

## **9 FAM 41.101 NOTES**

*(CT:VISA-1269; 08-21-2009)*  
*(Office of Origin: CA/VO/L/R)*

### **9 FAM 41.101 N1 INTERPRETATION OF CONCEPTS**

#### **9 FAM 41.101 N1.1 Residence**

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

“Residence” is defined in INA 101(a)(33) as the alien’s “place of general abode; the ... principal, actual dwelling place in fact, without regard to intent.” In other words, it is the place where the alien in fact lives and under most common circumstances from which the alien conducts his or her life. It is not necessarily the place where the alien actually is at any given moment.

#### **9 FAM 41.101 N1.2 Physical Presence**

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

“Physical presence” constitutes the fact of being in a place at a given moment. This is a factual state or condition. “Physical presence” differs from “residence” in that “residence” is the particular location of a person’s general abode whereas “physical presence” is the particular location of the person at the given time. Thus, although the alien’s general abode may be located in one place, the alien may be physically present in another.

### **9 FAM 41.101 N2 PLACE OF APPLICATION FOR VISA APPLICANTS**

*(CT:VISA-1269; 08-21-2009)*

- a. A consular officer must accept a nonimmigrant visa (*NIV*) application in either of two circumstances:

- (1) The alien is a resident of the consular district; or
  - (2) At the direction of the Department, regardless of the location of the alien's residence.
- b. The alien must make application for a nonimmigrant in the consular district in which he *or* she has residence. (See 9 FAM 41.101 N2.2 about applicants physically present but not residents of a consular district.)

## **9 FAM 41.101 N2.1 Alien Who is Resident in a Consular District**

*(CT:VISA-1112; 11-17-2008)*

22 CFR 41.101 requires that you accept applications from visa applicants resident in post's consular district, even though the applicant may be absent from that district at the time of application. The regulatory language does not specifically require an alien with residence in the district to be physically present in the district nor does it restrict the applicant's presence to any particular location at the time of application.

## **9 FAM 41.101 N2.2 Alien Who is Physically Present but Not Resident in a Consular District**

*(CT:VISA-1112; 11-17-2008)*

22 CFR 41.101(a) gives you the discretion to permit an alien who is physically present in your consular district to apply for a nonimmigrant visa (NIV) outside his or her resident district. While 22 CFR 41.101(a) gives consular officers discretionary authority to reject applications by persons who are physically present in but not residents of the consular district, the Department expects that such authority will seldom, if ever, be used.

## **9 FAM 41.101 N2.3 Alien Who is Neither Resident Nor Physically Present in a Consular District**

*(CT:VISA-1269; 08-21-2009)*

The provisions of 22 CFR 41.101(a) preclude acceptance or processing of a *regular type* NIV application when the alien is neither a resident of nor physically present in the consular district at the time of application. Under no circumstances whatsoever may a consular officer accept an application from, nor may an NIV be issued to, such an alien. *For guidance on A or G visas, or diplomatic and official type visas, which have different*

*requirements regarding physical presence, please (see 9 FAM 41.21, procedural notes).*

## **9 FAM 41.101 N3 PERSONAL APPEARANCE**

*(CT:VISA-1112; 11-17-2008)*

As set forth in 22 CFR 41.102, every alien seeking an NIV must apply in person and be interviewed by a consular officer. The regulation does provide for specific exceptions. If certain circumstances are present, then you may in your discretion waive personal appearance. Neither 22 CFR 41.101 nor its interpretations in these Notes have any bearing on the personal appearance requirement. Consular officers shall take into account both the factors noted in 9 FAM 41.101 N2.2 and the limitations of waiver authority in 22 CFR 41.102 in determining whether a waiver of personal appearance is warranted in a mail-in application from an alien resident of the district who is physically present elsewhere.