

## 9 FAM 40.82 Notes

(TL:VISA-183; 12-18-1998)

### 9 FAM 40.82 N1 Draft Evaders

#### 9 FAM 40.82 N1.1 Scope of Section

(TL:VISA-183; 12-18-1998)

*The Immigration Act of 1990 (Pub. L. 100-649) amended former INA 212(a)(22) to INA 212(a)(8) and changed the word “persons” to “alien”. Consequently, a U.S. citizen who departed the United States to avoid the draft or who deserted the U.S. Armed Forces and departed would not be ineligible under INA 212(a)(8)(B). The Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (Pub. L. 102-232), however, amended INA 212(a)(8) to again refer to “persons”. **Thus, this section again applies to anyone, including a former U.S. citizen, who is currently applying for a visa (other than a person who left as a nonimmigrant and is seeking to reenter the United States as a nonimmigrant)***

#### 9 FAM 40.82 N1.2 Primary Purpose of Departure From or Remaining Outside United States

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

To invoke ineligibility under INA 212(a)(8)(B), the departure or remaining abroad must have been for the primary purpose of evading or avoiding military service. The consular officer must determine in the light of all the facts and circumstances of the individual case whether an alien departed from or remained outside the United States primarily to evade or avoid military service or whether they did so for some other reason.

### 9 FAM 40.82 N2 War or National Emergency

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

INA 212(a)(8)(B) has application at any time the United States is at war or in a state of national emergency, and a state of national emergency existed from September 24, 1939, to September 24, 1978. Consequently, as indicated in 9 FAM 40.82 N5 below, an alien who departed from or remained outside the United States to evade or avoid military service between September 8, 1939, and September 24, 1978, would be subject to the second clause of INA 212(a)(8)(B).

## **9 FAM 40.82 N3 Status at Time of Departure Determines Applicability**

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

INA 212(a)(8)(B) does not bar the issuance of a nonimmigrant visa to an alien who departed to evade or avoid military service while in the United States as a nonimmigrant. A permanent resident legal alien, however, who departed from or remained outside the United States to evade or avoid military service would be ineligible for both immigrant and nonimmigrant visas.

## **9 FAM 40.82 N4 Conviction Not Necessary for Ineligibility**

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

Under this ground of ineligibility, no conviction for desertion or draft evasion is required. The consular officer need only be satisfied from the evidence that the applicant departed from or remained outside the United States to evade or avoid military service.

## **9 FAM 40.82 N5 Presidential Pardon for Vietnam-era Violators of Selective Service Laws**

### **9 FAM 40.82 N5.1 Vietnam-era Draft Evaders Considered Relieved of Ineligibility Under INA 212(a)(8)(B)**

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

President Carter's general pardon has been interpreted to include alien Vietnam-era violators of the Selective Service laws only. Vietnam-era deserters are not included in the pardon. Accordingly, aliens who departed the United States or remained abroad for the purpose of avoiding induction into service between August 4, 1964, and March 28, 1973, are considered to have been relieved of excludability under the second clause of INA 212(a)(8)(B), and may be issued any type of immigrant or nonimmigrant visa for which they are found eligible, if they have not been convicted for that action.

### **9 FAM 40.82 N5.2 Effect of Pardon on Vietnam-era Deserters**

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

Vietnam-era deserters are not included in the pardon, thus they are subject to a finding of ineligibility under INA 212(a)(8)(B).

## **9 FAM 40.82 N5.3 Aliens Ineligible to Citizenship Not Affected by Pardon**

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

The Presidential pardon provides no relief for an alien found ineligible under the first part of INA 212(a)(8)(B) as an alien who is ineligible for citizenship i.e., a person who was convicted of either desertion from or leaving the country to evade military service. [See INA 314, 9 FAM 40.82 Related Statutory Provisions.] Ineligibility to citizenship because of seeking and obtaining exemption from service on the grounds of alienage is irrelevant in this context.

## **9 FAM 40.82 N6 Effect of Discharge on Deserters**

*(TL:VISA-4; 11-19-87)*

A deserter who subsequently received a discharge may (or may not) have been relieved of such ineligibility, depending on the disposition of the desertion aspect of the case by the appropriate branch of service. Any desertion involving a subsequent discharge must be referred to the Department (CA/VO/L/A) for an advisory opinion.

## **9 FAM 40.82 N7 Obtaining Information from Selective Service System Records**

*(TL:VISA-183; 12-18-1998)*

*See 9 FAM 40.82 Procedural Notes.*