

9 FAM 40.301 NOTES

(CT:VISA-1939; 11-01-2012)
(Office of Origin: CA/VO/L/R)

9 FAM 40.301 N1 DEPARTMENT'S INA 212(D)(3)(A) WAIVER AUTHORITY

(CT:VISA-1908; 10-01-2012)

The Congress, in enacting INA 212(d)(3)(A), conferred upon the Secretary of State and consular officers the important discretionary function of recommending waivers for nonimmigrant visa (NIV) ineligibilities to the Department of Homeland Security (DHS) for approval. You should not hesitate to exercise this authority when the alien is entitled to seek waiver relief and is otherwise qualified for a visa, and when the granting of a waiver is not contrary to U.S. interests. The proper use of this authority should serve to further our immigration policy supporting freedom of travel, exchange of ideas, and humanitarian considerations, while at the same time ensuring, through appropriate screening, that our national welfare and security are being safeguarded.

9 FAM 40.301 N2 SUBMITTING WAIVER RECOMMENDATIONS

(CT:VISA-1908; 10-01-2012)

- a. To submit INA 212(d)(3)(A)(i) (8 U.S.C. 1182(d)(3)(A)(i)) waiver recommendations to the Admissibility Review Office (ARO) at Customs and Border Protection (CBP), you must use the Admissibility Review Information Service (ARIS), located in the CCD (Consular Consolidated Database). You should select the "Request Waiver" link next to the appropriate applicant to open the Waiver Request Form and create a waiver request. Consular officers and managers may both initiate and submit new waiver requests as well as update and submit waiver requests with a status of Pending Manager Approval. Foreign Service nationals may only initiate cases before sending them to an officer for approval. The ARO will review the waiver recommendation and submit the response to post through the CCD. Once posts have installed Nonimmigrant Visas (NIV) 04.04.00, users will be able to directly access the ARIS Waiver Request form through the Association - Clearance option on the NIV Applicant Information window:

- (1) From the NIV Applicant Clearance window, users can click the new "ARIS

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Waiver Request" button that will take the user to the ARIS Waiver request form on the CCD from which they can complete and submit the request.

- (2) Consular officers must refuse the applicant under all grounds of ineligibility that apply in the NIV system, and not simply 221(g) the case while the waiver request is pending.
- (3) Consular officers must scan all supporting documents into the NIV case. Depending on the ineligibility, this may include police/court records, OF-194, panel physician evaluation, copy of an approved petition, etc. Any document in a foreign language must be accompanied by an English translation. Clearly label supporting documents scanned into NIV, or identify them in the case notes. If records no longer exist because of time elapsed, posts must explicitly state so in the comments section of ARIS.
- (4) Posts can check on the status of a waiver request through the NIV ARIS Request window and the NIV Clearance window. Response times for ARIS waivers can take up to 120 days.

9 FAM 40.301 N3 CRITERIA FOR INA 212(D)(3)(A) WAIVER RECOMMENDATION

(CT:VISA-1908; 10-01-2012)

The following conditions must be met before an INA 212(d)(3)(A) waiver can be recommended or granted:

- (1) The applicant is not inadmissible under INA 214(b);
- (2) The applicant is not inadmissible under INA 212(a)(3)(A)(i)(I), INA 212(a)(3)(A)(ii), INA 212(a)(3)(A)(iii), INA 212(a)(3)(C), or INA 212(a)(3)(E);
- (3) The applicant is not seeking a waiver of nonimmigrant documentary requirements of INA 212(a)(7)(B), which may only be waived under the provisions of INA 212(d)(4). (See 9 FAM 41.1, 9 FAM 41.2, and 9 FAM 41.3.); and
- (4) The applicant is, otherwise, qualified for the nonimmigrant visa (NIV) he or she is seeking.

9 FAM 40.301 N4 FACTORS TO CONSIDER WHEN RECOMMENDING A WAIVER

(CT:VISA-1908; 10-01-2012)

- a. You may recommend an INA 212(d)(3)(A) waiver for any nonimmigrant whose case meets the criteria of 9 FAM 40.301 N3 above and whose presence would not be harmful to U.S. interests. Eligibility for a waiver is not conditioned on

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having some qualifying family relationship, or the passage of a specific amount of time since the commission of the offense, or any other special statutory threshold requirement. The law does not require that such action be limited to humanitarian or other exceptional cases. While the exercise of discretion and good judgment is essential, you may recommend waivers for any legitimate purpose such as family visits, medical treatment (whether or not available abroad), business conferences, tourism, etc.

- b. You should consider the following factors, among others, when deciding whether to recommend a waiver:
 - (1) The recency and seriousness of the activity or condition causing the alien's inadmissibility;
 - (2) The reasons for the proposed travel to the United States; and
 - (3) The positive or negative effect, if any, of the planned travel on U.S. public interests.
- c. Explain your reasoning for recommending a waiver in the comments section of ARIS.

9 FAM 40.301 N5 SPECIAL PROCESSING FOR CERTAIN WAIVERS REQUESTED BY U.S. LAW ENFORCEMENT AGENCIES

(CT:VISA-1908; 10-01-2012)

Certain INA 212(d)(3)(A) waivers requested at the initiative of interested U.S. Government agencies for law enforcement purposes require special handling and should be processed in accordance with the guidance provided in 9 FAM Appendix G, 600.

9 FAM 40.301 N6 REFERRAL OF WAIVER RECOMMENDATIONS

9 FAM 40.301 N6.1 When to Submit Applications to DHS/Customs and Border Protection (CBP)

(CT:VISA-1908; 10-01-2012)

- a. With the exception of those cases described in 9 FAM 40.301 N6.2 below, and cases involving K and V nonimmigrants, you must submit INA 212(d)(3)(A) waiver recommendations to ARO via ARIS.
- b. If you do not believe that the alien should be admitted temporarily despite the ground of inadmissibility (if you do not want to recommend a waiver), do not

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submit an ARIS waiver recommendation to ARO. CBP/ARO requires a positive recommendation from State (normally the consular office) in order to take action on a waiver request, but the Visa Office can also make the recommendation (see 9 FAM 40.301 N6.2). However, you are generally in a better position to adjudicate waiver requests since you have direct access to the applicant and are more familiar with the case than the Department.

9 FAM 40.301 N6.2 When To Submit Applications To Department for Review

(CT:VISA-1908; 10-01-2012)

- a. If you do not recommend that an alien be granted a waiver but the applicant or an interested party insists on pursuing the request, you must submit an advisory opinion to CA/VO/L/A through the NIV System for non-security ineligibilities, and an security advisory opinion (SAO) to CA/VO/L/C for security grounds of inadmissibility INA 212(a)(3)(B),(D),(E),(F). Any classified information must be forwarded to Department of Homeland Security (DHS).
- b. You may not refuse an alien's request for the Department's review of your decision that a waiver is not justified. You, however, may submit a recommendation to the Department against such waiver along with the reasons for your objection to the waiver.
- c. You cannot submit a waiver request to DHS if you are required to submit the waiver to the Department. Submit waiver requests dealing with security grounds of inadmissibility to CA/VO/L/C as a request for a Visas Donkey SAO, and submit non-security related cases to CA/VO/L/A for an advisory opinion.
- d. You must provide all relevant information regarding the alien's case to CA/VO/L/A when requesting the Department's determination of whether a waiver should be recommended. You must also refer the following categories of cases to the Department for a determination of whether to recommend a waiver of inadmissibility to CBP/ARO:
 - (1) Any case in which you have doubts as to whether an INA 212(d)(3)(A) waiver recommendation is warranted, or know or believe the Department has pertinent information not available to you;
 - (2) Any case, regardless of the ground of inadmissibility, in which the alien or the alien's representative (e.g., family member, attorney) requests that a waiver be considered, even if you believe the waiver is not warranted;
 - (3) Any case in which the Department's security advisory opinion is required (see 9 FAM Appendix G, 500);
 - (4) Any case in which we previously declined to recommend, or the Attorney General or Secretary of Homeland Security, to grant, an INA 212(d)(3)(A) waiver to an alien;

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- (5) Any case in which the alien's presence or activities in the United States might become a matter of public interest or of foreign relations significance;
- e. Provide all relevant information regarding the alien's case via a Security Advisory Opinion (SAO) or Advisory Opinion (AO) as appropriate, when requesting the Department's determination of whether a waiver should be recommended.
- f. As a reminder, you should report fraud or any other criminal immigration violation to the responsible Immigration and Customs Enforcement (ICE) Attaché, through the appropriate channels. If you have an ineligible K or V nonimmigrant visa applicant, instruct the applicant to file Form I-601, Application for Waiver of Grounds of Inadmissibility, with United States Citizenship and Immigration Services (USCIS).

9 FAM 40.301 N7 EXPEDITE REQUESTS

(CT:VISA-1908; 10-01-2012)

- a. Expedite requests must be reserved for cases with urgent humanitarian need for travel, such as medical treatment or a death in the applicant's family and cases where there is clear and significant U.S. government interest. The expedite request should include specific dates (of meetings, funerals, etc.) whenever possible. ARO will not expedite cases in which applicants fail to apply well in advance of their intended travel dates. Contact CA/VO/F/P for assistance and advice on potential expedite requests.
- b. ARO regional e-mail addresses are as follows:
- af.waiver.aro@dhs.gov
 - eap.waiver.aro@dhs.gov
 - eur.waiver.aro@dhs.gov
 - nea.waiver.aro@dhs.gov
 - sa.waiver.aro@dhs.gov
 - wha.waiver.aro@dhs.gov
- c. However, ARO prefers that posts contact the ARO via the VO/F/P officer with the waivers portfolio.

9 FAM 40.301 N8 WAIVER VALIDITY

(CT:VISA-1908; 10-01-2012)

- a. If an alien meets the criteria for a waiver as set forth above, you may recommend a waiver valid for multiple applications for admission for a period of

more than one year, but not to exceed five years. Generally, CBP/ARO does not grant more than a 12 month, multiple entry waiver to first and second time waiver recipients. The maximum waiver validity that ARO can grant is 60 months, multiple entries. [Exception: The maximum waiver validity that ARO can grant for a C1/D visa is 24 months.]

- b. When recommending waivers valid for more than one year, you must believe that the admissions will not be prejudicial to the U.S. interests and will contribute to trade and commerce, including tourism, or serve a compassionate or humanitarian purpose. ARO cannot grant waivers longer than the validity request by the consular officer, but they may grant shorter validities than those requested.
- c. INA 212(d)(3)(A) waivers are valid for the duration indicated by the ARO officer in the ARIS response. The waiver validity starts on the visa issuance date. Please note, however, that a visa must be issued within 45 days of the receipt of the approved waiver and according to the terms of the approved waiver. You must manually limit the validity of the visa to the validity of the waiver.

9 FAM 40.301 N8.1 Cases With Number of Entries and/or Period of Validity Authorized by Waiver Exceeds Reciprocity

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If DHS grants a waiver for more entries or a longer period than the appropriate visa reciprocity schedule specifies, issue the visa for not more than the number of entries and validity period listed in the reciprocity schedule. (For example, if DHS grants a waiver for multiple entries for a six-month period and the reciprocity schedule calls for one entry of three months, issue the visa for one entry, three months).

9 FAM 40.301 N8.2 Aliens Not Eligible for Multiple Entry Waiver Recommendations

(CT:VISA-1908; 10-01-2012)

A recommendation for waiver of inadmissibility valid for multiple applications for admission is not available to an alien who:

- (1) Has a mental or physical disorder;
- (2) Is a narcotic drug addict or a narcotic trafficker;
- (3) Is afflicted with a communicable disease;
- (4) Was convicted for committing a serious crime involving moral turpitude such as arson, assault with a dangerous weapon, housebreaking, incest, rape, or voluntary manslaughter and has not been rehabilitated and

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integrated into society for at least five years since the date of conviction or release from confinement, whichever is later in time; or

- (5) Has engaged in prostitution or has procured or attempted to procure or import prostitutes or has received proceeds of prostitution within 10 years immediately preceding the visa application.

9 FAM 40.301 N9 ANNOTATIONS FOR 212(D)(3)(A) WAIVER CASES

(CT:VISA-1908; 10-01-2012)

- a. Consular officers must comply with all "Conditions of Waiver" noted by ARO in ARIS after an approved waiver decision is returned to post. Visas with approved waivers must be annotated with the "Grounds for waiver" information as it appears in ARIS (generally "212(d)(3)(A): <insert ineligibility waived>").
- b. You must issue visa relative to a waiver with 45 days of waiver approval, or CBP will consider the waiver invalid.

9 FAM 40.301 N10 CONSISTENCY IN REQUESTING A WAIVER

(CT:VISA-1908; 10-01-2012)

You must maintain consistency in your waiver recommendations. If you requested a waiver for a particular applicant in the past, you should do so for future applications, unless there is new derogatory information, a material change in the purpose of their trip, or some other material change in circumstances relevant to the factors to be considered under INA 212(d)(3)(A).

9 FAM 40.301 N11 WHEN PROCESSING WAIVERS FOR GOVERNMENT GRANTEES

(CT:VISA-1908; 10-01-2012)

Whenever an alien who is inadmissible under INA 212(a) is to be recommended for a leader grant, U.S. Government scholarship, or Department sponsored exchange, all required processing, including a waiver of inadmissibility must be completed before the nominee is informed that he and/or she is being considered for such a grant. For this reason the required processing must be completed without the normal visa application or personal interview of the alien. Name checks as required, a security advisory opinion, if required, and the waiver recommendation must be processed through the Department.

9 FAM 40.301 N12 INA 212(D)(3)(A) WAIVER OF INA 212(A)(1)

(CT:VISA-1908; 10-01-2012)

For information regarding an INA 212(d)(3)(A) waiver of a medical ground of ineligibility for an alien proceeding to the United States to undergo medical treatment, see 9 FAM 40.11 N13.

9 FAM 40.301 N13 INTENTIONAL TRAFFICKING CONVICTIONS

(CT:VISA-1908; 10-01-2012)

A conviction for intentional trafficking of a controlled substance is a crime involving moral turpitude, or a 212(a)(2)(A)(i)(I) ineligibility (see 9 FAM 40.21(a) N2.3-4).

9 FAM 40.301 N14 POSTING OF BONDS IN CERTAIN CASES

(CT:VISA-1908; 10-01-2012)

Whenever the posting of a departure bond is required by DHS in connection with INA 212(d)(3)(A) action, the bond is to be posted at the time the alien applies for admission into the United States; you should not require evidence that the bond has been filed as a condition of visa issuance.

9 FAM 40.301 N15 NAME CHECK REQUIREMENTS

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See reciprocity schedule for individual countries.