recommendation or joint action. To ensure that the original finding of ineligibility is fully in accord with both law and regulations, the consular officer shall carefully review cases of aliens who have been found ineligible under INA 212(a)(2)(A), (B), (D), and (E) who intend to apply for relief under INA 212(h).

9 FAM 40.21(a) PN2.2 Form I-601, Application for Waiver of Grounds of Excludability

(TL:VISA-342; 01-08-2002)

The consular officer shall interview the alien and the alien's spouse or other qualifying relatives, if appropriate, and make every effort to complete the processing of the Form I-601, *Application for Waiver of Grounds of Excludability* at the time of the formal refusal of the visa. The consular officer may also assist the alien in:

- (1) Filling out Form I-601;
- (2) Obtaining other required documents; and
- (3) Ensuring that Form I-601 contains complete and accurate information. [See 9 FAM Part IV, Services for INS.]

9 FAM 40.21(a) PN2.3 Executing Form I-601, Application for Waiver of Ground of Excludability

(TL:VISA-342; 01-08-2002)

The consular officer shall describe briefly the grounds for the visa refusal and cite the pertinent section of the INA (e.g., "convicted of theft of fur coat valued at \$300; INA 212(a)(2)(A)(i).") If the refusal was based on classified information, the consular officer shall indicate on Form I-601, *Application for Waiver of Ground of Excludability* that the classified information will be furnished in a separate document. In cases of convictions involving moral turpitude, it is essential that certified copies of the items listed in 9 FAM 40.21(a) PN1.1(1), (2) and (3), (with translations where necessary), are attached to Form I-601. If the court records are not available, the consular officer shall prepare a statement to that effect as an attachment to Form I-601.

9 FAM 40.21(a) PN2.4 Forwarding Form I-601, Application for Waiver of Ground Excludability to INS

(TL:VISA-342; 01-08-2002)

When sending Form I-601, *Application for Waiver of Ground Excludability* to INS the consular officer shall:

(1) Forward the completed Form I-601 and the prescribed fee (see instructions on form), together with the results of the interview, the required attachments, the unclassified portion of the visa file, and the visa petition (if any), to the appropriate immigration office abroad;

(2) Inform the applicant of the disposition of the waiver request, the date on which Form I-601 was mailed to the immigration office and that office's address; and

(3) Instruct the applicant to address any further inquiries directly to the designated immigration officer. [For the location of immigration offices abroad and their respective areas of responsibility in connection with INA 212(h), see Part IV, Services for INS, Exhibit I.]

9 FAM 40.21(a) PN2.5 INS Notification Regarding Form I-601, Application for Waiver of Ground Excludability

(TL:VISA-342; 01-08-2002)

When a waiver is granted, the INS will so notify the consular office. Upon its receipt, the post shall attach the notification to the Form *DS-230, Application for Immigrant Visa and Alien Registration*.

9 FAM 40.21(a) PN2.6 Validity of Waivers

(TL:VISA-129; 11-09-1995)

INS regulations at 8 CFR 212.7(a)(4) provide that a waiver granted under INA 212(h) shall apply only to those grounds of excludability and to those crimes, events or incidents specified in the application for a waiver. Once granted the waiver shall be valid indefinitely, even if the recipient of the waiver later abandons or otherwise loses lawful permanent resident status. However, a waiver granted to an alien who obtains lawful permanent residence on a conditional basis under INA 216 shall automatically terminate concurrently with the termination of such residence pursuant to the provisions of INA 216. A waiver granted under INA 212(g), (h) or (i) shall apply only to those grounds of excludability and to those crimes, events or incidents specified in the application for a waiver. A new or replacement visa may be issued to an alien who was previously granted such a waiver.

9 FAM 40.21(a) PN2.7 Waiver for Alien Fiance(e)s of Armed Forces Personnel

(TL:VISA-129; 11-09-1995)

When an alien fiance(e) of a member of the Armed Forces has been found ineligible and it appears that the benefits of INA 212(h) might be available once the marriage has taken place, the consular officer shall explain the applicable section to the military officer from whom permission to marry is being sought. The consular officer shall also inform the authorizing officer that INS does not make advance determinations regarding the granting of a waiver.

9 FAM 40.21(a) PN2.8 INS Authority for Issuing Waivers is Discretionary

(TL:VISA-129; 11-09-1995)

The authority exercised by INS under INA 212(h) is discretionary. In cases where an eligible alien insists upon preceding an ineligible relative to the United States, the consular officer shall ask the alien to sign a statement that he or she has been informed that an exercise of INS's discretionary authority cannot be guaranteed. [See § 9 FAM 42.68 N1.3.] Consular officers must not take the initiative in suggesting the separation of a family in order to place the ineligible alien in a position to apply for a waiver of the grounds of excludability.