9 FAM 41.22
NOTES

(CT:VISA-1038; 09-25-2008)
(Office of Origin: CA/VO/L/R)

9 FAM 41.22 N1 ALIENS ENTITLED TO A-1 CLASSIFICATION

(TL:VISA-14; 08-30-1988)

The following aliens are entitled to A-1 nonimmigrant classification under INA 101(a)(15)(A).

9 FAM 41.22 N1.1 Alien Accredited by Foreign Government as Officer at Diplomatic or Consular Post

(CT:VISA-1038; 09-25-2008)

a. An alien duly accredited by a foreign government recognized de jure by the United States as an officer of a permanent diplomatic mission or consular post established in the United States with the consent of the Department, who seeks to enter the United States solely for the purpose of performing duties appropriately performed by such an officer. (Officers of diplomatic missions usually have the title of "Ambassador," "Minister," "Counselor," "Secretary," or "Attaché" such as military, commercial, financial, agriculture, or scientific; and those of consular posts, "Consul General," "Consul," or "Vice Consul.") *(*See 9 FAM 41.22 N5 of this section regarding "Honorary Consul."*)*

b. De jure recognition is not synonymous with diplomatic relations, and de jure recognition may continue even though diplomatic relations have been severed. Consequently, an A-1 visa may be issued to an alien who seeks to enter the United States for the purpose of performing official duties for a government which has severed diplomatic relations with the United States, provided that:

   (1) The United States has recognized that government de jure prior to severance of diplomatic relations;

   (2) There is a continuing status of de jure recognition; and

   (3) There is a reciprocal exchange of representatives between the

United States and that government. An A-1 classification for such an alien is warranted even if, owing to the absence of diplomatic relations, the individual will function under the aegis of the embassy of a third country protecting power.

9 FAM 41.22 N1.2 Alien Head of State or Government

(TL:VISA-14; 08-30-1988)

An alien holding the position of head of state or head of government in a government recognized de jure by the United States.

9 FAM 41.22 N1.3 Certain Alien Officials of Foreign Governments

(TL:VISA-14; 08-30-1988)

An alien seeking to enter the United States to perform official duties for a government recognized de jure by the United States who holds any of the following positions in that government:

(1) A position corresponding to that of a member of the U.S. Cabinet;

(2) The presiding officer of a national legislative body; or

(3) A member of the highest judicial tribunal.

9 FAM 41.22 N1.4 Family Member of Alien Classifiable A-1

(TL:VISA-320; 09-27-2001)

See 22 CFR 41.21(a)(3).

9 FAM 41.22 N1.5 Career Courier

(TL:VISA-520; 02-11-2003)

See 22 CFR 41.22(h)(1).

9 FAM 41.22 N2 ALIENS ENTITLED TO A-2 CLASSIFICATION

(TL:VISA-14; 08-30-1988)

The following aliens are entitled to A-2 nonimmigrant classification under INA 101(a)(15)(A).

9 FAM 41.22 N2.1 Alien Accredited by Foreign Government as Employee at Diplomatic or Consular Post

(TL:VISA-14; 08-30-1988)

An alien duly accredited by a foreign government recognized de jure by the United States who seeks to enter the United States solely to serve as a full-time employee of a permanent diplomatic mission or consular post established in the United States by that government, who is not within any of the categories entitled to A-1 classification, and whose duties are those normally performed by employees of permanent diplomatic missions or consular posts established in the United States.

9 FAM 41.22 N2.2 Alien Seeking to Perform Official Duties for Foreign Government

(CT:VISA-1038; 09-25-2008)

a. An alien seeking to enter the United States, pursuant to orders or instructions from a government recognized de jure by the United States, to perform duties or services for that government (including participation in an international meeting *or* conference other than one convened by or under the auspices of an international organization, held in the United States) which, in the view of the Department, are official in nature. *(*See 9 FAM 41.24 N1 and 9 FAM 41.24 N2 for classification of aliens attending meetings or conferences convened by or under the auspices of an international organization.*)*

b. In accordance with the above provisions, foreign government officials and law enforcement personnel coming to the United States under sponsorship of the foreign government for training by Diplomatic Security's Office of Antiterrorism Training Assistance (DS/ATA) shall be accorded A-2 visas. As the training program is less than 90 days, the visa should include the required "TDY" designation per 9 FAM 41.21 PN5.1. *(*See 9 FAM 41.21 PN5.2 for guidance on annotating the "ATA" visas*.)*

9 FAM 41.22 N2.3 Family Member of Alien Classifiable A-2

(TL:VISA-320; 09-27-2001)

See 22 CFR 41.21(a)(3).

9 FAM 41.22 N2.4 Official Acting as Courier

(TL:VISA-320; 09-27-2001)

See 22 CFR 41.22(h)(2).

9 FAM 41.22 N2.5 Personnel of Foreign Armed Services

(CT:VISA-1038; 09-25-2008)

a. Personnel of foreign armed services from other than NATO countries, coming to the United States in connection with their military status for education or training at any of the U.S. military schools *or on a U.S. military installation,* are treated as foreign government officials for visa classification purposes.

b. Also treated as foreign government officials *are personnel of foreign armed services from other than NATO countries,* coming to receive military training for up to 90 days on TDY status at a location other than a U.S. military school or a U.S. military installation, provided that the training is either U.S. Government-provided or sponsored, or if the training has been licensed by *the Office of Defense Trade Control Licensing (*PM/DTCL*). To verify PM/DTCL licensing of training, submit a request* for an advisory opinion (AO) slugged for *the Advisory Opinions Division (*CA/VO/L/A*)* and PM/DTCL, using CVIS and KOMC tags *and* identifying the U.S. firm the applicant's state is providing the training.

9 FAM 41.22 N3 EVIDENCE OF QUALIFICATION FOR A-1 OR A-2 CLASSIFICATION

9 FAM 41.22 N3.1 Purpose of Entry and Official Duties in United States Determines Classification

(CT:VISA-1038; 09-25-2008)

a. Qualification for A-1 or A-2 classification is determined by the purpose for which the alien seeks to enter the United States and the nature of the official duties the alien will perform while there. Therefore, the fact that an alien is an official or employee of a foreign government or is the holder of a diplomatic, official, or service passport does not in itself, except for a head of state or head of government as provided in 9 FAM 41.22 N1.2 of this section, qualify the alien for an A-1 or A-2 visa.

b. The fact that there may be government interest or control in a given organization is not in itself controlling on the matter of A-2 entitlement.

There must be some further showing that the particular duties or services to be performed by the applicant are themselves of an inherently governmental character or nature. Where an organization is essentially engaged in commercial and/or competitive activities (e.g., banking, mining, transportation), an official of such organization would generally not be qualified for an A-2 visa. Depending upon the purpose of travel to the United States, consideration may be given to B-1, L-1, or E classification. Consular officers shall review all applications for A-2 visas for officials of organizations which are not directly engaged in functions of a governmental nature as measured by U.S. standards.

c. If any difficulty is encountered in resolving a particular case, the consular officer shall submit the case to the Department (CA/VO/L/A) for an advisory opinion. The advisory opinion request shall include a full report as to the nature, structure and purpose of the organization concerned, together with the consular officer's analysis and comments.

9 FAM 41.22 N3.2 Visa Stamped "Diplomatic" or "Official" for any Nonimmigrant Classification

(TL:VISA-320; 09-27-2001)

An alien may be entitled to receive a visa stamped "diplomatic" or "official" in any of the nonimmigrant classifications provided in INA 101(a)(15) without qualifying for an A-1 or A-2 classification. (See 9 FAM 41.26 and 9 FAM 41.27.)

9 FAM 41.22 N4 ALIENS ENTITLED TO A-3 CLASSIFICATION

(CT:VISA-1038; 09-25-2008)

An A-3 visa may be issued to an applicant who is the personal employee of an alien of a foreign mission in the United States in the A-1 or A-2 visa category. In order for an applicant to receive an A-3 visa, the employer must be in "A" visa status. *You may check the diplomatic status of the employer through The Office of Foreign Mission Information System (TOMIS) that is available in the CCD under the "Cross Applications" menu. In the event that the employer is not yet listed in TOMIS, but has been issued an A-1 or A-2 visa, you may rely upon a note from the Foreign Ministry confirming the employer's accreditation and his or her employment of the applicant.*

9 FAM 41.22 N4.1 Aliens Not Entitled to A-3

Classification

(TL:VISA-320; 09-27-2001)

If a staff member of a foreign mission in the United States is a legal permanent resident (LPR), then his or her domestic employee is not entitled to receive an A-3 visa. Such an employee must qualify for the appropriate H-2 or immigrant visa (IV).

9 FAM 41.22 N4.2 Qualifying for A-3 Visa

(TL:VISA-320; 09-27-2001)

In order to benefit from A-3 status, the alien must be coming to the United States to perform a specific job, and must be capable of doing so, regardless of whether the alien has ever performed such a job in the past. For example, an alien with a degree in computer science who is coming to work as a domestic employee may be issued an A-3 visa if he or she clearly has the intent and ability to perform the job. However, if a consular officer believes that an applicant is presented as a domestic employee for someone in A-1 or A-2 status, but will actually work as a computer consultant for a private company, then the A-3 visa should be denied. The alien should be found ineligible under INA 214(b), as he or she has not established his or her eligibility in any nonimmigrant visa (NIV) category. Such an applicant may also be subject to a finding of ineligibility under INA 212(a)(6)(C). Similarly, an A-3 visa application on behalf of someone who has recently resided illegally in the United States, or who may have previously sought another visa status and was refused under INA 214(b), and who appears to be using the A-3 application to evade U.S. immigration requirements, should be carefully scrutinized to determine whether the applicant actually intends to take up the stated employment.

9 FAM 41.22 N4.3 Key Questions to be Addressed in A-3 Applications

(CT:VISA-1038; 09-25-2008)

a. Several key questions the consular officer should address in cases involving A-3 applicants are:

   (1) Is the applicant capable of performing the work required?;

   (2) Are the parties concerned entering into a true employee and/or employer relationship for a reasonable period of time? i.e., can it be reasonably assumed that the applicant's background, education skills, employment history, or relationship to the prospective employer will not preclude the parties from entering into a "true" employee and/or employer relationship? *(See 9 FAM 41.22 N4.4)*;

(3) Is the applicant otherwise fully qualified? *(*See 9 FAM 41.21 N6*)*; and

(4) Will the applicant receive a fair wage by U.S. standards? Under the U.S. Fair Labor Standards Act (FLSA), all full-time, live-in domestic employees must be paid the prevailing or minimum wage per hour under Federal law, and in the jurisdiction which the domestic will be employed, for all hours on duty. Under prevailing practice, live-in domestics receive free room and board in addition to their salary. Although the employer is not required to pay for medical insurance, the employer is responsible for ensuring that the employee does not become a public charge while in his or her employ. *(See 9 FAM 41.21 N6.2 and 9 FAM 41.22 N4.4.)*

b. Provided the answers to each question above is yes, and the applicant is not inadmissible on independent grounds of the INA, an A-3 visa should be issued. If otherwise, the applicant should be denied the visa under INA 214(b) and/or any other appropriate section of the INA.

9 FAM 41.22 N4.4 Salary, Contracts and Employer Obligations

(CT:VISA-1038; 09-25-2008)

a. As noted above, A-3 *and G-5* employees are covered by the Fair Labor Standards Act (FLSA). *In each case, you* must request the employer to provide a contract, in both English and a language understood by the employee, to demonstrate that the employee will receive a fair wage, and that the employee understands his or her duties and rights regarding salary and working conditions. *(*See also 9 FAM 41.21 N6.2.*)*

b. The contract *must* stipulate the number of hours to be worked by the employee per week, the rate of pay *(the state or Federal minimum or prevailing wage, whichever is greater for every hour worked)*, the number of authorized holidays, vacation, and sick leave days per year, and the regular day(s) off each week. Under Federal law, the rate of overtime pay need not exceed the regular hourly rate if the employee resides in the home of the employer, but state law governing overtime rate also applies and must be checked. If the employee does not reside with the employer, overtime for hours in excess of 40 hours per week must be paid at the rate of time and a half. *The contract also must contain provisions* to the effect that the employer will not withhold the employee's passport nor prohibit the employee from leaving the premises when the employee is not on duty. If *you* request a contract and none is furnished, *refuse the* applicant under INA 214(b). *(See 9 FAM 41.21 N6.2(b).) If you routinely* encounter A-3 *or G-5* applications that do not meet FLSA standards, contact CA/VO/L/A for assistance.

c. A-3 *and G-5* applicants are subject to all ineligibilities under INA 212(a), but are not required to have a foreign residence which they have no intention of abandoning. Therefore, bona fide A-3 *and G-5* applicants may not be denied as intending immigrants under INA 214(b) *provided a complying, credible contract is provided.* In addition, A-3 *and G-5* applicants are subject to INA 222(g).

d. The employer must pay the domestic's initial travel expenses to the United States, and subsequently to the employer's onward assignment, or to the employee's country of normal residence at the termination of the assignment.

e. In accordance with INA 291, the burden of proof for A-3 or G-5 eligibility is on the applicant. You must assess the credibility of the applicant and the evidence submitted to determine qualification for an A-3 or G-5. The applicant must satisfy you that he or she will credibly engage in A-3 or G-5 activity under the contractual terms, and thereby maintain lawful status.

f. Do not issue a visa unless you can reasonably conclude that the employer will in fact provide the employee with the required wages and working conditions. You may presume that the applicant is not eligible if the employer does not carry the diplomatic rank of Minister or higher, or a position equivalent to Minister or higher. To rebut this presumption, the employer must demonstrate that he or she will have sufficient funds to comply with the FLSA, as reflected in the contract. You must deny the visa if you are not convinced the employer can in fact meet the terms of the contract. Consideration must also be given to the number of employees a particular employer may reasonably be able to pay.

g. If an employer has had previous instances of non-compliance with contracts with A-3 or G-5 employees or has a pattern of employee disappearance or credible abuse allegations, you may presume that the applicant is not eligible for the visa and refuse it. (See 9 FAM 41.21 N6.2 (b).) To rebut this presumption, the employer and the visa applicant would have to convince you that such an outcome is not likely to recur (e.g., by the employer's establishing that he or she had had a reasonable expectation that previous employees would remain in A-3 or G-5 status, rather than suddenly cease working in the household and remain unlawfully in the United States and that the disappearances were promptly reported, and by evidence establishing that the employer and the visa applicant intend to fulfill the provisions of the contract and enter into a bona fide employer-employee relationship, and that the applicant intends to maintain A-3 or G-5 visa status while in the United States). The burden of proof remains on the applicant and the employer to establish eligibility and future compliance with all requirements.

9 FAM 41.22 N4.5 Refusals and Advisory Opinions

(CT:VISA-1038; 09-25-2008)

Posts are not required to obtain an advisory opinion before refusing an A-3 visa application under INA 214(b) in cases where the applicant does not intend to take up the position, or where a contract is not provided in accordance with the consular officer's request. Consular officers may not, however, refuse an A-3 visa applicant under INA 214(b) who meets the qualifications for A-3 status, but whom the consular officer believes is an intending immigrant. Posts should not hesitate to seek the Visa Office's advice in questions of eligibility. In addition, posts should report by cable to the Department any denials in the 'A' category which are likely to prompt inquiries or complaints from the applicant's host government. These cabled reports should be slugged for the Office of the Chief of Protocol (S/CPR) and the Office of Foreign Missions (DS/*OFM*) in addition to the following Visa Office (CA/VO) addressees: CA/VO/L/A and CA/VO/F/P.

9 FAM 41.22 N5 HONORARY CONSULS

(CT:VISA-1038; 09-25-2008)

Honorary consuls are usually so designated because the performance of duties for the foreign government which appoints them is only incidental to the primary purposes of entry into, or presence in, the United States, typically for business, employment, study, or some other nongovernmental purpose. Therefore, an honorary consul does not usually seek to enter solely in order to perform governmental official duties and is not normally classifiable A-1 or A-2. However, the term "honorary" may be used in the consul's title even though the consul is coming solely to perform official duties. In such a case, the consular officer shall request the Department's (CA/VO/L/A) advisory opinion for the appropriate visa classification of the alien.