9 FAM 40.65 NOTES

(CT:VISA-1706;   09-23-2011)
(Office of Origin: CA/VO/L/R)

9 FAM 40.65 N1 *VISA INELIGIBILITY AND INADMISSIBILITY* FOR "SMUGGLING"

(CT:VISA-1706;   09-23-2011)

Section 212(a)(6)(E) of the INA provides for the inadmissibility for visa issuance of "any alien" who "at any time"..."knowingly"... has "encouraged, induced, assisted, abetted or aided"..."any other alien"..."to enter or to try to enter the United States" in violation of law *is ineligible for a visa and inadmissible to the United States.*

9 FAM 40.65 N2 DEFINING "ANY ALIEN"

(CT:VISA-1706;   09-23-2011)

All aliens, including permanent resident aliens seeking reentry into the United States, are potentially subject to this provision. However, the Secretary of Homeland Security may waive *inadmissibility (see 9 FAM 40.65 N8)* for a permanent resident alien who has sought to assist only his spouse, child or parent and who is returning to the United States under the conditions found in section 211(b), i.e., one who returns under circumstances not requiring a returning resident visa (within one year without a reentry permit, or within a maximum of two years with a reentry permit). (See INA 211(b).)

9 FAM 40.65 N3 *VISA INELIGIBILITY AND INADMISSIBILITY* COVERING "AT ANY TIME"...PERIOD *APPLIES TO SMUGGLING*

(CT:VISA-1706;   09-23-2011)

The conduct which is proscribed under this section may have occurred at any time in the past. Therefore, there will be instances in which an alien previously exempted from the effects of this particular inadmissibility in its original version (prior to June 1, 1991) may currently be *ineligible for a visa*

and inadmissible. (See the discussion of elimination of "for gain" requirement in 9 FAM 40.65 N7 below and its effect on assisting family members to enter the United States in 9 FAM 40.65 N6 below.)

9 FAM 40.65 N4 SMUGGLER MUST ACT "KNOWINGLY"

(CT:VISA-829; 08-16-2006)

A key element of the new INA 212(a)(6)(E) provision is that the "smuggler" must act "knowingly" to encourage, induced, or assist an illegal alien to enter the United States. In other words, in order to be found inadmissible the "smuggler" must be aware of sufficient facts such that a reasonable person in the same circumstances might conclude that his or her encouragement, inducement, or assistance could result in the entry of the alien into the United States illegally and, further, the "smuggler" must act with intention of encouraging, inducing, or assisting the alien to achieve the illegal entry. Therefore, belief that the alien was entitled to enter legally, although mistaken, would be a defense to inadmissibility for a suspected "smuggler."

9 FAM 40.65 N5 "ENCOURAGE, INDUCE, ASSIST, ABET, OR AID"

(CT:VISA-890; 05-30-2007)

The actions for which a "smuggler" might be found inadmissible are numerous:

(1) They could be as little as offering an alien a job under circumstances where it is clear that the alien will not enter the United States legally in order to accept the employment (encourage and induce);

(2) They might actually involve physically bringing an alien into the United States illegally (aid and assist);

(3) With regard to a visa application, we would hold that an alien who knowingly makes false oral or written statements on behalf of a visa applicant, including a family member, is inadmissible under this section, provided the false statement was material (i.e., the visa applicant was or would have been found eligible for the visa based on the alien's false statement but, on the true facts the visa applicant was not eligible for the visa);

(4) INA 212(a)(6) (8 U.S.C. 1182(a)(6)) relates to assisting aliens to

enter the United States "in violation of law", and therefore where the assistance relates to a misrepresentation in another alien's application for a visa or admission to the United States it would only be a violation of law if the misrepresentation meets the standards for a 212(a)(6)(C) finding; and

(5) If an advisory opinion (AO) is required for a 212(a)(6)(C) finding in accordance with the guidelines in 9 FAM 40.63 N7, an AO must be submitted before a 212(a)(6)(E) finding can be made.

9 FAM 40.65 N6 "ANY OTHER ALIEN"... EFFECT OF REVISION ON FAMILY RELATED SMUGGLING

(CT:VISA-829; 08-16-2006)

Encouraging inducing, or assisting any other alien, even close family members, to enter the United States illegally can result in inadmissibility under this section. This is in contrast to the previous version (INA 212(a)(31)) which was interpreted to exclude actions on behalf of close family members where the sole motive for the actions was family affection and not financial or other "gain." (See the discussion on elimination of "for gain" requirement in 9 FAM 40.65 N7 below.)

9 FAM 40.65 N7 ELIMINATING "FOR GAIN" REQUIREMENT

(CT:VISA-1706; 09-23-2011)

a. *The provisions of INA 212(a)(6)(E) (formerly 212(a)(31) were significantly amended by the Immigration Act of 1990 (IMMACT90). Section 601(a) of the IMMACT90 altered the language of 212(a)(6)(E) by eliminating the words "for gain." Under the previous section an alien "smuggler" could not be found inadmissible for encouraging, inducing or assisting the illegal entry of another alien unless it could be established that the actions of the "smuggler" were motivated by at least the expectation of, if not the receipt of, some tangible "gain," usually money or services.*

b. *The "for gain" element was often the most difficult part of a case to establish under the former provisions, with the result that many suspected "smugglers" could not be found inadmissible. Elimination of the "for gain" element obviates the necessity to establish the expectation or receipt of profit as an element of a finding of inadmissibility under INA 212(a)(6)(E).*

9 FAM 40.65 N8 WAIVERS

(CT:VISA-1706; 09-23-2011)

a. *Although all aliens, including permanent resident aliens seeking reentry into the United States, are potentially subject to INA 212(a)(6)(E), the Secretary of Homeland Security may waive inadmissibility for a nonimmigrant visa applicant pursuant to INA 212(d)(3)(A). (See 9 FAM 40.301).*

b. *With respect to an immigrant, pursuant to INA 212(d)(11), the Secretary of Homeland Security may, in his or her discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive visa ineligibility and inadmissibility under INA 212(a)(6)(E) if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of such action was the alien's spouse, parent, son, or daughter. A waiver under INA 212(d)(11) is only available to immigrant visa applicants in the following categories:*

   - *Immediate relatives (IR categories)*
   - *Unmarried sons and daughters of U.S. citizens*
   - *Spouses and unmarried sons and daughters of permanent resident aliens*
   - *Married sons and daughters of U.S. citizens*

   Moreover, the Secretary of Homeland Security may also waive inadmissibility for a permanent resident alien who has sought to assist only his spouse, parent, son or daughter and who is returning to the United States under the conditions found in section 211(b), i.e., one who returns under circumstances not requiring a returning resident visa (within one year without a reentry permit, or within a maximum of two years with a reentry permit). (See INA 211(b).)