9 FAM 40.22
NOTES

(CT:VISA-1493; 09-02-2010)
(Office of Origin: CA/VO/L/R)

9 FAM 40.22 N1 APPLYING INA 212(a)(2)(B)

(CT:VISA-838; 09-19-2006)

Any alien convicted of two or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were five years or more is inadmissible.

9 FAM 40.22 N1.1 Cases Involving Both INA 212(a)(2)(A)(i) and (2)(B)

(CT:VISA-838; 09-19-2006)

A case may arise in which the pertinent court records indicate that the alien had been convicted and sentenced to imprisonment for four years for committing rape, a crime involving moral turpitude, and that the alien had also been convicted and sentenced to imprisonment for one year for drunkenness, a crime not involving moral turpitude. In such a case, the alien would be inadmissible under INA 212(a)(2)(A)(i) and (2)(B).

9 FAM 40.22 N1.2 Effects of Suspended Sentence, Foreign Pardon, or Amnesty Decree

(CT:VISA-1493; 09-02-2010)

a. A sentence to confinement, the execution of which has been suspended by a court of competent jurisdiction, is still considered to have been "actually imposed" within the meaning of INA 212(a)(2)(B) (Matter of Castro, 19 I&N 692). Hence, if an alien has been convicted of committing two or more offenses for which the aggregate sentences to confinement were five years or more, but the court suspended the execution of the sentence in whole or in part so as to reduce the actual term of confinement to less than 5 years, the case would still come within the purview of INA 212(a)(2)(B).

b. *If* a court of competent jurisdiction suspends the imposition of sentence,

(i.e., chooses some other form of punishment, such as probation or community service), any period of confinement proscribed by law for the crime in question for which the applicant was convicted is not within the meaning of INA 212(a)(2)(B) since it was never "actually imposed."

c. A further distinction must be made between a sentence suspended by the court and, on the other hand, a pardon or general amnesty. An alien who has been convicted of two or more offenses for which the aggregate sentences to confinement were five years or more but which are later extinguished by reason of the granting of an unconditional foreign pardon or amnesty decree of any kind, whether granted at the conclusion of the original trial, in appellate proceedings, or in any other type of proceedings, would be inadmissible under INA 212(a)(2)(B). The fact that the beneficiary of such a pardon or decree was relived in whole or in part from serving a sentence to confinement would not alter the fact that such a sentence would be compatible in determining the aggregate sentences to confinement actually imposed.

9 FAM 40.22 N1.3 Effect of One Conviction for Two or More Offenses

(CT:VISA-838; 09-19-2006)

In view of the specific language of INA 212(a)(2)(B), it is not necessary to establish that an alien has been convicted on two separate and distinct occasions in order to sustain a finding of inadmissibility thereunder. For example, a record of conviction showed that an alien had been convicted on four separate and distinct counts of violating the following sections of the Internal Revenue laws (1934 Edition): Section 1162 (Registry of Stills); Section 1170 (Premises Prohibited for Distilling); Section 1184 (Distilling Without Posting Bond); and Section 1185 (Distilling Mash). A sentence to imprisonment of two years was imposed on each count in the indictment or a total of eight years. Although there was only one conviction, and although the offenses were predicated on a single scheme of misconduct, the fact that there was a series of criminal acts would require a finding of inadmissibility under the provisions of INA 212(a)(2)(B).

9 FAM 40.22 N1.4 Political Offenses

(CT:VISA-1493; 09-02-2010)

In connection with the term "purely political offenses" as used in INA 212(a)(2)(B), see 9 FAM 40.21(a) N10. Requests for advisory opinions should be submitted in accordance with 9 FAM 40.21(a) PN1.

9 FAM 40.22 N2 TWO CLASSES OF JUVENILE DELINQUENTS

(CT:VISA-838; 09-19-2006)

The controlling law differentiates between two classes of juvenile delinquents: those under the age of fifteen at the time of commission of the acts underlying their delinquency, and those between the ages of fifteen and eighteen at the time of commission of the underlying offense.

(1) A juvenile whose offense was perpetrated before the alien's fifteenth birthday cannot be held inadmissible under INA 212(a)(2)(B) by reason of the offense, regardless of the nature of the offense, the type of court which heard the case, or whether the alien was treated as a juvenile or as an adult.

(2) A juvenile whose offense was perpetrated between the ages of fifteen and eighteen will be subject to the provisions of INA 212(a)(2)(B) if the:

  (a) Alien was tried and convicted as an adult; and

  (b) Alien was convicted of a violent felony as defined in sections 1(1) and 16 of Title 18 of the United States Code. (See 9 FAM 40.21(a) N9.4-2.)

(3) Juvenile delinquency is not a crime and may not serve as the basis for a finding of INA 212(a)(2)(B) inadmissibility. (See 9 FAM 40.21(a) N9.)

9 FAM 40.22 N3 IMMIGRANT APPLICANTS FOR WAIVERS UNDER INA 212(H)

(CT:VISA-838; 09-19-2006)

An immigrant visa applicant who is found inadmissible under INA 212(a)(2)(B) and is the spouse, parent, son, or daughter of a U.S. citizen or of a lawful resident alien may seek a waiver of inadmissibility under INA 212(h). (See 9 FAM 40.21(a) N4 and 9 FAM 40.21(a) PN2 for detailed waiver information and procedures.)