

## **9 FAM 40.4 NOTES**

*(TL:VISA-654; 08-31-2004)*  
*(Office of Origin: CA/VO/L/R)*

### **9 FAM 40.4 N1 Maintain Confidentiality of Visa Record, Information, or Other Purposes Information**

*(TL:VISA-654; 08-31-2004)*

a. INA 222(f) provides for the confidentiality of visa records. *As used in this context the designation "confidential" does not relate to the security classification of a document but rather to its releasability. The INA 222(f) generally requires that information contained in visa records: "shall be used only for the formulation, amendment, administration, or enforcement of the immigration, nationality, and other laws of the United States."*

Therefore, the focus for determining the releasability of a given document (telegrams, memoranda, reports, and any other documentation relating to an identifiable applicant) from a visa file shall depend on whether its release provides any assistance in the administration or enforcement of U.S. law (whether Federal, State, or local), or whether release of information would breach the confidentiality provision of INA 222(f). These restrictions also apply to direct quotations from information contained in visa records, to the visual inspection of such records, and to the disclosure of information from visa records.

b. Posts shall not release originals of an item in a visa record to a visa applicant nor allow the applicant to inspect the visa records except for civil documents. Furthermore, the INA 222(f) requirement of confidentiality prohibits divulging, even on an oral basis, the verbatim text of cables, memoranda, reports, and other documents bearing on an applicant's case.

### **9 FAM 40.4 N2 Visa Record Make-Up**

*(TL:VISA-654; 08-31-2004)*

For the purposes of INA 222(f), a "record" includes only information or documents pertaining to an individual visa applicant. It does not include material from general instructions, visa manuals or other similar documents which make no reference to individual named applicants. Therefore, a "record" may consist of:

(1) Any document presented by an alien in connection with a visa application and retained by the consular officer at the conclusion of a visa interview;

(2) Any item, which may have a bearing on the alien's visa application, submitted to the post by the alien, by other agencies, or by the Department, such as an advisory opinion; and

(3) Any item generated by the post dealing with the alien's entitlement to visa status or ineligibility including, but not limited to:

- (a) Correspondence with other posts about a visa;
- (b) Correspondence with the applicant;
- (c) Investigative reports;
- (d) *Immigrant visa and nonimmigrant visa refusal worksheets; and*
- (e) The post's requests for advisory opinions from the Department.

## **9 FAM 40.4 N3 Freedom of Information Act (FOIA) and Privacy Act Disclosure**

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

The FOIA (5 U.S.C. 552 et seq.) generally, provides for access by the public to the records maintained by Federal agencies. The Privacy Act (5 U.S.C. 552a et seq.) generally protects the records maintained by Federal agencies on individual U.S. citizens and lawful permanent residents (LPRs) from disclosure, but provides for access to such records by the individual citizen or LPR.

### **9 FAM 40.4 N3.1 Who Can Request Visa Records or Information under FOIA**

*(TL:VISA-654; 08-31-2004)*

U.S. citizens and aliens, resident in the United States or abroad (except fugitives), and corporations or foreign governments can request information under FOIA. Furthermore, the requester is not required to establish a particular need or basis for the request. *Copies of government records may be obtained through FOIA request unless the information requested falls within one or more of FOIA's nine exemptions.*

#### **9 FAM 40.4 N3.1-1 FOIA Exemption from Release of Visa-Related Matters**

*(TL:VISA-654; 08-31-2004)*

*a. The FOIA (5 U.S.C. 552(b)) exempts from its general mandate of disclosure matters which are "specifically exempted from disclosure by statute, provided, that such statute:*

*(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or*

*(B) establishes particular criteria for withholding or refers to particular types of information to be withheld.*

*b. The language of INA 222(f) (8 U.S.C. 1202(f)) provides in part that:*

*"records of the Department of State and diplomatic and consular offices of the United States pertaining to the issuance or refusal of visas or permits to enter the United States shall be considered confidential and shall be used only for the formulation, amendment, administration, or enforcement of the immigration, nationality, and other laws of the United States..."*

*It has been determined, therefore, that visa records and information contained in a visa applicant's file are statutorily exempt from release under the FOIA provisions.*

#### **9 FAM 40.4 N3.1-2 Releasable Visa-Related Information**

*(TL:VISA-30; 01-31-1990)*

Copies of unclassified pages of 9 FAM or unclassified documents containing general information relating to visa procedural instructions are releasable since they are not considered visa records for the purposes of INA 222(f). [See 9 FAM 40.4 N2 above.]

#### **9 FAM 40.4 N3.2 Who May Receive Information and Records under Privacy Act of 1974**

*(TL:VISA-654; 08-31-2004)*

*It has been determined that INA 222(f) is also an exemption to the Privacy Act. Therefore, individuals, such as U.S. citizens and legal permanent residents, who might otherwise be able to obtain government records relating to themselves under the Privacy Act, cannot do so if the records are Department of State visa records covered by INA 222(f), unless the records fall within an exception to INA 222(f).*

#### **9 FAM 40.4 N3.2-1 Releasing Visa Records to Parent(s) of Minor Child**

*(TL:VISA-30; 01-31-1990)*

A U.S. citizen parent, a lawful permanent resident (LPR) parent, or a non-LPR alien parent may request access to his or her minor U.S. citizen or LPR child's records under the provisions of the Privacy Act. If the parents of the minor are divorced, the fact that the requesting parent has not been awarded custody of the child has no bearing on the parent's right of access to the minor's file. Consequently, if the information is releasable to the

minor child, it is also releasable to that child's parent provided the parent presents proof of such relationship.

### **9 FAM 40.4 N3.2-2 Exception to Privacy Act Prohibition Against Disclosure Where Danger to Health or Safety Is Involved**

*(TL:VISA-599; 11-24-2003)*

The Privacy Act gives the Department considerable latitude to release documents or information pertaining to a citizen or a lawful permanent resident (LPR) to a third party in situations where the health or safety of the citizen or LPR would be in jeopardy without the release. Consequently, the Department supports a liberal interpretation with regard to the release of information in such situations.

### **9 FAM 40.4 N4 FOIA and Privacy Act Requests**

*(TL:VISA-654; 08-31-2004)*

a. With the exception of requests mentioned in 9 FAM 40.4 N5.5 below, in any case where a request for release of documents or information contained in a visa applicant's file specifically makes reference to the FOIA or Privacy Act, the consular officer shall advise the requester, *if they wish to pursue the matter, they must* submit the request in writing to:

*Margaret P. Grafeld  
Office of Information Resource Management  
Programs and Services  
A/RPS/IPS, SA-2 Rm 515 22<sup>nd</sup> Street, NW  
Department of State  
Washington, DC 20522-6001*

b. *At the same time, the consular officer shall also inform the requester that visa records are confidential under INA 222(f) and are generally not releasable under FOIA or Privacy Act unless the document was submitted by or sent to the requesting party. Therefore, persons requesting visa information under the FOIA or Privacy Act generally will only be able to obtain documents they have already seen. [See 9 FAM 40.4 N5 below for instructions relating to requests for information from the applicant or the applicant's representative.]*

c. The Information and Privacy Coordinator serves as a control point for disseminating FOIA requests for adjudication by appropriate offices, i.e., CA/VO/L/A for requests relating to visa files.

d. *When the Department receives a FOIA or Privacy Act request relating to visa records, the Department's FOIA/PA office, Office of Information Resources Management Programs and Services (A/RPS/IPS) will task the relevant post(s) (as well as VO, NVC, and KCC, if appropriate) to search their records for responsive documents and to send documents*

*that fit the description to the request, regardless of whether post believes the documents may be protected by INA 222(f) and exempt from release. A/RPS/IPS will then forward the visa records produced by posts to CA/VO/LA, which will review the documents and determine what, if any, documents may be released consistent with INA 222(f) and relevant FOIA and PA exemptions. In general, the Department will only be able to release to the visa applicant or his or her representative those documents that were submitted by or provided by the applicant in the course of processing the visa application.*

## **9 FAM 40.4 N5 Releasing Documents or Information to Visa Applicants**

*(TL:VISA-654; 08-31-2004)*

Posts must reveal information in visa records in communicating with a visa applicant regarding such matters as unfulfilled documentary requirements, reasons for findings of ineligibility, availability of waiver relief, etc. Such release of information in visa records is consistent with the INA 222(f) provision that visa records may be used for the administration of U.S. immigration laws, provided such use is confined to what is operationally necessary to assure the orderly processing of a visa case. *In addition, posts may not disclose information that is classified or law enforcement sensitive/SBU. Posts also may not disclose information obtained from other agencies without the approval of the agency that provided the information.*

### **9 FAM 40.4 N5.1 Refusal to Release Information for Security Grounds**

*(TL:VISA-30; 01-30-1990)*

If an alien was refused a visa for security grounds, the consular officer must confine the statement of the reasons for the refusal to a reference to the law or to the Code of Federal Regulations. In no case shall the post release information of a confidential nature to the interested party.

### **9 FAM 40.4 N5.2 Non-FOIA or Non-Privacy Act Requests from Applicant**

*(TL:VISA-30; 01-31-1990)*

Requests from an applicant or his or her representative for documents or information from the applicant's visa record which do not make reference to the FOIA, nor the Privacy Act, and which do not appear to bear any relation to the current adjudication of a case e.g., visa was already issued, or long since denied, may be honored to the extent provided in 9 FAM 40.4 N5.3 and 9 FAM 40.4 N5.4 below.

## **9 FAM 40.4 N5.3 Documents Releasable to Applicant**

*(TL:VISA-30; 01-31-1990)*

The documents listed below are deemed releasable to an applicant as they constitute the applicant's original source documents. Consequently, returning the following documents to the applicant does not violate the INA 222(f) requirement of confidentiality. These documents include:

(1) Correspondence previously sent to or given to the applicant by the post;

(2) Civil documents presented by the applicant [see 9 FAM 40.4 N5.5 below]; and

(3) Visa applications and any other documents, including sworn statements, submitted by the applicant to the consular officer in the form in which they were submitted, i.e., with any remarks or notations by U.S. Government employees deleted.

## **9 FAM 40.4 N5.4 Only Copies May Be Released**

*(TL-VISA-30; 01-31-1990)*

With the exception of item (2) in 9 FAM 40.4 N5.3 above, the post may release **only copies** (certified or otherwise) of the documents listed in the Note and **must retain the originals in the visa file**.

## **9 FAM 40.4 N5.5 Exceptions for Release of Copies of Civil Documents in Visa Records**

*(TL: VISA-599; 11-24-2003)*

a. The consular officer may honor requests for copies of civil documents, such as birth, death, or divorce certificates submitted by an alien in support of a visa if these requests are made by the alien, or his or her attorney or other representative of record. In addition, except in cases where the requested document generated a finding of ineligibility, for example by being fraudulent, posts may release the original of a civil document retained in a visa file to an interested party.

b. However, before original civil documents may be released, the post shall make a copy of the documents for retention in its files. If the requested documents are not available, as in many cases where immigrant visas have been issued, the post shall indicate in its reply that since the documents were attached to the immigrant visa, copies may be obtained upon application to the DHS district office holding the alien's file.

## **9 FAM 40.4 N5.6 Requests by Person Other than Visa Applicant Where no File Exists or no Information on File**

*(TL:VISA-654; 08-31-2004)*

Generally, the post may inform an inquirer, whether official or nonofficial, that the visa file in question does not contain the document or the information being sought if such is the case. (In these instances, if the case was submitted as a FOIA or Privacy Act request, the post need not refer it to the Department unless the Department, *NVC*, *KCC*, or *some other post* has a file containing this information.)

## **9 FAM 40.4 N6 Releasing Visa Records or Information to Attorneys and Other Representatives of Record**

*(TL:VISA-149; 08-09-1996)*

Prior to any release of information, the consular officer shall immediately inform the Department and request from CA/VO/L/A an advisory opinion if he or she has reason to believe that the information being requested will be used in litigation against the Department or another U.S. agency. Furthermore, in cases where the consular officer has reasonable doubt as to the attorney's claim of representation [see 9 FAM 40.4 N12 below], the consular officer will inform the visa applicant of such a claim and request confirmation of the attorney's legal representation.

## **9 FAM 40.4 N7 Releasing Information to Third Parties during Visa Processing**

### **9 FAM 40.4 N7.1 Other Parties Who May Receive Information**

*(TL:VISA-599; 11-24-2003)*

a. When a post receives a non-FOIA and/or Privacy Act-related request for information on a specific visa case which is currently in process or under review and the request comes from a party other than the applicant or the applicant's attorney or other representative of record, the consular officer must determine whether there is a valid basis for the party's interest in the case. If the interested party can satisfy the consular officer that a legitimate basis exists in the applicant's case or if the applicant has authorized such party to receive information about the case, the consular officer may use information in the alien's visa record in responding to the interested party's inquiries. Readily established kinship to the applicant is an acceptable basis for personal interest in a visa case.

b. Congressional correspondence regarding an alien's visa case also qualifies the inquirer as having a legitimate interest in the case, as long as the Congressional office is clearly representing the interests of the applicant and not those of a party who is adverse to the issuance of a visa to the applicant.

c. If there is a question regarding the qualification of any particular organization that the visa applicant has designated as the representative for the visa case, the consular officer shall submit a request for an advisory opinion to CA/VO/L/A.

### **9 FAM 40.4 N7.2 Withholding Information**

*(TL:VISA-30; 01-31-1990)*

All restrictions imposed on the release of items from visa records to the applicant are applicable to interested "other party" requests. [See 9 FAM 40.4 N5 above.] In addition, the consular officer must use discretion in determining whether to reveal information that might cause embarrassment to the applicant. For example, a consular officer may decide to refer only to INA 212(a) in an INA 212(a)(2)(D) refusal. However, when specific information regarding a case is being declined, the consular officer may suggest that the requester communicate directly with the visa applicant for more specific details.

### **9 FAM 40.4 N7.3 Visa Records Verification**

*(TL:VISA-599; 11-24-2003)*

Pursuant to anti-fraud efforts, the post may try to verify the bona fide nature of documents presented in connection with visa applications or the veracity of statements made by the applicants. Such verification requires of necessity that information and documents from visa records be brought to the attention of the parties from whom verification is sought. This use of documents and information is authorized under INA 222(f) since it promotes the administration and enforcement of U.S. immigration law. The consular officer must limit disclosures to those portions of the visa record that are suspect and to persons who may reasonably be considered to be in position to assist in the verification. The consular officer must assure that **copies rather than originals** are shown to the party from whom verification is requested.



## **9 FAM 40.4 N8 Requests by U.S. Courts, Foreign Courts or Governments for Release of Visa Information**

*(TL:VISA-537; 04-15-2003)*

INA 222(f) allows for discretionary release of information from, or certified copies of, visa records by the Secretary of State:

(1) In cases where a U.S. court or a foreign court certifies that documents from a visa record are necessary in cases pending before the court involving such visa record 222(f)(1) (see 9 FAM 40.4 N8.1 and N8.2.);

(2) Where release would further the administration or enforcement of U.S. law (opening text of INA 222(f)) (see 9 FAM 40.4 N8.3-1 and N8.3-2.); or

(3) With regard to information from a visa lookout database or, if necessary and appropriate, other related visa records, for use by a foreign government on the basis of reciprocity, in preventing, investigating or punishing acts that would constitute a crime in the United States or, pursuant to agreement, to deny visas to persons who would be inadmissible to the United States (INA 222 (f)(2)(A) and (B)). (See 9 FAM 40.4 N8.3-1 and N8.3-3.)

### **9 FAM 40.4 N8.1 U.S. Court Requests**

*(TL:VISA-149; 08-09-1996)*

The consular officer shall refer to CA/VO/L/A by telegram any U.S. court request for copies of documents or information contained in a visa file and simultaneously pouch certified copies of the requested documents. Upon receipt of the certified copies of the documents and/or information requested by the court, the Department will review the material and if deemed appropriate, forward the records to the interested courts.

### **9 FAM 40.4 N8.2 Foreign Court Requests**

*(TL:VISA-532; 03-31-2003)*

a. INA 222(f) is interpreted to provide for the release to foreign courts of information or certified copies of visa records at the discretion of the Secretary of State, provided the court certifies that the information contained in the files is needed. When a post is informed that a foreign court seeks documents or information from a visa applicant's records for use in a case pending before that court, the post shall require that the request be submitted in the form of the judge's certification of such need. The court must also provide information about the nature of the case,

including a brief description of the case and how the requested information will assist the court. The foreign government's ministry of foreign affairs (MFA) shall transmit the court's request to the post by means of a diplomatic note to preserve the principle of inviolability of visa records under relevant international conventions or customary international law.

b. The post shall forward the request to CA/VO/L/A (INFO: L/CA, L/DL; TAGS; KLIB, CVIS) for a decision on the release of the information. If the request for release is approved, the post shall not release original documents from the visa files under any circumstances. Furthermore, information released from visa files that might be used in a foreign court proceeding must be accompanied by a diplomatic note stating the privileges or immunities that would otherwise be accorded such information or records under applicable treaties or customary international law. The Department's authorizing response will provide the language for individual notes.

## **9 FAM 40.4 N8.3 Foreign Government Requests**

### **9 FAM 40.4 N8.3-1 Prior Department Approval Generally Required**

*(TL:VISA-532; 03-31-2003)*

a. **Confidentiality:** With the exceptions noted in N8.3-2 and N8.3-3, below, the consular officer shall obtain express approval from CA/VO/L/A (INFO: CA/FPP and L/CA) for the release of information from visa records to foreign law enforcement or other authorities for investigative or other purposes. Prior to seeking such approval, however, the consular officer shall obtain a written request from the requesting foreign official specifying that the information:

- (1) Will be treated as confidential; and
- (2) Will not be used in a foreign court proceeding unless the court has separately requested the information via diplomatic channels.

b. **Release to further U.S. Government law enforcement:** Upon receipt of a request from foreign law enforcement or authorities other than a foreign court for the release of information from visa records, the consular officer shall first determine whether the release of the requested information would further the administration or enforcement of the INA or other U.S. law, including post's routine anti-fraud program. If it would, the consular officer shall ascertain whether an advisory opinion is required under N8.3-2, below.

c. **Release to prevent, investigate or punish activity considered criminal in United States:** If the release of visa information to a foreign government, not including a foreign court, would not further the administration or enforcement of U.S. law, the consular officer shall

determine whether all three of the following requirements under INA 222(f)(2)(A) for sharing such information with a foreign government are satisfied:

(1) That the foreign government is recognized de jure by the United States;

(2) That the foreign government is identified in the list in 9 FAM 40.4 Exhibit II of governments eligible for visa lookout and related information sharing on the basis of reciprocity for purposes of INA 222(f)(2)(A); and

(3) That the information will be of assistance to the foreign government in preventing, investigating or punishing acts that would constitute a crime in the United States. This would include an investigation by a foreign consular officer or immigration officer, for purposes of determining eligibility for a visa or entry to a foreign country, or whether an alien has engaged in activity that would be criminal under U.S. law.

**Note:** If the consular officer finds that the above requirements are satisfied or is uncertain whether they are satisfied, the consular officer shall ascertain whether an advisory opinion is required under N8.3-3, below.

**9 FAM 40.4 N8.3-2 Release Without Express Authorization from Department in Routine Anti-Fraud Cases**

*(TL:VISA-599; 11-24-2003)*

The Department has approved the release of information or copies of items in a visa file to foreign law enforcement authorities in cases where such release will further the routine anti-fraud program at a Foreign Service post. Release of information from visa records in this context does not require the Department's express approval with the following conditions:

(1) The consular officer must first explain, in writing, to the local authorities that the release is without prejudice to any rights, privileges or immunities that the post or members of the post enjoy under applicable laws or treaties and that the information may be used only for the purpose for which it was requested. The consular officer shall transmit copies of documents released from visa files under a cover letter that states:

"The embassy's and/or consulate's archives and documents are inviolable at any time and wherever they may be. In the circumstances of the present case, the U.S. Government expressly waives the inviolability accorded the attached documents from such archives, but only for the limited purpose of making available to [name of foreign government law enforcement authority] the attached document(s) for (describe the purpose for the release). Further dissemination requires the written consent of the embassy and/or consulate";

(2) The consular officer may release information only pursuant to the express approval of the chief or deputy chief of the consular section;

(3) The consular officer must be satisfied that the information will be used only for purposes that will further the enforcement or administration of U.S. laws;

(4) The consular officer may not surrender original documents to foreign authorities without the Department's authorization;

(5) The consular officer shall not release classified information without the Department's authorization;

(6) The consular officer must seek an advisory opinion from CA/VO/L/A in any case:

(a) In which the officer believes that public disclosure of the release may have a significant negative impact on U.S. foreign policy or relations with another government or otherwise be contrary to the national interest;

(b) Wherein such release involves sensitive bilateral issues, would constitute a clearly unwarranted invasion of personal privacy (whether a U.S. citizen, LPR or foreign national);

(c) Involving a visa record that contains identifying information about a Foreign Service national (FSN) who has participated in an investigation, when the consular officer has reason to believe that disclosure of such identifying information to foreign authorities may subject the FSN to any adverse consequences;

(d) In any case where there is an ongoing U.S. Government law enforcement investigation; or

(e) In any case in which the consular officer is uncertain as to whether release would comply with these guidelines;

(7) The consular officer may release information obtained from the visa record of a person who is a U.S. citizen or permanent resident alien only in conformity with applicable Department's Privacy Act guidelines and regulations, including accounting-of-disclosure provisions. Where the information in question is obtained from nonimmigrant visa (NIV) records, the consular officer may assume that the subject individual is not a U.S. citizen or permanent resident alien, unless the consular officer has knowledge to the contrary. Where the information is obtained from records regarding an issued immigrant visa (IV), however, the consular officer should assume that the subject individual is a U.S. citizen or permanent resident alien, unless the officer has knowledge to the contrary;

(8) The consular officer shall keep the Office of Consular Fraud Prevention (CA/FPP) advised of all fraud matters, including releases of information pursuant to this section.

**9 FAM 40.4 N8.3-3 Release for Preventing, Investigating or Punishing Terrorism or Other Criminal Activity**

*(TL:VISA-599; 11-24-2003)*

a. **Authorization to release records:** Pursuant to INA 222(f)(2)(A), the Department has approved the case-by-case release, on the basis of reciprocity, of information from the CLASS database (Department of State source data only; other agency data may not be released without express Department authorization in an advisory opinion) and, when necessary and appropriate, other records covered by 222(f) that are related to information in the database to authorities of a government recognized de jure by the United States for the purpose of preventing, investigating, or punishing acts, whether in the United States or abroad, that would constitute a crime in the United States, including, but not limited to, terrorism or trafficking in controlled substances, persons, or illicit weapons. Department authorization is not required for the release of information in CLASS for that purpose unless the case involves a situation in which a request for an advisory opinion is necessary under N8.3-3(e).

b. **Privacy Act concerns and third party agency consent:** Any release of records under INA 222(f)(2)(A) is limited by applicable Department Privacy Act guidelines and regulations (see subparagraph f (5), below). A record that originated with an agency other than the Department or DHS may not be released without the consent of the originating agency's headquarters, obtained by the Department through established procedures. Furthermore, any CLASS entry based on information provided by the Department (e.g., in a security advisory opinion or an advisory opinion) or another agency may not be released without verification that the originating agency's headquarters consents to its release. Posts should request authorization in such cases by submitting a request for an advisory opinion to CA/VO/L/A.

c. **Reciprocal release of visa information:** The determination of whether a foreign government is entitled, on the basis of reciprocity, to be provided visa information under INA 222(f)(2) is made by the Department (Office of Visa Services (CA/VO) in consultation with the Office of the Assistant Legal Adviser for Consular Affairs (L/CA)). For purposes of INA 222(f)(2), reciprocity, generally, is established by written agreement, statement of mutual understanding, or exchange of notes. In any case in which the foreign government that would be the recipient of visa information is not included in the list of "Governments Eligible to Receive Visa Information", (see 9 FAM 40.4 Exhibit II), and the particular information would not further post's anti-fraud program (see 9 FAM 40.4 N8.3-2), a post should request an advisory opinion from CA/VO/L/A. The request for advisory opinion should indicate whether the foreign government has either provided visa lookout information to post or has offered to do so.

d. **Release of information from "related" records when "necessary and appropriate.":** For purposes of INA 222(f)(2)(A), consular officers should consider records pertaining to the issuance or refusal of visas to constitute records covered by 222(f) that are "related" to information in the CLASS database. Such records include, but are not limited to, electronic records (such as Consolidated Consular Database (CCD) or Modernized NIV System documents) reflecting visa application, issuance or refusal, or name check data; paper records submitted by a visa applicant or others relative to a visa application or a determination of whether an alien should be ineligible for a visa; and images of such paper records that have been retained by electronic means. Information from such a "related" visa record may not be shared with a foreign government unless the Department (CA/VO/L/A) advises, in response to a request for an advisory opinion, that it is "necessary and appropriate" to release such information.

e. **Instances in which advisory opinions required:** Unless the information is releasable without an advisory opinion under 9 FAM 40.4 N8.3-2, a post must request an advisory opinion from the Department (CA/VO/L/A) in any one of the following situations:

- (1) Where there is a "DPT-00" entry in CLASS for a subject;
- (2) Where a record covered by 222(f) has originated with an agency other than the Department, and that agency has not given its consent to the release of the record to a third party;
- (3) Where an entry in CLASS for a subject is based on information provided by the Department (e.g., in a security advisory opinion or an advisory opinion) or another agency;
- (4) Where the foreign government is not included in the list of "Governments Eligible to Receive Visa Information" in 9 FAM 40.4 Exhibit II;

(5) Where the foreign government requests, or the consular officer recommends the release of, information from visa records other than CLASS;

(6) Where information that would otherwise be releasable under INA 222(f)(2)(A) is classified;

(7) Where the foreign government requests original documents;

(8) Where the officer believes that disclosure of the release of information may have a significant negative impact on U.S. foreign policy or relations with another government or otherwise be contrary to the national interest;

(9) Where the release of information involves sensitive bilateral issues or would constitute a clearly unwarranted invasion of personal privacy (whether a U.S. citizen, LPR or foreign national);

(10) Where there is an ongoing U.S. Government, law enforcement investigation; and

(11) In any case in which the consular officer is uncertain as to whether the release of information would be authorized under INA 222(f)(2)(A).

f. **Conditions for release:** Except as provided in subparagraph (e), above, or 9 FAM 40.4 N8.3-2, the following conditions will apply to the release of information from or copies of visa records related to information in the CLASS database under INA 222(f)(2)(A):

(1) The consular officer may release copies of a visa lookout entry only pursuant to the express approval of the chief or deputy chief of the consular section;

(2) The consular officer has reason to believe that the information will be of assistance to the foreign government in preventing, investigating, or punishing acts that would constitute a crime in the United States, and the post must have received prior written assurances from the other government that any information and copies of documents from the visa records of the post and the Department will be treated as confidential and will not be used in a foreign court proceeding unless the court has separately requested the information via diplomatic channels;

(3) A consular officer's authority to release to a foreign government, on a case-by-case basis, information in the lookout database and, when authorized by the Department, other related visa records is not limited to action taken in response to a request regarding an individual but includes, in appropriate circumstances, the proactive release of information. However, regardless of whether the other government has requested lookout and other related visa information in the particular case, a consular officer may release such information only if the other government has already provided post with written assurances in accordance with subparagraph (2), above;

(4) A consular officer releasing records to a host government under INA 222(f)(2)(A) must explain, in writing, to the other government that the release is without prejudice to any rights, privileges or immunities that the post or members of the post enjoy under applicable laws or treaties and that the information is being provided for the purpose of preventing, investigating, or punishing acts that would constitute a crime in the United States. The consular officer shall transmit copies of documents released from visa files under a cover letter that states: "The embassy's and/or consulate's archives and documents are inviolable at any time and wherever they may be. In the circumstances of the present case, the U.S. Government expressly waives the inviolability accorded the attached document(s) from such archives, but only for the limited purpose of making them available to (name of foreign government agency) for the purpose of preventing investigating, or punishing acts that would constitute a crime in the United States. Further dissemination requires the written consent of the embassy and/or consulate";

(5) The consular officer may release CLASS data or visa information or records regarding a person who is a U.S. citizen or permanent resident alien only in conformity with applicable Department Privacy Act guidelines and regulations, including accounting-of-disclosure provisions. Where the information in question is obtained from nonimmigrant visa (NIV) records, the consular officer may assume that the subject individual is not a U.S. citizen or permanent resident alien, unless the consular officer has knowledge to the contrary. Where the information is obtained from records regarding an issued immigrant visa (IV), however, the consular officer should assume that the subject individual is a U.S. citizen or permanent resident alien, unless the officer has knowledge to the contrary.



## **9 FAM 40.4 N8.4 Abusive Use of Information**

*(TL:VISA-30; 01-31-1990)*

The post must take care to prevent the abusive use of post-supplied information by local authorities, the release of information in violation of U.S. law, or the inadvertent or unauthorized waiver by the U.S. Government of important immunities. Where required, any post's communication seeking Department approval for release of information must:

(1) Describe the nature of the investigation or other purpose of the request;

(2) Explain why the information would further the administration or enforcement of U.S. law; and

(3) Specify that the local authorities understand and will comply with the conditions specified in 9 FAM 40.4 N8.3-1 above.

## **9 FAM 40.4 N8.5 Consular Officer and/or Foreign Service National Testimony for Foreign Law Enforcement Authorities**

*(TL:VISA-654; 08-31-2004)*

Requests for permission to provide testimony to foreign law enforcement authorities by consular officers or Foreign Service nationals must show action for the Bureau of Consular Affairs (CA). *CA/VO/L/A*, *Bureau of Diplomatic Law and Litigation (L/DL)*, and the Office of the Assistant Legal Adviser for Consular Affairs (L/CA) must be listed under the caption line of all cables. When submitting such requests the telegram must:

(1) Provide tags, which will include KFRD, CVIS, CASC, APER, AMGT, and ODIP, as appropriate;

(2) Designate the subject line as "Request for Testimony in Foreign Country"; and

(3) Provide the name of the employee requested to testify including diplomatic title and grade; the foreign office making the request; the expected date of testimony; the purpose of the testimony; the text of the diplomatic note requesting testimony; the post's recommendation; and any comments regarding the case.

## **9 FAM 40.4 N9 Use of Visa Records by Other U.S. Government Agencies and/or Non-U.S. Government Agencies**

### **9 FAM 40.4 N9.1 Visa Records Access**

*(TL:VISA-30; 01-31-1990)*

Access to visa records on an informal basis by duly authorized employees of other U.S. Government agencies is permissible without prior Department approval on a "need-to-know" basis when an agency's use of the information will further the administration and enforcement of U.S. laws. The file may not be removed from the premises and must be reviewed under the supervision of a consular officer. Post shall permanently attach a printed or typewritten statement to the file showing the signature, title, date, and employer of the person reviewing the file and reasons thereof. If it appears that the request does not relate to this objective, the consular officer shall request an advisory opinion from CA/VO/L/A prior to release of the information.

### **9 FAM 40.4 N9.2 Providing Copies of Items in Visa Records to Other Agencies, or for Use in Courts**

*(TL:VISA-599; 11-24-2003)*

If the Bureau of Diplomatic Security (DS), another section of the Department or another U.S. Government agency needs copies of items in a visa record, the requesting agency must submit a memorandum for the post's files identifying the documents and specifying that they are needed in connection with the enforcement or administration of U.S. law. In addition, if original documents are required, the requesting office or agency must explain in its memorandum why an original is required and give assurances that the original will be returned if practicable. The memorandum must also affirm that chain of custody will be maintained, the originals and any copies will be securely stored, and any use or disclosure will be exclusively for U.S. Federal law enforcement purposes. The memorandum shall also identify the office and officer to which custody is being transferred. With one exception originals can only be released pursuant to an advisory opinion request, slugged for action by Consular Affairs Office of Legislation and Advisory Opinion (CA/VO/L/A) and the Office of the Assistant Legal Adviser for Consular Affairs (L/CA). If the request is approved, the consular officer shall retain a certified copy of the document prior to its release. The releasing officer shall also inform the requesting agency's employee of the confidentiality of information contained in visa records. Advisory opinion approval is not required in cases where DS has certified in its memorandum that the reason the original is required is that it is for forensic analysis or

that it is immediately needed as possible evidence with respect to an internal investigation. In such cases approval may be presumed and post shall make a certified copy of the record to be maintained in the file, along with the original DS memorandum, a copy of which is to be forwarded to CA/VO/L/A immediately.

## ***9 FAM 40.4 N10 Department of Homeland Security (DHS) Requests for Visa-Related Information***

### **9 FAM 40.4 N10.1 Pre-Approval Investigation Reports**

*(TL:VISA-654; 08-31-2004)*

a. Investigation reports requested by Department of Homeland Security (DHS) prior to petition approval or discretionary adjustment of status do not pertain to the issuance or refusal of a visa or permit to enter the United States, with the exception of information taken directly from existing files. Since the Department acts as the DHS agent in conducting these investigations, once the investigation reports are forwarded to DHS they become part of the DHS records system. Therefore, with the exception of information taken from visa files as previously noted, pre-approval investigation reports do not receive the confidentiality protection of INA 222(f). As a result, the post shall refer requests for the release of such reports to DHS.

b. Reports, such as fraud reports, which are initiated by consular posts in connection with the processing of a visa application following receipt of an approved petition, generally are protected from release pursuant to INA 222(f). However, there are instances when, pursuant to DHS regulations, it is necessary for DHS to release such reports to the petitioner in order to adequately administer the immigration laws. For example, when DHS wishes to revoke a petition, by regulation, it must inform the petitioner of the evidence upon which it bases the revocation in order that the petitioner be given an opportunity to rebut the adverse evidence. In such instances, CA/VO and DHS have agreed that DHS may release consular reports to the petitioner. Therefore, all such reports shall be prepared keeping in mind the safeguards for protecting classified information and other sensitive matters, such as identities of informants, mentioned in 9 FAM 40.4 N10.2 below. For example, if the sources of adverse information are sensitive, they might be identified in the body of the report as a "highly reliable source" and the name listed in a separate paragraph marked "Not for Release."

## **9 FAM 40.4 N10.2 Protecting Confidentiality of Pre-Approval Reports**

*(TL:VISA-599; 11-24-2003)*

a. Since some pre-approval reports submitted to DHS are not accorded the protection provided by INA 222(f), consular officers must ensure the protection of information that might prejudice U.S. Government interests. Consular officers must draft reports without derogatory characterizations or other language that could create problems if presented to the petitioner. Names and information which may identify sensitive or confidential sources and information from visa files protected by INA 222(f) must be positioned in separate paragraphs which begin with the capitalized heading "NOT FOR RELEASE." If confidential sources can be compromised even with the segregation of certain material in protected paragraphs, the consular officer shall ensure that the entire report will become classified information to preclude release of the document to the petitioner.

b. DHS routinely releases summaries of classified investigation reports that were used to deny a visa petition. Where release of such summaries may compromise a sensitive source, the consular officer shall begin a pre-approval report with the phrase "SUMMARY NOT RELEASABLE; IDENTITY OF CONFIDENTIAL SOURCE AT RISK." If only a portion of the report could compromise the sensitive source, the consular officer shall begin the first paragraph with the phrase "SUMMARY NOT RELEASABLE (**identify paragraphs that should not be summarized**); IDENTITY OF CONFIDENTIAL SOURCE AT RISK." The consular officer shall follow the same procedures for protecting information released from visa records under INA 222(f), and use the phrase "INFORMATION FROM VISA RECORDS" instead of "identity of confidential source at risk."

## **9 FAM 40.4 N10.3 Furnishing Information to DHS for Petition Cases and Other Proceedings**

*(TL:VISA-599; 11-24-2003)*

Information supplied to DHS for use in petition cases and other proceedings is for use against person appearing before DHS. Therefore, extracts from or copies of public records of foreign governments supplied to DHS must be provided in duly authenticated form. Oral statements furnishing credible information must, whenever possible, be reduced to writing and sworn to before a consular officer. An unclassified report to DHS shall in no case contain material that could not be divulged to the alien in the course of a hearing or proceeding. In accordance with the Schedule of Fees in 22 CFR 22.1 Item 38, no charge is to be made for notarial service on documents required by other U.S. Government agencies.

## **9 FAM 40.4 N10.4 Referring Inquiries to DHS**

*(TL:VISA-599; 11-24-2003)*

The post shall refer inquiries about or from individuals who have withdrawn their applications for admission to the United States to the DHS office that prepared Form I-275, Withdrawal of Application/Consular Notification, if the purpose of the inquiry is to challenge the decision of DHS. Forms I-275 are furnished to the consular office where the visa was issued for its information only. Therefore, the post is not required to provide a copy of the form to the person making the inquiry. In addition, consular officers shall not quote from the form or comment on the DHS action.

## **9 FAM 40.4 N11 Release of Tax Information in Visa Files to the Internal Revenue Service (IRS)**

### **9 FAM 40.4 N11.1 Information Relating to U.S. Citizens or Lawful Permanent Resident (LPR) Aliens**

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

Release of information from U.S. tax forms by a consular officer to the IRS where fraud is suspected by the officer falls within the "routine use" exception to the Privacy Act adopted by the Department with reference to all of its systems of files. Therefore, in any case in which a consular officer comes into possession of information that leads the officer to conclude that a violation or potential violation of U.S. tax law may have occurred with respect to any person, the officer may refer the information to the IRS. Information concerning any individual may also be released to the IRS at its request in a specific case when it is asserted that a violation of law or a potential violation of law may have occurred. However, routine searches of consular files by IRS employees would be inappropriate in the absence of the approval of the Department.

### **9 FAM 40.4 N11.2 Record-Keeping Requirement**

*(TL:VISA-149; 08-09-1996)*

In cases involving the release of information to the IRS relating to a U.S. citizen or legal permanent resident alien, the consular officer shall maintain with regard to each disclosure a name-retrievable record of the disclosure, showing the nature of the information disclosed and the date and purpose of disclosure.

## **9 FAM 40.4 N11.3 Requests Relating to Nonresident Alien Files**

*(TL:VISA-30; 01-31-1990)*

Requests for information from tax records pertaining to nonresident aliens may be released to the IRS at that agency's request or upon a consular officer's initiative, provided the consular officer is satisfied that the information contained in the file is to be used in the administration and enforcement of U.S. law.

## **9 FAM 40.4 N12 Working with Attorneys: Establishing Relationships**

*(TL:VISA-654; 08-31-2004)*

When a letter is received from an attorney in the United States and the consular officer is reasonably satisfied that an attorney-client relationship exists, correspondence between the post and the attorney may be treated with the same courtesy as provided to the visa applicant. Reasonable evidence establishing the attorney-client relationship may include:

(1) Form G-28, Notice of Entry of Appearance as Attorney or Representative, required for practicing before DHS;

(2) A printed letterhead stationary showing membership in the legal profession (member of a U.S. State or District of Columbia bar association practicing in the United States) and stating that such an attorney has been retained or employed to represent the applicant; *or*

(3) A letter from the applicant that identifies the attorney or representative with whom the applicant established such relationship.

### **9 FAM 40.4 N12.1 Corresponding with Representative of Record**

*(TL:VISA-30; 01-31-1990)*

The consular officer shall correspond directly with the applicant's representative of record, even in cases where the applicant is physically present in the United States, unless the applicant requests otherwise. However, the fact that there is a representative of record does not preclude the post from corresponding with the applicant, provided the post sends a copy of the communication simultaneously to the applicant's representative. If the representative inquires about the reasons for refusal of a visa, the delay in issuing the visa, or any other aspects of a visa case, the reply shall contain only pertinent facts which are unclassified. [See 9 FAM 40.4 N5.2 above.]

## **9 FAM 40.4 N12.2 Notifying Attorney**

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

The post shall send a notification of the action taken at the time of the final immigrant visa appointment to the applicant's attorney of record on a locally reproduced nonstandard form letter [see 9 FAM 40.4 Exhibit I]. If the immigrant visa is refused, the consular officer shall hand a copy of the refusal letter, and a copy of Form OF-194, The Foreign Service of the United States of America, attached to the form letter to the alien (making sure that the refusal worksheet is retained in the applicant's visa file). In cases where the attorney of record has specifically requested a telegraphic notification and made arrangements for payment, the post shall send the notification in the form of an interested-party cable.

## **9 FAM 40.4 N12.3 Local or U.S.-Licensed Attorneys Practicing Abroad**

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

Consular officers shall extend to a U.S. attorney who has been practicing abroad and is a member of a State bar association or to a local attorney-at-law, the same courtesies in correspondence that are extended to an attorney practicing in the United States, provided the consular officer is satisfied that the required relationship exists.

## **9 FAM 40.4 N12.4 Inquiries Concerning Attorney Representation**

(TL:VISA-30; 01-31-1990)

Consular officers shall **not** advise applicants against employing attorneys nor stamp or type language to that effect on correspondence with visa applicants. However, if an alien makes a specific inquiry regarding the advisability of retaining an attorney, the consular officer shall advise the inquirer that the decision to retain an attorney is one to be made by the concerned party. The consular officer, however, may inform the alien that representation by an attorney is not required to apply for a visa.

## **9 FAM 40.4 N12.4 Inquiries Concerning Attorney Representation**

(TL:VISA-654; 08-31-2004)

*Each post has the discretion to establish its own policies regarding the extent to which attorneys and other representatives may have physical access to the Consulate or attend visa interviews, taking into consideration such factors as a particular consulate's physical layout and any space limitations or special security concerns. Whatever policies are set must be consistent and applied equally to all. For example, either all attorneys at a*

*particular post must be permitted to attend consular interviews or all attorneys must be prohibited from attending interviews.*

## **9 FAM 40.4 N13 Unethical Conduct**

### ***9 FAM 40.4 N13.1 Intermediaries Other than Attorneys and U.S. Agents***

*(TL:VISA-654; 08-31-2004)*

a. All or part of the privileges indicated herein may be denied to any intermediary, *other than an attorney*, who is an alien established abroad or to any category of alien intermediaries (for example, consultants, travel agents, etc.), other than an attorney, who the consular officer has reason to believe has been engaged in unethical or fraudulent conduct during the visa process. The post shall report any such decision to the Department with an explanation. However, documents, which have been requested from visa applicants, may be accepted from an agent since an individual could easily mail the documents to the consular officer as having been submitted by the visa applicant.

### ***9 FAM 40.4 N13.2 Attorneys and Intermediaries Based in the United States***

*(TL:VISA-654; 08-31-2004)*

*In cases where the principal consular officer believes that all or any part of the privileges indicated herein must be denied to any attorney or U.S. based representative because of unethical conduct or for other good reason, the consular officer shall submit a cable slugged for "CA/VO; CA/VO/L/A; CA/VO/FP; CA/FPP." The report shall contain the reasons for denial of privileges and the proposed reply to the attorney or U.S. based representative, for the Department's final determination. In addition, if the individual in question has previously been the subject of a communication from the Department regarding unethical or fraudulent activity, the consular officer shall make reference to such communication.*