

9 FAM 40.103 NOTES

(TL:VISA-207; 09-19-2000)

9 FAM 40.103 N1 Purpose and Scope

(TL:VISA-207; 09-19-2000)

INA 212(a)(10)(C) was included in the IMMACT of 1990 as a means of combating the increasing number of child abductions from the United States by alien parents. It renders the alien ineligible so long as the alien withholds custody of the child outside of the United States from the custodial parent, and so long as the child remains a "child" according to INA 101(b)(1), i.e., unmarried and under the age of twenty-one. However, an exception has been made for an alien who takes an abducted child to a country which is party to the Hague Convention on the Civil Aspects of International Child Abduction. Since the Convention provides a means for the return of the child through an established legal mechanism which takes into account the best interests of the child, the Congress chose not to penalize any abductor who removes a child to a country which is party to that Convention.

9 FAM 40.103 N2 Definitions

(TL:VISA-207; 09-19-2000)

a. "Any alien" refers to all aliens including legal permanent resident aliens.

b. "A court in the United States" refers to any Federal, state or local court having jurisdiction to grant an order of custody.

c. "A court order granting custody" refers to any order by a court, whether it be a temporary or permanent order.

d. "A person" refers to any person including U.S. citizens, legal permanent resident aliens and aliens temporarily residing in the United States.

e. *"Agent" is generally defined as a person authorized by another to represent or act for that person. Most cases of agent representation will be based on a contractual relationship such as attorney client, but numerous other possibilities exist. Such determinations should be made in consultation with CA/VO/L/A.*

f. *"Intentionally" means that the alien providing such assistance, material support or safe haven did so purposefully and knew or reasonably should have known that such aid furthered an alien with the conduct described in INA 212(a)(1)(C)(i).*

g. "Material support" includes, but is not limited to, an alien aiding an "alien child abductor" by providing transportation, funds, false documentation or identification to, or aiding in the communications of, any alien child abductor.

9 FAM 40.103 N3 Ineligibility Under INA 212(a)(10)(C)

(TL:VISA-207; 09-19-2000)

An alien is ineligible under INA 212(a)(10)(C) if, at the time of the visa application, the alien is:

(1). Withholding custody (outside the United States) of a child from the custodial parent; or

(2). Aiding such child abductor, or relatives of the child abductor.

9 FAM 40.103 N4 Withholding Child Outside United States

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

Undoubtedly, in many cases the most difficult element in establishing ineligibility under this section will be determining the location of the child. Where an alleged abductor refuses to divulge the location of a child and the abductor is currently residing abroad, the consular officer may presume that the child is residing with the abductor. Any assertion by an abductor who resides abroad that the child remains in the United States (e.g., with relatives) should be established to the consular officer's satisfaction by direct evidence.

9 FAM 40.103 N5 Time of Abduction

(TL:VISA-207; 09-19-2000)

It is irrelevant to visa ineligibility whether the child abduction occurred after the entry of an order of custody where the abduction causes the non-abducting parent to institute legal proceedings or the child has been abducted in the midst of court proceedings and the court subsequently enters an order of custody in favor of the non-abducting parent.

9 FAM 40.103 N5.1 Government Officials

(TL:VISA-207; 09-19-2000)

The exceptions for U.S. Government and foreign government officials apply to those government officials who are providing support to a household or individual that currently holds an abducted child, when such officials are acting in their official capacity to protect the welfare and best interest of the abducted child.

9 FAM 40.103 N5.2 Hague Convention Countries

(TL:VISA-207; 09-19-2000)

The law provides for an exception to be made for an alien who takes an abducted child to a country which is party to The Hague Convention. Since the Convention provides a means for the return of the child through an established legal mechanism which takes into account the best interests of the child, the Congress chose not to penalize any abductor who removes a child to a country which is party to that Convention.

9 FAM 40.103 N6 Referral for Advisory Opinion

(TL:VISA-207; 09-19-2000)

The consular officer must refer the case to the Department (CA/VO/L/A) for an advisory opinion if the consular officer believes the alien is ineligible under INA 212(a)(10)(C). Any conclusions made by CA/VO/L/A will be made in consultation with CA/OCL/C.

9 FAM 40.103 N7 Removal of the Ineligibility

(TL:VISA-207; 09-19-2000)

An alien remains ineligible under INA 212(a)(10)(C) only so long as the child has not been returned to the person granted custody by the order of a court in the United States. Once the child is surrendered to the person having lawful custody and the child and the individual granted lawful custody are allowed to return to the custodian's residence, the ineligibility ceases and the post shall remove the alien from the lookout. The alien's ineligibility will also cease if the child reaches the age of twenty-one or marries. [See 9 FAM Part IV Appendix D 204 for deletion procedures.]

9 FAM 40.103 N8 Hague Convention Countries

(TL:VISA-207; 09-19-2000)

For a current list of countries which are party to the Hague Convention on the Civil Aspects of International Child Abduction see 9 FAM 40.103 Exhibit I.