9 FAM 40.23 Notes

(TL:VISA-512; 01-22-2003)
(Office of Origin: CA/VO/L/R)

9 FAM 40.23 N1 Scope of INA 212(a)(2)(C)

(TL:VISA-46; 8-26-91)

The Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Public Law 100-204, December 22, 1987, amended the predecessor section to INA 212(a)(2)(C), INA 212(a)(23), by dividing it into subsections (A) and (B). Furthermore, subsection (B), now INA 212(a)(2)(C), added a new clause. The first and original clause addresses ineligibility for trafficking, whereas the second and added clause lists certain activities related to the trafficking of controlled substances which, also, result in ineligibility.

9 FAM 40.23 N1.1 First Clause of Subsection (B); Examples of "Trafficking

(TL:VISA-512; 01-22-2003)

a. The first clause of INA 212(a)(2)(C) has been found to apply in a broad range of cases, including a single purchase of drugs with the intent to resell them, but without the resale actually having occurred. It has also been held that an alien is a trafficker even though the alien receives no personal gain or profit from the transaction if the alien acts knowingly and consciously as a conduit between supplier and customer. The Attorney General has held that a "single act of conscious participation as an "illicit trafficker" *is* within the meaning of INA 212(a)(2)(C).

b. It must be noted that, unlike INA 212(a)(2)(D), the language in the first clause of INA 212(a)(2)(C) makes no mention of "engaging" in any proscribed activities. Therefore, the term "illicit trafficker" does not require that one *has* been "engaged" continuously in illicit trafficking. Rather, it denotes a person whose involvement with narcotic drugs includes trafficking, whether primary or incidental. Since the standard of proof for this provision "reason to believe" is substantially lower than that required for a conviction, it has been held that a consular officer may have reason to believe an alien is a trafficker even though criminal charges against the alien which relate to the facts forming the basis of ineligibility as a trafficker have been dismissed.

9 FAM 40.23 N1.2 Second Clause of INA 212(a)(2)(C)

(TL:VISA-172; 10-30-1997)

a. Public Law 100-204 amended the previous version of INA 212(a)(2)(C) to render ineligible "any alien who the consular officer or immigration officer knows or has reason to believe is or has been a knowing assistor, abettor, conspirator, or colluder with others in the illicit trafficking in any such controlled substances."

b. The primary purpose of this amendment is to render ineligible for visa issuance those aliens who, although not traffickers as defined in 9 FAM 40.23 N1.1, are actively involved in activities supporting the illegal trafficking in controlled substances. These activities include:

(1) Knowingly laundering money for traffickers either directly or by claiming ownership or direction of, or operating for traffickers a front business financed at least in part by drug proceeds;

(2) Knowingly facilitating trafficking by providing airstrips for the movement of drugs or secure premises for drug transactions; or

(3) Knowingly accepting the proceeds of trafficking in return for direct assistance in trafficking activities, especially acceptance of such proceeds by public officials such as police, customs inspectors, immigration officials or judges.

c. Other than cases with significant foreign policy implication or significant public interest, findings of ineligibility in the cases listed in paragraph (b) above shall not require an advisory opinion from the Department. However, in those types of cases listed in paragraph (b) where such foreign policy implication or public interest is apparent and in any case not of the type listed above involving the second clause of INA 212 (a)(2)(C), consular officers shall submit a request for an advisory opinion to the Department (CA/VO/L/A). In cases requiring an advisory opinion, although the names of aliens who appear to fall within the purview of this clause may be entered into CLASS as prospective ineligible aliens, (CLASS Code "P2C") they be entered into CLASS as permanently ineligible under the second clause of INA 212(a)(2)(C) absent a concurring advisory opinion. The advisory opinion request must include a comprehensive report of all the facts in the case, identifying not only how the alien assisted the illegal trafficking of controlled substances, but also that the alien did so knowingly. The consular officer shall evaluate the reliability of available sources of information. Furthermore, the officer shall submit, together with the request for an advisory opinion, copies or verbatim text of other agencies' reports, if any.

9 FAM 40.23 N2 "Reason to believe"

(TL:VISA 46; 8-26-91)

a. Under INA 212(a)(2)(C), if the consular officer has "reason to believe" that the alien is or has been engaged in trafficking, the standard of proof is met and the officer shall make a finding of ineligibility.

b. "Reason to believe" might be established by a conviction, an admission, a long record of arrests with an unexplained failure to prosecute by the local government, or several reliable and corroborative reports. The essence of the standard is that the consular officer must have more than a mere suspicion—there must exist a probability, supported by evidence, that the alien is or has been engaged in trafficking. The consular officer is required to assess independently evidence relating to a finding of ineligibility.

c. The consular officer shall assess all evidence relating to a finding of ineligibility. This evidence might include conclusions of other evaluators. Such conclusions, no matter how trustworthy, cannot alone support a finding of ineligibility.

9 FAM 40.23 N3 Relation to INA 212(a)(2)(A)(i)(I)

(TL:VISA-46; 8-26-91)

Drug control legislation is basically regulatory, and, thus, has not been found to constitute criminal activity involving moral turpitude. Further, while trafficking in large quantities of hard drugs such as heroin might arguably involve moral turpitude, neither the Department, the INS, nor the courts have held it to be so. A finding of ineligibility under INA 212(a)(2)(C) does not support a finding under INA 212(a)(2)(A)(i)(I) as well.

9 FAM 40.23 N4 No Waiver for Immigrant Visa Applicants

(TL:VISA-46; 8-26-91)

The INA, as amended, provides for no immigrant visa waiver under INA 212(h) for persons ineligible under 212(a)(2)(C).