

9 FAM 41.121 Notes

(TL:VISA-185; 02-26-1999)

9 FAM 41.121 N1 Grounds for Refusal

(TL:VISA-185; 02-26-1999)

a. Most refusals of nonimmigrant visas are made under INA 214(b), which requires that every *visa applicant* is presumed to be an immigrant until *he or she* establishes entitlement to nonimmigrant status under INA 101(a)(15) at the time of application for a visa. There is no waiver of this ground of ineligibility, *nor are there any provisions under INA 214(b) for permanent refusals.* The determination that the alien is not a nonimmigrant can be made only on the basis of the facts existing at the time of a specific visa application. The fact that a *visa applicant* was unable to establish nonimmigrant status at one time would not preclude *such applicant* from subsequently qualifying for a visa by showing a change in circumstances.

b. Certain grounds of ineligibility found in INA 212(a) do not apply to nonimmigrants. For example, *nonimmigrants* are exempt from the provisions of INA 212(a)(3)(D); (5)(A), (5)(B), (5)(C), (7)(A), (8)(A) and (10)(A). INA 102 provides broad exemptions for "A" and "G" category aliens, except *domestics and personal employees*, and INA 212(d)(2) exempts the latter from INA 212(a)(28). Upon a basis of reciprocity, INA 212(d)(8) also provides broad exemptions for foreign government officials in transit. These are not in the nature of waivers or other discretionary acts; they provide statutory immunity from ineligibility under the special provisions. INA 212(d)(1) does not provide exemption for INA 212(a)(3)(A), (3)(B), (3)(C), or (7)(B).

c. For aliens found ineligible under non-exempted provisions of INA 212(a), the consular officer has discretionary authority under INA 212(d)(3)(A) to recommend to INS a waiver of the specific ground of ineligibility.

9 FAM 41.121 N2 Refused Applicants Have Reasonable Opportunity to Establish Eligibility

(TL:VISA-2; 8-30-87)

INA 291 places the burden of proof upon the applicant to establish eligibility to receive a visa. However, the applicant is entitled to have full consideration given to any evidence presented to overcome a presumption or finding of ineligibility. It is the policy of the U.S. Government to give the applicant every reasonable opportunity to establish eligibility to receive a visa. This policy is the basis for the review of refusals at consular offices and by

the Department. It is in keeping with the spirit of American justice and fairness. With regard to cases involving classified information, the cooperation accorded the applicant must, of course, be consistent with security considerations, within the reasonable, non-arbitrary, exercise of discretion in the subjective judgments required under INA 214(b) and 221(g).

9 FAM 41.121 N3 Temporary Admission of Ineligible Aliens

(TL:VISA-185; 02-26-1999)

See 9 FAM 40.301.

9 FAM 41.121 N4 Power to Grant or Refuse Visas May Not Be Delegated

(TL:VISA-185; 02-26-1999)

The determination of an alien's classification and eligibility to receive a visa is the statutory responsibility of the consular officer and may not be delegated to any other officer (except as provided in 22 CFR 41.111(b)) or to a member of the clerical staff. See 9 FAM 41.111 N1.

9 FAM 41.121 N5 Applicants Ineligible to Receive Visas

(TL:VISA-185; 02-26-1999)

See 9 FAM 40.11 through 9 FAM 40.208 for ineligible classes—immigrant and nonimmigrant.