9 FAM 40.6 Notes

(TL:VISA-653; 08-31-2004)
(Office of Origin: CA/VO/L/R)

9 FAM 40.6 N1 Ineligibility Findings/Refusal Codes and "Quasi" Ineligibilities/Lookout Codes

(TL:VISA-653; 08-31-2004)

a. Consular officers should only make a formal finding of ineligibility in the context of visa application or revocation of an existing visa. A "hard" refusal code entry should only be placed in CLASS if the consular officer is denying or revoking a visa.

b. If a consular officer obtains derogatory information outside the context of an application or revocation, the consular officer should enter the alien's name in the CLASS lookout system under the appropriate "P" (quasi-ineligibility") code corresponding to the suspected or presumed ineligibility. The alien's eligibility should then be resolved if/when the alien applies for a visa. At that time the alien should generally be confronted with the derogatory information, unless it is classified, law enforcement sensitive, SBU (Sensitive but Unclassified), or other-agency sourced, and given an opportunity to present rebuttal evidence, after which the consular officer can make a definitive determination and, if the alien is found ineligible, definitive ("hard") refusal code entry should be placed in CLASS.

c. A consular officer may not deny or revoke a visa based on a "quasi-ineligibility." If an alien applies for a visa, the alien's eligibility must be definitively resolved.

9 FAM 40.6 N2 Referral of Cases to Department for Advisory Opinions

9 FAM 40.6 N2.1 Requests for Department Guidance

(TL:VISA-653; 08-31-2004)

An advisory opinion is to be submitted in any case where a question exists regarding the interpretation or application of law or regulation.

9 FAM 40.6 N2.2 Deferred Issuance Pending Advisory Opinion Receipt

(TL:VISA-653; 08-31-2004)

If the Department's opinion has been requested, a visa may not be issued until the opinion has been officially rendered *and communicated to the requesting post.*

9 FAM 40.6 N3 Effect of Department of Homeland Security (DHS) Lookout Entries

9 FAM 40.6 N3.1 Effect of Definitive DHS Ineligibility Findings

(TL:VISA-653; 08-31-2004)

DHS findings of ineligibility generally are entered into the **Treasury Enforcement Communication System** (**TECS**), and these entries pass electronically into the Department's **CLASS** lookout system. If the consular officer determines that an alien is identifiable with the subject of a *DHS*-generated lookout entry indicating a definitive determination of inadmissibility, the consular officer may assume that the finding was correct and may refuse the application under the particular INA section indicated by the *DHS* lookout entry, unless the ineligibility is non-permanent and can be overcome through changed circumstances (e.g., medical or public charge ineligibilities) or the entry relates to an ineligibility which only applies at the port of entry and is not a basis for a visa refusal (e.g., *INA 212(a)(7)(A))*. Except in those cases involving non-permanent ineligibilities, the consular officer should not look behind a definitive *DHS* finding or re-adjudicate the alien's eligibility with respect to the provision of inadmissibility described in the *DHS* lookout entry.

9 FAM 40.6 N3.2 Processing Refusals Based on DHS Findings of Ineligibility

(TL:VISA-653; 08-31-2004)

The consular officer should inform the applicant that the refusal was based on a finding of ineligibility made by *DHS*, without referring to the existence of a *DHS* computer lookout on the applicant. If the subject of a definitive *DHS* entry wishes to pursue his/her application, he/she will require a waiver of ineligibility from the *DHS* (if available). If the alien maintains that the *DHS* finding was erroneous, the consular officer should generally advise the applicant to contact *DHS* directly to request reconsideration of the finding of ineligibility and deletion of any lookout. However, the consular officer may choose to contact *DHS* on behalf of the applicant in appropriate cases, such as where important U.S. interests are at stake or where the consular

officer has information that could assist *DHS* in reconsideration of the case.

9 FAM 40.6 N3.3 Overcoming a Refusal Based on an DHS Finding

(TL:VISA-653; 08-31-2004)

If the consular officer refuses an application based on a definitive *DHS* lookout entry and *DHS* subsequently determines that the finding was erroneous and deletes its entry, then the consular officer may process the case to conclusion and should send in a VISAS CLOK cable requesting deletion of any post-originated CLASS entry which may have been made as a result of the *DHS* entry. If, notwithstanding *DHS's* removal of the entry, the consular officer believes that the facts on which the *DHS* entry were based justify a finding of ineligibility, the case should be referred to the Department for an advisory opinion.

9 FAM 40.6 N3.4 Quasi-Refusal Lookout Entries

(TL:VISA-653; 08-31-2004)

If the *DHS* entry is a quasi-refusal **("P")** lookout, the entry has no binding effect, and the consular officer should evaluate the derogatory information that formed the basis for the lookout and should adjudicate the applicant's eligibility. If the consular officer determines that the applicant is not inadmissible, the consular officer should issue the visa and annotate it appropriately to ensure that *DHS* port inspectors will understand that the consular officer was aware of the *DHS* **"P"** lookout and concluded nonetheless that the applicant was eligible. If the consular officer issues a visa over an *DHS* "P" entry, the consular officer should remind the applicant that he or she will be subject to inspection upon arrival in the United States and that *DHS* has the independent authority to deny the alien admission, notwithstanding the alien's valid visa.