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U.S. Department of State Foreign Affairs Manual Volume 9
Visas

9 FAM 40.31 NOTES

*(CT:VISA-1889; 09-18-2012)
(Office of Origin: CA/VO/L/R)*

9 FAM 40.31 N1 BACKGROUND

(CT:VISA-1031; 09-22-2008)

Section 212(a)(3)(A) of the Immigration and Nationality Act was created by the Immigration Act of 1990, Public Law 101-649, and supplants many elements of former INA sections 212(a)(27) and 212(a)(29). It retains from these predecessor provisions the inadmissibility of aliens seeking to enter the United States to engage solely, principally, or incidentally 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)

(CT:VISA-1482; 08-30-2010)

INA 212(a)(3)(A) (8 U.S.C. 1182(a)(3)(A)) contains four distinct grounds of inadmissibility. It renders inadmissible 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 United States 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, a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means.

9 FAM 40.31 N3 SECURITY ADVISORY OPINIONS (SAO) REQUIRED

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- a. The Department's security advisory opinion (SAO) is required in any case involving possible inadmissibility under INA 212(a)(3)(A) (8 U.S.C. 1182(a)(3)(A)), except for those cases under INA 212(a)(3)(A)(ii) noted below that require an advisory opinion (AO) from CA/VO/L/A. This requirement is imposed to ensure consistency and uniformity of interpretation and to allow input from other interested U.S. Government agencies. SAO requests must be submitted by means of a "VISAS DONKEY, VISAS BEAR, or VISAS MANTIS" as appropriate.
- b. SAO requests must provide a summary of all information known to post, including a complete citation of the *Consular Lookout* and *Support System* (CLASS) entries (if any), as well as your evaluation of the case and recommendation regarding eligibility. They should be directed to the Coordination Division (CA/VO/L/C). For INA 212(a)(3)(A) cases involving primarily criminal matters (e.g., organized crime and gang activities, child abduction cases, etc.), you must request an AO from the Advisory Opinions Division (CA/VO/L/A). Once an SAO or an AO has been requested, no visa may be issued until the Department's response has been received.
- 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 review through the AO or SAO process, as appropriate.

9 FAM 40.31 N4 INFORMATION RELATING TO ALIENS' ORGANIZED CRIME AFFILIATIONS (FORMERLY RUSSIAN BUSINESS INVESTIGATION INITIATIVE (RBII) REPORTS)

(CT:VISA-1889; 09-18-2012)

- a. Section 212(a)(3)(A)(ii) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(A)(ii)) precludes the issuance of a *U.S.* visa to anyone whom "you or the Secretary of Homeland Security 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, we (State Department) informed you that the Secretary of Homeland Security 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. Prior to September 2008, posts were instructed to submit "VISAS SHARK" cables to report information regarding possible or identified members of organized crime groups within the Former Soviet Union. 08 SECSTATE 102952

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notified *posts* that the Visas Shark program no longer exists. Posts who encounter information that would previously have been submitted under the Visas Shark program should enter P3A2 entries for the alien(s) in question and maintain indefinitely post files related to every CLASS entry. If you obtain evidence of organized crime membership of an alien who holds a valid U.S. visa and you believe that information was not available to the adjudicating consular officer at the time of issuance, you should refer the case to your CA/VO/L/A desk officer by e-mail to determine whether sufficient evidence exists to recommend a revocation of the alien's visa.

- c. Beginning in September 2008, we entered into CLASS P3A2 hits for aliens previously identified to the Department who may have membership in or extensive business relationships with an identified organized crime family that could constitute an inadmissibility under INA section 212(a)(3)(A)(ii). When you encounter a P3A2 hit during visa adjudication, you must suspend adjudication on the case under INA section 221(g) and submit a request for an advisory opinion from CA/VO/L/A. See 9 FAM 40.31 N5.3 and 9 FAM 41.122 PN2.
- d. The requirement to submit formal advisory opinion requests to CA/VO/L/A for any applicant who may have an inadmissibility under INA 212(a)(3)(A)(ii) based upon organized crime involvement replaces the former VISAS EEL requirement. See 9 FAM 40.31 N5.3 and 9 FAM 40.31 PN1.

9 FAM 40.31 N5 ADJUDICATING INADMISSIBILITY UNDER INA 212(A)(3)(A)

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

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

(CT:VISA-1889; 09-18-2012)

INA 212(a)(3)(A) (8 U.S.C. 1182(a)(3)(A)) contains three main *subcategories*. The first, (i), is divided into two subcategories. The first main *subcategory*, Section (i)(I), makes an applicant inadmissible who you know or have reason to believe is entering the United States solely, principally, or incidentally to engage in espionage or sabotage. Normally, you will receive such information from a U.S. intelligence or law enforcement organization. Upon receipt of the information, you should suspend processing the case, deny the application under INA 221(g) (8 U.S.C. 1201(g)), and submit a VISAS DONKEY security advisory opinion (SAO) to CA/VO/L/C.

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

(CT:VISA-1889; 09-18-2012)

The second main *subcategory*, INA 212(a)(3)(A)(i)(II) (8 U.S.C. 1182(a)(3)(A)(i)(II)), makes inadmissible an applicant who you know or have reason to believe is coming to the United States solely, incidentally, or principally to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information.

- (1) Non-sensitive: One potential source of inadmissibility under this section is the violation of economic sanctions imposed by Executive Order on state sponsors of terrorism, currently Cuba, Iran, Sudan, and Syria. A current list of U.S. Government-designated State Sponsors of Terrorism is maintained by S/CT and may be accessed here. Details of the orders, which vary by country, are listed in Visa Reciprocity Schedules by Country Finder. The Executive Orders generally restrict or prohibit the transfer of goods, services, or funds between any of these states and the United States. If you encounter visa applications that seem to involve such transfers, you should err on the side of caution and submit a request for a security advisory opinion (SAO), using the "VISAS MANTIS" indicator. If the goods, services, or funds involved are not such that they are associated with the technology alert list described below, the AO 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 (see 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 VISAS MANTIS request for a security advisory opinion (SAO) to the Department.

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

(CT:VISA-924; 01-14-2008)

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

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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, you 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 Technology Alert List (TAL) Cases

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When applying the TAL, you 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 inadmissibility under INA 212(a)(3)(A)(i)(II), submit *an SAO* in the form of VISAS 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 a VISAS MANTIS SAO is submitted in a TAL case, you 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 or Nuclear? What is his current position and where does he *or she* work? What is the address and phone number of the company(ies) he *or she* intends to visit? Who is *the applicant* point of contact? Who is funding the travel or education? Will he *or she* 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 *or she* be "exporting" this new knowledge to a hostile nation?
- (4) You should permit and even encourage TAL applicants to provide supporting documentation from their home organizations. For example, project descriptions, annual reports, and letters of recommendation from a United States source or from abroad can be useful in helping to flesh out an applicant's real motives for travel. Such documents should be described in the SAO and held until the case has been closed.

9 FAM 40.31 N5.1-5 Seeking Security Advisory Opinions (SAO) for Technology Alert List (TAL) Cases

(CT:VISA-1889; 09-18-2012)

- a. With the exception of applicants who are nationals or employees of states

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sponsoring terrorism, VISAS MANTIS SAOs are not mandatory for all scientific and technical visitors seeking to engage in one of the critical fields. However, you should use caution in adjudicating all such cases. Only when you believe INA 212(a)(3)(A) clearly does not apply should the case be processed to conclusion without seeking the Department's opinion.

- b. You should seek the help of the Office of the Defense Attaché at post. The Defense Attaché and his or 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 a VISAS MANTIS SAO to CA/VO/L/C.
- c. The *DHS Attaché* or U.S. Customs *and Border Protection (CBP) representative* at post is also a valuable asset in these matters. *CBP at post is* responsible for enforcement and investigation overseas of all suspected violations of United States 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 you suspect, 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 as a VISAS MANTIS SAO.

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

(CT:VISA-1889; 09-18-2012)

The second main *subcategory* of INA 212(a)(3)(A) (8 U.S.C. 1182(a)(3)(A)) makes a visa applicant inadmissible if you have 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

(CT:VISA-1889; 09-18-2012)

- a. INA 212(a)(3)(A)(ii) visa ineligibility may arise from the fact that the applicant is a member of a KNOWN criminal organization which includes the Chinese Triads; the Mafia; the Yakuza; any of the various groups constituting the

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organized crime families of the Former Soviet Union; any of the organized Salvadoran, *Honduran, Guatemalan, and Mexican* street gangs in North America, including, but not limited to, the Mara Salvatrucha 13 (MS 13), *Mexican Mafia, SUR-13, Matidos-13, Florencia-13, La Familia, Nortenos, Clanton-14, Center Street Locos, Diablos, South Los, La Raza, Vatos Locos, Tortilla Flats, Latin Kings, Eastside Homeboys, Varrío Northside, Rebels-13, Brown Pride*, and 18th Street (18th Street) gangs; and the biker gangs the Hells Angels, the Outlaws, Bandidos, and the Mongols. If an active member of one of these organized crime groups applies for a visa, you must suspend processing the visa application, deny it under INA 221(g), and submit a request for an advisory opinion to CA/VO/L/A.

- b. As written, INA 212(a)(3)(a)(ii) is applicable to an individual entry, although the basis for applying INA 212(a)(3)(a)(ii) to active 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 *inadmissible* under then section INA 212(a)(27) *the precursor to the current INA 212(a)(3)(A)(ii)*. In 1992, the Department obtained concurrence from the INS to treat Triad membership as a ground of *inadmissibility* pursuant to INA 212(a)(3)(a)(ii). In 1995, this was extended with *Department of Justice* concurrence to organized crime groups operating in the former Union of Soviet Socialist Republics. By agreement with DHS in 2005, the ineligibility was extended to active members of organized Salvadoran street gangs in North America, including, but not limited to, the Mara Salvatrucha 13 (MS 13) and 18th Street (18th Street) gangs. By agreement with DHS in 2011, the ineligibility was extended to active members of the organized crime group known as the Yakuza, and the organized biker gangs Hells Angels, Outlaws, Bandidos, and Mongols.
- c. The basis for these determinations was that these groups operated as permanent organized criminal societies. Active membership in these groups could reasonably be considered to involve a permanent association with criminal activities and, therefore, 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 a prior finding that an alien was a member of an organized crime group will not result in a finding of inadmissibility for that alien with respect 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

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would be reason to believe the alien was not going to engage, even incidentally, in violations of United States 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 Office of Visa Services (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. You must consult with CA/VO/L/A on such cases and receive their concurrence that an alien can overcome a 3A2 visa inadmissibility finding before issuing a visa to an alien with a previous 3A2 refusal.

9 FAM 40.31 N5.4 Officials of Taiwan

(CT:VISA-1609; 12-20-2010)

Unless the alien is otherwise inadmissible, INA 212(a)(3)(A)(ii) (8 U.S.C. 1182(a)(3)(A)) will 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 United States 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. (See 9 FAM 40.31 N5.5 (b) below.)

9 FAM 40.31 N5.5 National Security Entry-Exit Registration System (NSEERS)

(CT:VISA-1889; 09-18-2012)

Reserved

9 FAM 40.31 N6 INADMISSIBILITY UNDER INA 212(A)(3)(A)(III)

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(CT:VISA-1333; 09-30-2009)

INA 212(a)(3)(A)(iii) 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 activities related to a recognized judicial or legal process, 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 an applicant is planning such activity, you should suspend processing, deny the application under INA 221(g), and submit a VISAS DONKEY Security Advisory Opinion (SAO) to the Office of Coordination Division (CA/VO/L/C). The consular section should also coordinate such cases with all elements of the Mission.