

## **9 FAM 42.61 NOTES**

*(CT:VISA-1865; 09-05-2012)*  
*(Office of Origin: CA/VO/L/R)*

### **9 FAM 42.61 N1 DETERMINING PLACE OF APPLICATION BY RESIDENCE, NOT COUNTRY OF NATIONALITY**

#### **9 FAM 42.61 N1.1 Background**

*(CT:VISA-715; 03-09-2005)*

Department regulations designate the alien's residence as the determining factor for the place of application under normal circumstances. This is based on the view that a consular officer assigned to the country of the alien's residence is in the best position to resolve questions relating to visa eligibility. It is easier for an officer familiar with the culture, language, and legal and political framework of the country in which the alien lives to interpret local documents and evaluate claims made by the alien. A fraudulent claim or document that might quickly be spotted in the country of the alien's residence could go undetected at a post in another part of the world. An alien fearing visa refusal may wish to apply away from home in order to keep possible grounds of ineligibility from being discovered. Accordingly, officers should refer to the guidelines in the following notes when dealing with the case of any immigrant wishing to pursue an application outside the alien's place of residence.

#### **9 FAM 42.61 N1.2 Defining Residence**

*(CT:VISA-1865; 09-05-2012)*

INA 101(a)(33) states, in part: "The term "residence" means the place of general abode; the place of general abode of a person means his *or her* principal, actual dwelling place in fact, without regard to intent." If an alien can show that his or her "principal, actual dwelling place" is or was in a specified country, the fact that the alien does/did not have, or intend to have, the status of a lawful permanent resident or any other legal status in that country is not relevant.

### **9 FAM 42.61 N2 ALIENS APPLYING ABROAD**

## 9 FAM 42.61 N2.1 Usual Place of Application

(CT:VISA-1558; 09-30-2010)

- a. As a general rule, an applicant in the United States should apply for a visa at the post in the consular district of the applicant's last foreign residence. That is the only post required to accept the case for processing, although some other post might do so as a matter of discretion.
- b. However, you must accept, when so directed by the Department, the immigrant visa (IV) case of any alien who is a citizen or a national of the consular district, regardless of the alien's last residence abroad.
- c. The assignment of an IV petition to a post by the IV processing center in the United States will constitute such a direction by the Department.

## 9 FAM 42.61 N2.2 Special Exceptions

### 9 FAM 42.61 N2.2-1 Discretionary Cases for Hardship Reasons

(CT:VISA-1865; 09-05-2012)

The Department strongly encourages posts to consider discretionary acceptance of the case of an alien residing in the United States if:

- (1) The alien demonstrates that *it would be a* hardship *if they were* required to return to the country of last foreign residence; and
- (2) The additional workload is acceptable.

### 9 FAM 42.61 N2.2-2 Posts Encouraged to Accept Cases Clearly Involving Hardship

(CT:VISA-1089; 10-23-2008)

The Department urges posts to accept legitimate hardship cases (see 9 FAM 42.61 N2.2-3 or 9 FAM 42.61 N2.2-4) when the workload permits. The Department also encourages posts to be flexible in accepting cases which 9 FAM 42.61 N2.2-3 below would indicate should ordinarily be processed at another post in the same country.

### 9 FAM 42.61 N2.2-3 Determining Hardship

(CT:VISA-1865; 09-05-2012)

- a. Hardship would not usually be considered to exist when an alien does not wish to return to the place of last foreign residence only because of inconvenience or expense.
- b. A brief, temporary absence from work would not generally be considered a hardship.

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- c. Inability of an alien to travel long distances because of physical infirmity or advanced age would be considered to entail hardship.
- d. The presence of war, widespread civil disturbance, revolution, or other similar phenomena in an alien's country of last foreign residence would be evidence that *it would be a* hardship if the alien were required to return to that country. If the post is inclined to accept a case but has doubts about the alien's claim regarding a disturbance of some kind in the alien's *last* country of residence, the Department's advice may be sought (slug telegram CA/VO/F/P).
- e. Aliens from countries with no visa-issuing post could possibly entail hardship.

### **9 FAM 42.61 N2.2-4 Department and Post of Jurisdiction Informed When Discretionary Case Accepted**

*(CT:VISA-1558; 09-30-2010)*

Posts accepting a discretionary case must inform both the Department's Post Liaison Division (CA/VO/F/P) and the post with jurisdiction over the alien's place of residence by telegram. Reports of acceptance must be made in each individual case, except when the alien is a member of a group or class of aliens routinely accepted by the post and the Department has already been informed of the policy, or when a group or class of aliens has been the subject of instructions from the Department.

## **9 FAM 42.61 N3 THIRD COUNTRY PROCESSING FOR ALIENS ABROAD**

### **9 FAM 42.61 N3.1 Application of Nonresident Alien Physically Present in District**

*(CT:VISA-1865; 09-05-2012)*

Department regulations provide that a post must accept an application from an alien physically present in the consular district even though not a resident *in that district*, provided the alien expects to remain in the consular district throughout the several months that it normally takes to process an application and is legally able to do so.

### **9 FAM 42.61 N3.2 Application in Third Country by Aliens Abroad**

*(CT:VISA-854; 11-21-2006)*

Unless physically present in the consular district as described above (see 9 FAM 42.61 N3.1) an alien in whose country of residence IVs are routinely processed

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should not normally be accepted for processing by a post in a third country. Should a post wish to accept such a case in exceptional circumstances, it must first obtain Department (CA/VO/F/P) approval. Such requests should be sent telegraphically and should include the post of primary jurisdiction as an information addressee.

**9 FAM 42.61 N3.2-1 Defining Homeless Case**

*(CT:VISA-854; 11-21-2006)*

Generally, a “homeless” visa applicant is one who is a national of a country in which the United States has no consular representation or in which the political or security situation is tenuous or uncertain enough that the limited consular staff is not authorized to process IV applications. Countries whose nationals are considered homeless are listed in 9 FAM 42.61 Exhibit I.

**9 FAM 42.61 N3.2-2 Homeless Physically Present in the United States**

*(CT:VISA-854; 11-21-2006)*

Applicants residing in the United States may elect to apply for adjustment of status with Department of Homeland Security (DHS) under the provisions of INA 245(i) (8 U.S.C. 1255(i)), and thus rarely require visa processing abroad.

**9 FAM 42.61 N3.2-3 Homeless Physically Present in a Third Country**

*(CT:VISA-1865; 09-05-2012)*

Homeless applicants residing in a third country are processed at the same IV processing post as are nationals of that country. Posts must accept for processing any IV applicant who is physically present in their consular district, provided the applicant has the permission of the host government to remain there legally for a period sufficient to complete processing of the application. This does not include persons who have been determined not to be refugees, and who are subject to return to their country of origin.

**9 FAM 42.61 N3.2-4 Homeless Physically Present in Home Country**

*(CT:VISA-715; 03-09-2005)*

The visa office (VO) has designated specific posts to process IV applications from these homeless applicants. (See 9 FAM 42.61 Exhibit I for a list of nationalities considered homeless and the posts selected to process such cases.)

## 9 FAM 42.61 N3.2-5 Processing Homeless Cases

(TL:VISA-175; 01-15-1998)

See 9 FAM 42.61 Procedural Notes.

## 9 FAM 42.61 N4 POSSIBLE DELAYS IN PROCESSING OUT-OF-DISTRICT APPLICATIONS

(CT:VISA-1865; 09-05-2012)

*Processing posts must exercise particular* care to ensure that documentation and other elements of an out-of-district application are in order. It may be necessary to consult with the post of primary jurisdiction for background information or document verification. This may cause delays, possibly after the formal visa interview has taken place. The applicant should be informed of this possibility at the time of acceptance of the case for processing.

## 9 FAM 42.61 N5 RESIDENCE OF ALIEN WITH NO FIXED ADDRESS

(TL:VISA-175; 01-15-1998)

For the purpose of 22 CFR (see 9 FAM 42.61, Related Statutory Provisions). The residence of an alien with no fixed address, such as a member of a crew, may be determined as follows:

- (1) The residence of the alien's spouse and/or children, if any, can be applied to the alien;
- (2) If paragraph (1) above does not apply, the home port of a vessel may be used, or the location of the company employing the alien; or
- (3) If neither of the above paragraphs applies, the country in which the alien has resided the longest as an adult or the country of the alien's nationality applies.

## 9 FAM 42.61 N6 HUSBAND AND WIFE WITH DIFFERENT RESIDENCES

(CT:VISA-1865; 09-05-2012)

It would be unusual if a husband and wife resided in different consular districts but applied for visas together. In such an event, it would be preferable for the couple to apply where the principal alien resides, although the residence of the other spouse *may* be used if more convenient.