

9 FAM 40.65 Notes

(TL:VISA-419; 05-30-2002)

9 FAM 40.65 N1 Exclusion for “Smuggling”

(TL:VISA-46; 08-26-1991)

Section 212(a)(6)(E) of the INA provides for the ineligibility for visa issuance of “any alien” who has “at any time”...“knowingly”... “encouraged, assisted, abetted or aided”...“any other alien”...“to enter or to try to enter the United States” in violation of law.

9 FAM 40.65 N2 Defining “any alien”

(TL:VISA-419; 05-30-2002)

All aliens, including permanent resident aliens seeking reentry into the United States, are potentially subject to this provision. However, the Attorney General may waive excludability for a permanent resident alien who has sought to assist only his spouse, child or parent and who is returning to the United States under the conditions found in section 211(b), i.e., one who returns under circumstances not requiring a returning resident visa (within one year without a reentry permit, or within a maximum of two years with a reentry permit). [See INA 211(b).]

9 FAM 40.65 N3 Exclusion Covering “At any time”...Period

(TL:VISA-419; 05-30-2002)

The conduct which is proscribed under this section may have occurred at any time in the past. Therefore, there will be instances in which an alien previously exempted from the effects of this particular exclusion in its original version (prior to June 1, 1991) may currently be excludable. [See the discussion of elimination of “for gain” requirement in 9 FAM 40.65 N7 below and its effect on assisting family members to enter the United States in 9 FAM 40.65 N6 below.]

9 FAM 40.65 N4 Smuggler Must Act “Knowingly”

(TL:VISA-46; 08-26-1991)

A key element of the new INA 212(a)(6)(E) provision is that the “smuggler” must act “knowingly” to encourage or assist an illegal alien to enter the United States. In other words, in order to be found ineligible the “smuggler” must be aware of sufficient facts such that a reasonable person in the same circumstances might conclude that his or her encouragement or assistance could result in the entry of the alien into the United States illegally and, further, the “smuggler” must act with intention of encouraging or assisting the alien to achieve the illegal entry. Therefore, belief that the alien was entitled to enter legally, although mistaken, would be a defense to ineligibility for a suspected “smuggler.”

9 FAM 40.65 N5 “Encourage, Induce, Assist, Abet, or Aid”

(TL:VISA-46; 08-26-1991)

The actions for which a “smuggler” might be found ineligible are numerous. They could be as little as offering an alien a job under circumstances where it is clear that the alien will not enter the United States legally in order to accept the employment (encourage and induce), or they might actually involve physically bringing an alien into the United States illegally (aid and assist). With regard to a visa application, the Department would hold that an alien who knowingly makes false oral or written statements on behalf of a visa applicant, including a family member, is ineligible under this section.

9 FAM 40.65 N6 “Any other alien”...Effect of Revision on Family Related Smuggling

(TL:VISA-46; 08-26-1991)

Encouraging or assisting any other alien, even close family members, to enter the United States illegally can result in ineligibility under this section. This is in contrast to the previous version (INA 212(a)(31)) which was interpreted to exclude actions on behalf of close family members where the sole motive for the actions was family affection and not financial or other “gain.”[See the discussion on elimination of “for gain” requirement in 9 FAM 40.65 N7 below.]

9 FAM 40.65 N7 Eliminating “For Gain” Requirement

(TL:VISA-419; 05-30-2002)

The provisions of section 212(a)(6)(E) of the INA (formerly 212(a)(31)) were significantly amended by the Immigration Act of 1990 (IMMACT90). Section 601(a) of the IMMACT90 altered the language of 212(a)(6)(E) by eliminating the words “for gain.” Under the previous section an alien “smuggler” could not be found ineligible for encouraging or assisting the illegal entry of another alien unless it could be established that the actions of the “smuggler” were motivated by at least the expectation of, if not the receipt of, some tangible “gain,” usually money or services. The “for gain” element was often the most difficult part of a case to establish under the former provisions, with the result that many suspected “smugglers” could not be found ineligible. Elimination of the “for gain” element obviates the necessity to establish the expectation or receipt of profit as an element of a finding of ineligibility under INA 212(a)(6)(E).