9 FAM 40.31 Notes

(TL:VISA-311; 08-21-2001)

9 FAM 40.31 N1 Background

(TL:VISA-77; 03-30-1993)

Section 212(a)(3)(A) of the Immigration and Nationality Act was created by the Immigration Act of 1990, Pub. L. 101-649, and supplants many elements of former INA sections 212(a)(27) and 212(a)(29). It retains from these predecessor provisions the excludability of aliens seeking to enter the United States to engage in espionage, sabotage, or activities to unlawfully oppose, control, or overthrow the Government of the United States, and codifies for the first time the Department's long-standing policy to exclude aliens who seek to enter the United States to engage in illegal technology transfer or in any other unlawful activity.

9 FAM 40.31 N2 Scope of INA 212(a)(3)(A)

(TL:VISA-77; 03-30-1993)

INA 212(a)(3)(A) contains four distinct grounds of ineligibility. It renders excludable any alien who the consular or immigration officer knows or has reason to believe seeks to enter the United States to engage solely, principally or incidentally in any:

(1) Activity which violates any U.S. law relating to espionage or sabotage;

(2) Activity which violates or evades any law prohibiting the export from the United States of goods, technology, or sensitive information;

(3) Other unlawful activity; and

(4) Activity to oppose, control, or overthrow the government of the United States by force, violence, or other illegal means.

9 FAM 40.31 N3 Security Advisory Opinions Required

(TL:VISA-311; 08-21-2001)

a. The Department's security advisory opinion is required in any case involving possible ineligibility under INA 212(a)(3)(A). This requirement is imposed to ensure consistency and uniformity of interpretation and to allow input from other interested U.S. government agencies. Security advisory opinion requests must be submitted by means of a "VISAS DONKEY" telegram and include "DIR FBI WASHDC" as an action addressee.

b. “VISAS DONKEY” telegrams must provide a summary of all information known to post, including a complete citation of the CLASS entry (if any), as well as the consular officer’s evaluation of the case and recommendation regarding eligibility. They should be directed to CA/VO/L/C, except for INA 212(a)(3)(A)(ii) cases involving primarily criminal matters (e.g., organized crime activities, child abduction cases, etc.) which should be addressed to CA/VO/L/A. Once a security advisory opinion has been requested, no visa may be issued until the Department’s response has been received. *(For additional guidance on advisory opinion requirements, see 9 FAM Appendix C.)*

c. While INA 212(a)(3)(A) is written in the present tense, aliens who are known or believed to have engaged in activities encompassed by this section in the past must also be submitted for the Department’s advisory opinion.

9 FAM 40.31 N4 Russian Business Investigation Initiative (RBII) Reports

(TL:VISA-230; 01-19-2001)

a. Section 212(a)(3)(A)(ii) of the Immigration and Nationality Act precludes the issuance of a U.S. visa to anyone whom “a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in ... any other unlawful activity....” In February 1996 the State Department informed consular officers that the Attorney General concurred in the State Department’s request to apply this section of law broadly to anyone affiliated with organized crime in the former Soviet Union (FSU), just as for the Italian Mafia and the Asian Triads.

b. Posts should use “VISAS SHARK” and “VISAS EEL” cables for RBII reporting, requests for investigations, and requests for ineligibility findings on specific individuals.

c. The “VISAS SHARK” cable is used to report information on a possible NIS/BR organized crime group member who is not currently a visa applicant.

d. The “VISAS EEL” cable is used when Post seeks an advisory opinion on a visa applicant whom it believes may fall within the purview of INA 212(a)(3)(A)(ii) as a member of an organized crime group, or when Post seeks an RBII investigation of a U.S. based company following the visa application by an individual whom it suspects may be involved in illegal activity which would make him or her fall within the purview of INA 212(a)(3)(A)(ii) as a member of an organized crime group.

9 FAM 40.31 N5 Adjudicating Ineligibility Under INA 212(a)(3)(A)

9 FAM 40.31 N5.1 Ineligibility under INA 212(a)(3)(A)(i)

9 FAM 40.31 N5.1-1 Aliens Seeking Entry to Engage in Expionage or Sabotage

(TL:VISA-230; 01-19-2001)

INA 212(a)(3)(A) contains three main subdivisions. The first, (i) is divided into two subcategories. The first main subdivision, Section (i)(I), makes inadmissible an applicant who the consular officer knows or has reason to believe is entering the United States solely, principally, or incidentally to engage in espionage or sabotage. Normally, the consular officer will receive such information from a U.S. intelligence or law enforcement organization. Upon receipt of the information, the post should suspend processing the case, deny the application under INA 221(g), and submit a security advisory opinion (SAO) slugged for CA/VO/L/C.

9 FAM 40.31 N5.1-2 Aliens Seeking Entry Who Violate Laws Prohibiting Export of Goods and/or Technology from the United States

(TL:VISA-230; 01-19-2001)

The second main subdivision, INA 212(a)(3)(A)(i)(II) makes inadmissible an applicant who the consular officer knows or has reason to believe is coming to the United States solely, incidentally, or principally to violate or evade any law prohibiting the export of goods, technology, or sensitive information from the United States.

(1) **Non-sensitive:** One potential source of ineligibility under this section is the violation of economic sanctions imposed by executive order on (state sponsor) of terrorism, which currently are Cuba, Iran, Iraq, Libya, Sudan Syria, and North Korea. Details of the orders, which vary by country, are listed in 9 FAM 40.31 Part IV Appendix C and also are sent to posts by a periodic cable, "Summary of Special Processing Requirements". The orders generally restrict or prohibit transfer of goods, services, or funds between any of these states and the United States If consular officers encounter visa applications that seem to involve such transfers, they should err on the side of caution and submit a request for an advisory opinion, using the “VISAS DONKEY MANTIS” indicator. If the goods, services or funds involved are not such that they are associated with the technology alert list described below, the advisory opinion request should be sent to CA/VO/L/A.

(2) **Sensitive:** A case involving INA 212(a)(3)(A)(i)(II) can also involve the transfer of technology or equipment listed in the technology alert list. 9 FAM 40.31 Exhibit I. The list was established to control the export of sensitive technology, particularly that involving weapons of mass destruction. If an applicant for a visa plans to export equipment or information on this list from the United States to any country without proof that a competent U.S. Government authority has already approved an export license, the post should suspend processing, deny the application under INA 221(g), and submit a security advisory opinion to the Department, slugged for CA/VO/L/C.

9 FAM 40.31 N5.1-3 Using the Technology Alert List (TAL)

(TL:VISA-311; 08-21-2001)

The revised TAL consists of two parts: A "critical Fields List" (CFL) of major fields of controlled goods and technologies of tech transfer concern, including those subject to export controls for nonproliferation reasons; and the Department's list of designated state sponsors of terrorism. While restrictions on the export of goods and technologies apply to nationals of all countries, applicants from countries on the list of state sponsors of terrorism seeking to engage in a commercial exchange or academic pursuit involving one of the critical fields warrant special scrutiny. Officers are not expected to be versed in all the fields on the list. Rather, consular officers should shoot for familiarization and listen for key words or phrases from the list in applicants answers to interview questions.

9 FAM 40.31 N5.1-4 Interview Questions in TAL Cases

(TL:VISA-311; 81-21-2001)

When applying the TAL, consular officers should

(1) Determine whether the applicant proposes to engage in one of the scientific/technical fields listed in the Critical Fields List;

(2) If the applicant's planned activities raise questions of possible ineligibility under INA 212(a)(3)(A), submit a Security Advisory Opinion (SAO) in the form of VISAS DONKEY MANTIS or EAGLE MANTIS. An SAO is mandatory in all cases of applicants bearing passports of or employed by states designated as state sponsors of terrorism who seek to engage in a commercial exchange or academic pursuit involving one of the critical fields.

(3) When an SAO is submitted in a "TAL" case, consular officers should gather and report as much information as possible about the applicant's background, proposed activities, and travel plans. The effectiveness of the name check (and the turnaround time) is directly related to the completeness of the information in the SAO. For example: what branch of physics does the applicant study? Quantum? Nuclear? What is his current position and where does he work? What is the address and phone number of the company(ies) he intends to visit? Who is his point of contact? Who is funding the travel or education? Will he be returning to work in a country which sponsors terrorism or is under sanctions? How does the applicant plan to use the goods or knowledge acquired? Will he be "exporting" this new knowledge to a hostile nation?

(4) Consular officers should permit and even encourage TAL applicants to provide supporting documentation from their home organizations. For example, project descriptions, annual reports, letters of recommendation from a U.S. source or from abroad can be useful in helping to fleshout an applicant's real motives for travel. Such documents should be described by consular officer in the SAO and held until the case has been closed.

9 FAM 40.31 N5.1-5 Seeking Security Advisory Opinions for TAL Cases

(TL:VISA-311; 08-21-2001)

a. With the exception of applicants who are nationals or employees of states sponsoring terrorism, tech transfer SAOs are not mandatory for all scientific and technical visitors seeking to engage in one of the critical fields. However, consular officers should use caution in adjudicating all such cases. Only when consular officers believe (3)(A) clearly does not apply should the case be processed to conclusion without seeking the Department's opinion.

b. Consular officer's should seek the help of the Office of the Defense Attaché at post. The Defense Attaché and his/her staff are often very knowledgeable about sensitive military and dual-use technology. They can assist in deciphering an applicant's response or, the critical fields list, and can also provide follow-up questions. Remember, also, when in doubt send in an SAO to CA/VO/L\C.

c. The U.S. Customs Attaché or Senior Customs Representative responsible for or at post is also a valuable asset in these matters. As the agency responsible for enforcement and investigation overseas of all suspected violations of u.s. export control laws, customs can address questions concerning export licensing requirements, controlled commodities and related laws. Any activities suspected to be in violation of U.S. export laws should be promptly reported to the local or regional Customs Attaché, in accordance with local reporting procedures.

d. Posts should bear in mind that while the TAL is a valuable tool for recognizing possible illegal technology transfer, it is not the only mechanism for identifying such cases. There may be times when the consular officer suspects, for whatever reason, that an applicant may be (3)(A) despite the absence of the applicant's profession or area of study on the TAL. Such cases can and should be submitted in an SAO for the Department's advisory opinion.

9 FAM 40.31 N5.2 Ineligibility under INA 212(a)(3)(A)(ii)

(TL:VISA-230; 01-19-2001)

The second main subdivision of INA 212(a)(3)(A) makes a visa applicant inadmissible if the consular officer has reasonable grounds to believe that the applicant is coming to the United States solely, principally, or incidentally to engage in "any other unlawful activity." Law enforcement or intelligence agencies would normally inform the post and the Department about such cases.

9 FAM 40.31 N5.3 Application of INA 212(a)(3)(A)(ii) for Aliens Engaging in Organized Crime

(TL:VISA-230; 01-19-2001)

a. Organized crime may arise from the fact that the applicant is a member of one of certain known criminal organization, which includes the Chinese Triads, the Mafia, or any of the various groups constituting the organized crime families of the former Soviet Union. If a member of one of these organized crime groups applies for a visa, the consular officer should suspend processing the visa application, deny the application under INA 221(g), and submit the report to the Department, slugged for CA/VO/L/C.

b. Although, as written, INA 212(a)(3)(A)(ii) is applicable to an individual entry, the basis for applying INA 212(a)(3)(A)(ii) to members of organized criminal societies makes it a de facto permanent ground of ineligibility. The Department began considering organized crime membership as a ground of ineligibility in 1965, when Attorney General Katzenbach concurred with a recommendation by Secretary of State Rusk that an alien's membership in the Mafia was sufficient basis to find the alien ineligible under then section INA 212(a)(27). In 1992, the Department obtained concurrence from the INS to treat Triad membership as a ground of ineligibility pursuant to INA 212(a)(3)(A)(ii), and in 1995, this was extended with INS concurrence to organized crime groups operating in the former Union of Soviet Socialist Republics.

c. The basis for these determinations was that these groups operated as permanent organized criminal societies. Membership in these groups was permanent in nature, and could reasonably be considered to involve a permanent association with criminal activities, and could reasonably support a conclusion that any travel by such an alien to the United States could result in a violation of U.S. law, whether as a principal or incidental result of such travel. Therefore, while the ineligibility as a matter of law related to the specific nature of the trip, the basis for making the finding gave a reasonable basis for treating this as a blanket ineligibility which would apply to every application for entry to the United States.

d. There are some rare occasions where the basis for this finding will not apply to a specific application. For example, if the alien was entering on a controlled basis as part of an official governmental delegation on official business, a visa could be issued since there would be reason to believe the alien was not going to engage, even incidentally, in violations of U.S. law. Similarly, a visa could be issued if a serious medical emergency issuance could be justified, or if the alien was coming to cooperate in a U.S. Government investigation into criminal activities. Clear and compelling evidence that the alien has ceased to be associated in any way with an organized crime group (such as might be the case with Mafia members who have cooperated with their government and testified against other members) might also justify issuance.

e. The CA/VO has not developed formal guidance on when one can issue a visa to a member of an organized criminal group because INA 212(a)(3)(A)(ii) grounds are so compelling in such cases that exceptions to these determinations are extremely rare. Consular officers must determine eligibility on a case-by-case basis.

9 FAM 40.31 N5.4 Officials of Taiwan

(TL:VISA-112; 05-26-1995)

Unless the alien is otherwise excludable, INA 212(a)(3)(A)(ii) shall not apply to the President of Taiwan or any other high-level official of Taiwan who applies to enter the United States for the purposes of discussions with the U.S. Federal or State government concerning:

(1) Trade or business with Taiwan that will reduce the U.S. and/or Taiwan trade deficit;

(2) Prevention of nuclear proliferation;

(3) Threats to the national security of the United States;

(4) The protection of the global environment;

(5) The protection of endangered species; or

(6) Regional humanitarian disasters.

9 FAM 40.31 N6 Ineligibility Under INA 212(a)(3)(A)(iii)

(TL:VISA-230; 01-19-2001)

INA 212(a)(3)(A)(iii) the third subdivision, makes a visa applicant inadmissible if the applicant seeks to enter the United States solely, principally, or incidentally to engage in any activity to oppose, control, or overthrow the Government of the United States by force, violence, or other unlawful means. The Department does not construe this section to cover the legitimate exercise of free speech, normal diplomatic activity, or legal processing, but rather to include sedition, treason, terrorism, and overt or covert military operations against the Government of the United States. If a post develops information indicating that applicants are planning such activity, it should suspend processing, deny the application under INA 221(g), and submit a security advisory opinion to the Department, slugged for CA/VO/L/C. The consular section should also coordinate such cases with all elements of the Mission.