9 FAM 41.11
NOTES

(CT:VISA-1662; 06-28-2011)
(Office of Origin: CA/VO/L/R)

9 FAM 41.11 N1 ENTITLEMENT TO NONIMMIGRANT STATUS

9 FAM 41.11 N1.1 Length of Stay and Permissible Activities

(CT:VISA-1360; 10-23-2009)

The Immigration Nationality Act (INA) makes basic distinctions between immigrant aliens and nonimmigrant aliens with regard to length of stay and permissible activities. The immigrant is admitted into the United States for permanent residence without restriction as to length of stay and may engage in virtually every legitimate activity in which a U.S. citizen may engage. The nonimmigrant alien may remain only until a predetermined date and may engage only in activities allowed for the assigned nonimmigrant classification under INA 101(a)(15). The nonimmigrant alien will be subject to removal or other measures to enforce removal from the United States if he or she fails to maintain nonimmigrant status by failing to depart at the end of the authorized period of stay or engages in unauthorized activities.

9 FAM 41.11 N1.2 Restrictions on Employment

(CT:VISA-1360; 10-23-2009)

The most significant restriction on activities of nonimmigrant aliens relates to employment. In certain nonimmigrant classifications, employment is prohibited. In others, employment of a specified, restricted kind may be authorized upon fulfillment of certain requirements. Therefore, an applicant expecting to be gainfully employed in the United States may not be classified as a nonimmigrant unless the intended employment is, or may be, authorized under a nonimmigrant classification for which all other requirements are met by the applicant.

9 FAM 41.11 N1.3 Intent to Adjust Status

(CT:VISA-1660; 06-14-2011)

If an alien wishes to enter the United States in order to remain there permanently, the consular officer should not generally suggest that the alien apply for a nonimmigrant visa (NIV) and then seek adjustment of status under INA 245. The consular officer must review the requirements of the specific visa classification sought in order to advise the applicant regarding adjustment of status. If the classification is subject to an immigrant intent test, then travel to the United States for the specific purpose of adjusting would be inconsistent with that visa classification. On the other hand, there are NIV classifications, such as those found at INA 101(a)(15)(H-1B), (K), (L), which hold no prohibition to adjustment.

9 FAM 41.11 N1.4 Alien with Intent to Accept Short Term Employment During Visit

(TL:VISA-2; 08-30-1987)

An intention to accept employment is often tied with an intention to remain in the United States for an extended period of time. It is important to note, however, that this need not always be the case. For example, an alien employed in an occupation subject to seasonal fluctuations might apply for a tourist visa for the purpose of earning money in the United States during the slack season at home and then returning home to resume regular employment. Thus, the alien may not intend to remain in the United States longer than would be authorized, but may clearly intend to engage in unauthorized activities during the stay in the United States and may not be classified as a nonimmigrant for that reason.

9 FAM 41.11 N1.5 Immigrant Intent and INA 214(b)

(CT:VISA-1660; 06-14-2011)

a. The Immigration and Nationality Act (INA) distinguishes nonimmigrants from immigrants by considering all visa applicants to be immigrants unless they can prove that they are entitled to an NIV classification. Section 101(a)(15) of the Act defines an immigrant as a visa applicant who does not meet the requirements of one of the nonimmigrant categories listed in that section. To render this distinction operational, the INA under 214(b) deems all applicants to be immigrants until they prove to the consular officer that they qualify for nonimmigrant status (with the exception of H-1B, L, and V visas).

b. In order to be classified as a nonimmigrant, the alien must prove "to the satisfaction of the consular officer that he or she is entitled to a nonimmigrant status under section 101(A)(15) (with certain exceptions)". Thus, the alien must provide the consular officer a credible showing that

he is entitled to nonimmigrant status and that his intended activities are consistent with the status for which he is applying.

c. The consular officer assesses the credibility of the applicant and the evidence submitted to determine qualifications under 101(a)(15). The consular officer must be satisfied that the applicant will credibly engage in the activities authorized under the particular NIV classification, that the alien will abide by the conditions of that nonimmigrant category, and that the alien will thereby maintain lawful status.

d. The notes below provide general guidance on adjudication. When adjudicating NIV applications, a consular officer must be careful to recognize that the standards for qualifying for an NIV are found in the relevant subsections of 101(a)(15) rather than in 214(b) itself. 214(b) does not provide any independent standard for qualifying for an NIV, but refers to the specific standards set out in 101(a)(15). This section does not impose a separate standard on immigrant intent. The immigrant intent standards for each nonimmigrant classification are provided in the INA and corresponding regulations. Furthermore, this section does not constitute an independent ground of inadmissibility under INA 212(a) and shall not be used as such. Any questions arising under those sections must be addressed through the appropriate advisory opinion (AO) process. Thus, section 214(b) constitutes merely a basis of NIV refusal.

9 FAM 41.11 N2 RESIDENCE ABROAD AND IMMIGRANT INTENT

9 FAM 41.11 N2.1 When Residence Abroad Required

(CT:VISA-1660; 06-14-2011)

Not all NIV categories impose an immigrant intent requirement. Most NIV classifications that impose such use the residence abroad requirement. Other categories, such as the E visa, have a much lesser standard. When adjudicating NIV applications, it is important to apply the correct standard for that visa classification. NOTE: Only the following visa categories are subject to residence abroad requirements: B, F, H (except H-1), J, M, O-2, P, and Q.

9 FAM 41.11 N2.2 Residence Abroad *Defined*

(CT:VISA-1662; 06-28-2011)

a. The term "residence" is defined in INA 101(a)(33) as the place of general

abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent. This does not mean that an alien must maintain an independent household in order to qualify as an alien who has a residence in a foreign country and has no intention of abandoning it as required in INA 101(a)(15)(B), (F), (H) other than (H-1), (J), or (M), (O-2), (P), or (Q). If the alien customarily resides in the household of another, that household is the residence in fact.

b. When adjudicating this requirement, it is essential to view the requirement within the nature of the visa classification. Discussion of the requirement in the relevant sections will provide guidance.

c. The residence in a foreign country need not be the alien's current or former residence. For example, an alien who has been living in Germany may meet the residence abroad requirement by showing a clear intention to establish a residence in Canada after a temporary visit in the United States.

9 FAM 41.11 N3 CHOICE OF CLASSIFICATION

9 FAM 41.11 N3.1 Principal Purpose of Admission

(CT:VISA-1155; 02-17-2009)

An alien desiring to come to the United States for one principal, and one or more incidental, purposes should be classified in accordance with the principal purpose. For example, the consular officer should classify as F-1 or M-1 an alien seeking to enter the United States as a student who desires, prior to entering an approved school, to make a tourist trip of not more than 30 days within the United States. Also, when a family member's primary purpose to come to the United States is to accompany the principal, the classification of the accompanying family member is either of a derivative of the principal if the classification provides or as a B-2, if not. This is the case, even if the accompanying family member decides to attend school. (See 9 FAM 41.11 N5.2.)

9 FAM 41.11 N3.2 Choice When More Than One Classification Possible

(TL:VISA-356; 02-14-2002)

When it appears that an alien can properly be classified under two or more nonimmigrant classifications, the consular officer should explain to the alien the terms and requirements of each, including documentary requirements, maximum lengths of stay which may be authorized upon admission, and any other pertinent factors. (See the "Visa Reciprocity and Country Documents

Finder".)

9 FAM 41.11 N3.3 No Alternative to A and G Classification

(CT:VISA-1660; 06-14-2011)

The provisions of 22 CFR 41.22(b) relating to the A and G classifications are always controlling. The consular officer should not suggest alternative classifications.

9 FAM 41.11 N4 CLASSIFICATION OF SPOUSE

9 FAM 41.11 N4.1 Derivative Classification of Spouse Accompanying the Principal Alien

(CT:VISA-717; 03-10-2005)

In all nonimmigrant classifications except B, C, D, K, and V, the principal alien's spouse is entitled to derivative nonimmigrant classification. The consular officer must be satisfied that a valid marital relationship exists. If the spouse is applying in company with the principal alien, the determination that the principal alien is eligible for one of the nonimmigrant classifications is sufficient to establish that the spouse is eligible for the corresponding derivative classification.

9 FAM 41.11 N4.2 Principal Alien Must be Maintaining Status for Spouse to be Given Derivative Classification

(CT:VISA-1155; 02-17-2009)

If the spouse is seeking to follow to join a principal alien already in the United States, the consular officer must be satisfied that the principal alien is, in fact, maintaining the nonimmigrant status from which the spouse seeks derivative classification. In questionable cases, the consular officer may request verification from the Department of Homeland Security (DHS) or from the Department for holders of A, G, and NATO visas. If, in the course of processing an application, the consular officer learns that the principal alien is not in fact maintaining the status claimed (for example, is not pursuing a full course of study, participating in an exchange program, or performing the specified services or undertaking the specified training), such information should be reported to the appropriate DHS district office. (See 9 FAM 41.11 N4.3 concerning nonimmigrant intent.)

9 FAM 41.11 N4.3 Establishment of Nonimmigrant Status Also Required for Derivative Classification

(TL:VISA-458; 08-29-2002)

A spouse applying for a visa on the basis of derivative classification must establish the requisite nonimmigrant intent to the same extent as the principal alien. Thus, an applicant for a(n) F-2, J-2, H-4 (except the derivatives of an H-1), M-2, O-3, and P-4 visa must establish having a residence in a foreign country which the applicant has no intention of abandoning. If the spouse is applying for a visa in the same company with the principal alien, both applicants should be evaluated collectively. Differing conclusions concerning their entitlement to nonimmigrant classification would be rare and should be based on clearly defined, objective differences in their situations. If the derivative applicant is seeking to join a principal applicant already in the United States, a different situation may exist from that which existed at the time of the issuance of the principal alien's visa and could justify a determination by the consular officer that the derivative applicant does not have the requisite nonimmigrant intent.

9 FAM 41.11 N4.4 Choice of Alternate Classification When Derivative Status is Too Limiting for Spouse

(TL:VISA-2; 08-30-1987)

A spouse eligible for derivative classification may also qualify for and be issued another type of visa. For instance, the spouse of an F-1 student may wish to work. Since F-2 visa holders may not work, the spouse may wish to apply for an immigrant visa (IV), temporary worker visa, or another type of visa, which allows work for pay.

9 FAM 41.11 N4.5 Derivative Nonimmigrant Classification for Spouse of Permanent Resident Alien Signing INA 247(b) Waiver

(TL:VISA-2; 08-30-1987)

A permanent resident may accept a position or establish a business, which, if the alien were a nonimmigrant, would lead to A, E, or G classification. In order to retain permanent residence, the alien must sign a waiver of rights, privileges, exemptions, and immunities under INA 247(b). However, the spouse of such an alien may be granted derivative A, E, or G status if the spouse is a nonimmigrant or does not wish to maintain permanent residence. As an example, a permanent resident that is a citizen of a small country might be named to the country's permanent U.N. delegation. The alien could retain permanent residence by signing the waiver. The spouse

may, however, be granted derivative G-1 status if the spouse does not wish to maintain permanent residence or has never had it. For instance, if the principal alien has married after becoming a permanent resident and the spouse does not wish to remain permanently in the United States because of illness in the family abroad, a derivative G classification would be the only way for the spouse to join the principal alien for visits from time to time.

9 FAM 41.11 N4.6 Classification of Spouse Accompanying Alien Crew Member

(CT:VISA-1155; 02-17-2009)

The spouse of an alien crewmember entering the United States as a nonimmigrant under INA 101(a)(15)(D), who is coming to the United States solely to accompany the principal alien, is classifiable B-2. (See 9 FAM 41.31 N13.5.)

9 FAM 41.11 N4.7 Classification of Party to Proxy Marriage

(CT:VISA-1155; 02-17-2009)

a. INA 101(a)(35) provides that the term "spouse", "wife", or "husband" does not include a party to a proxy marriage, which has not been consummated.

b. Therefore, a spouse by a proxy marriage, which has not been consummated, cannot derive a nonimmigrant classification from a principal alien in the United States. In such cases, a B-2 visa may be issued to an otherwise qualified proxy spouse, provided the consular officer concludes that the principal alien in the United States is maintaining the appropriate nonimmigrant status and that the spouse seeks to travel to the United States for the purpose of joining the principal alien. After admission to the United States in B-2 status and consummation of the marriage, the spouse by proxy marriage can then apply to DHS for a change to the appropriate derivative nonimmigrant status.

9 FAM 41.11 N5 CLASSIFICATION OF CHILD

9 FAM 41.11 N5.1 Derivative Classification of Child Accompanying or Following to Join the Principal Alien

(TL:VISA-2; 08-30-1987)

The provisions of 9 FAM 41.11 N4.1 and 9 FAM 41.11 N4.2 are applicable to an alien child of a principal alien, provided the child is a "child" as defined in INA 101(b)(1)(A) through (E).

9 FAM 41.11 N5.2 Classification of Children Who Will also be Attending School

(TL:VISA-2; 08-30-1987)

A principal alien's child entitled to derivative nonimmigrant classification from the principal alien is not required to qualify under INA 101(a)(15)(F) as a nonimmigrant student, even though the child will attend school in the United States while accompanying the principal alien.

9 FAM 41.11 N6 ISSUANCE OF NONIMMIGRANT VISAS (NIV) TO SPOUSES AND/OR CHILDREN WHERE PRINCIPAL IS IN STATUS BUT HAS NO VISA

(CT:VISA-1360; 10-23-2009)

Derivative beneficiaries are entitled to apply for visas to follow and/or join principals who are maintaining status in the United States, even when the principal was never issued a visa in the classification being sought by the dependent. Take, for instance, a world-class soccer player, who changes his or her status from F-1 to O-1. The spouse and/or children are entitled to apply for nonimmigrant O-3 visas. Typical documentation for establishing entitlement to visas in such an instance might include marriage and birth certificates for the spouse and dependent(s), a copy of the principal beneficiary's approval notice, and any Form I-797, Notice of Action notices relating to the dependents' own change of status filings. Another example would be a foreign national who entered the United States on a B-1 visa and subsequently changed status to F-1. The spouse and/or child of the F-1 would be entitled to seek F-2 visas. In such cases, the dependent would need to present a properly endorsed Form I-20, Certificate of Eligibility for Nonimmigrant (F-1) Student Status - for Academic and Language Students, as evidence that the principal is enrolled, or will be enrolled within 60 days, in a full course of study or is in approved practical training.

9 FAM 41.11 N7 FOREIGN AGENTS REGISTRATION ACT

9 FAM 41.11 N7.1 Persons Subject to Act

(TL:VISA-246; 03-27-2001)

The Foreign Agents Registration Act (22 U.S.C. 611 through 613) requires persons within the United States acting as agents of a foreign principal to register with the Department of Justice. The purpose of this Act is "to protect the national defense, internal security, and foreign relations of the United States by requiring public disclosure by persons engaging in propaganda activities and other activities for or on behalf of foreign governments, foreign political parties, and other foreign principals so that the Government and the people of the United States may be informed of the identity of such persons and may appraise their statements and actions in the light of their associations and activities." If statements obtained from an alien in connection with a visa application suggest that the applicant may be subject to the registration requirement of the Act, the consular officer should so inform the alien and advise that registration forms may be obtained, after arrival in the United States, from the Department of Justice, Washington, DC.

9 FAM 41.11 N7.2 Foreign Officials Exempted

(TL:VISA-246; 03-27-2001)

Accredited diplomatic or consular officers and other officials of a foreign government are exempted from the registration requirement of the Act.

9 FAM 41.11 N8 MAINTENANCE OF STATUS AND DEPARTURE BOND

9 FAM 41.11 N8.1 Bond Requirement Determined by Consular Officer

(TL:VISA-2; 08-30-1987)

The second proviso to INA 221(g) provides for the posting of the maintenance of status and departure bond only in cases of applicants for B or F visas. The posting of such a bond should be required of an applicant only if the consular officer is not fully satisfied that the applicant will maintain visitor or student status in the United States and depart as required. Under no circumstances should a consular officer rely on such a bond as a substitute for a reasoned judgment with respect to the applicant's eligibility for a visa.

9 FAM 41.11 N8.2 Amount, Validity Period, and Posting of Bond

(CT:VISA-670; 01-11-2005)

The maintenance of status and departure bond is to be posted with the DHS district director having jurisdiction over the area of the United States in which the applicant proposes to visit or pursue a course of study. After acceptance by the DHS, the bond is valid for 1 year. Bonds are normally required in amounts ranging from a minimum of $1,000 to a maximum of $5,000 in increments of $500. In considering applications by a family group, the consular officer may require the posting of a bond by all, some, or only one of the applicants.

9 FAM 41.11 N8.3 Bond Posted and Accepted Prior to Visa Issuance

(CT:VISA-670; 01-11-2005)

After requiring the posting of a bond, the consular officer may not issue a visa to the applicant prior to the receipt of notification from the appropriate DHS district director that the bond has been posted and accepted.

9 FAM 41.11 N8.4 Forfeiture of Bond

(TL:VISA-2; 08-30-1987)

The maintenance of status and departure bond is not forfeited unless the alien violates status in the United States. A change of nonimmigrant status pursuant to INA 248 or adjustment of status pursuant to INA 245 does not result in forfeiture so long as the alien complies with the terms and conditions of the status in which the alien was admitted or to which the alien later changed or adjusted.

9 FAM 41.11 N8.5 Limitation on Visa Validity When Bond Posted

(CT:VISA-1155; 02-17-2009)

See 9 FAM 41.112 N9 regarding the limitation on visa validity when a bond has been posted, and 22 CFR 41.61(c) relating to F visas.