9 FAM 41.22
NOTES

(CT:VISA-1922; 10-05-2012)
(Office of Origin: CA/VO/L/R)

9 FAM 41.22 N1 ALIENS ENTITLED TO A-1 CLASSIFICATION

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

The following aliens are entitled to A-1 nonimmigrant classification under INA 101(a)(15)(A).

9 FAM 41.22 N1.1 Alien Accredited by Foreign Government as Officer at Diplomatic or Consular Post

(CT:VISA-1038; 09-25-2008)

a. An alien duly accredited by a foreign government recognized de jure by the United States as an officer of a permanent diplomatic mission or consular post established in the United States with the consent of the Department, who seeks to enter the United States solely for the purpose of performing duties appropriately performed by such an officer. (Officers of diplomatic missions usually have the title of "Ambassador," "Minister," "Counselor," "Secretary," or "Attaché" such as military, commercial, financial, agriculture, or scientific; and those of consular posts, "Consul General," "Consul," or "Vice Consul.") (See 9 FAM 41.22 N5 of this section regarding "Honorary Consul.")

b. De jure recognition is not synonymous with diplomatic relations, and de jure recognition may continue even though diplomatic relations have been severed. Consequently, an A-1 visa may be issued to an alien who seeks to enter the United States for the purpose of performing official duties for a government which has severed diplomatic relations with the United States, provided that:

   (1) The United States has recognized that government de jure prior to severance of diplomatic relations;

   (2) There is a continuing status of de jure recognition; and

   (3) There is a reciprocal exchange of representatives between the United States and that government. An A-1 classification for such an alien is warranted even if, owing to the absence of diplomatic relations, the individual will function under the aegis of the embassy of a third country protecting power.

9 FAM 41.22 N1.2 Alien Head of State or Government

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

An alien holding the position of head of state or head of government in a government recognized de jure by the United States.

9 FAM 41.22 N1.3 Certain Alien Officials of Foreign Governments

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

An alien seeking to enter the United States to perform official duties for a government recognized de jure by the United States who holds any of the following positions in that government:

(1) A position corresponding to that of a member of the U.S. Cabinet;

(2) The presiding officer of a national legislative body; or

(3) A member of the highest judicial tribunal.

9 FAM 41.22 N1.4 Family Member of Alien Classifiable A-1

(TL:VISA-320; 09-27-2001)

See 22 CFR 41.21(a)(3).

9 FAM 41.22 N1.5 Career Courier

(TL:VISA-520; 02-11-2003)

See 22 CFR 41.22(h)(1).

9 FAM 41.22 N2 ALIENS ENTITLED TO A-2 CLASSIFICATION

(CT:VISA-1438; 06-02-2010)

The following aliens are entitled to A-2 nonimmigrant classification under INA 101(a)(15)(A) (8 U.S.C. 1101(a)(15)(A)).

9 FAM 41.22 N2.1 Alien Accredited by Foreign Government as Employee at Diplomatic or Consular Post

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

An alien duly accredited by a foreign government recognized de jure by the United States who seeks to enter the United States solely to serve as a full-time employee of a permanent diplomatic mission or consular post established in the United States by that government, who is not within any of the categories entitled to A-1 classification, and whose duties are those normally performed by employees of permanent diplomatic missions or consular posts established in the United States.

9 FAM 41.22 N2.2 Alien Seeking to Perform Official Duties for Foreign Government

(CT:VISA-1038; 09-25-2008)

a. An alien seeking to enter the United States, pursuant to orders or instructions from a government recognized de jure by the United States, to perform duties or services for that government (including participation in an international meeting or conference other than one convened by or under the auspices of an international organization, held in the United States) which, in the view of the Department, are official in nature. (See 9 FAM 41.24 N1 and 9 FAM 41.24 N2 for classification of aliens attending meetings or conferences convened by or under the auspices of an international organization.)

b. In accordance with the above provisions, foreign government officials and law enforcement personnel coming to the United States under sponsorship of the foreign government for training by Diplomatic Security's Office of Antiterrorism Training Assistance (DS/ATA) shall be accorded A-2 visas. As the training program is less than 90 days, the visa should include the required "TDY" designation per 9 FAM 41.21 PN5.1. (See 9 FAM 41.21 PN5.2 for guidance on annotating the "ATA" visas.)

9 FAM 41.22 N2.3 Family Member of Alien Classifiable A-2

(TL:VISA-320; 09-27-2001)

See 22 CFR 41.21(a)(3).

9 FAM 41.22 N2.4 Official Acting as Courier

(TL:VISA-320; 09-27-2001)

See 22 CFR 41.22(h)(2).

9 FAM 41.22 N2.5 Personnel of Foreign Armed Services

(CT:VISA-1038; 09-25-2008)

a. Personnel of foreign armed services from other than NATO countries, coming to the United States in connection with their military status for education or training at any of the U.S. military schools or on a U.S. military installation, are treated as foreign government officials for visa classification purposes.

b. Also treated as foreign government officials are personnel of foreign armed services from other than NATO countries, coming to receive military training for up to 90 days on TDY status at a location other than a U.S. military school or a U.S. military installation, provided that the training is either U.S. Government-provided or sponsored, or if the training has been licensed by the Office of Defense Trade Control Licensing (PM/DTCL). To verify PM/DTCL licensing of training, submit a request for an advisory opinion (AO) slugged for the Advisory Opinions Division (CA/VO/L/A) and PM/DTCL, using CVIS and KOMC tags and identifying the U.S. firm the applicant's state is providing the training.

9 FAM 41.22 N3 EVIDENCE OF QUALIFICATION FOR A-1 OR A-2 CLASSIFICATION

9 FAM 41.22 N3.1 Purpose of Entry and Official Duties in United States Determines Classification

(CT:VISA-1038; 09-25-2008)

a. Qualification for A-1 or A-2 classification is determined by the purpose for which the alien seeks to enter the United States and the nature of the official duties the alien will perform while there. Therefore, the fact that an alien is an official or employee of a foreign government or is the holder of a diplomatic, official, or service passport does not in itself, except for a head of state or head of government as provided in 9 FAM 41.22 N1.2 of this section, qualify the alien for an A-1 or A-2 visa.

b. The fact that there may be government interest or control in a given organization is not in itself controlling on the matter of A-2 entitlement. There must be some further showing that the particular duties or services to be performed by the applicant are themselves of an inherently governmental character or nature. Where an organization is essentially engaged in commercial and/or competitive activities (e.g., banking, mining,

transportation), an official of such organization would generally not be qualified for an A-2 visa. Depending upon the purpose of travel to the United States, consideration may be given to B-1, L-1, or E classification. Consular officers shall review all applications for A-2 visas for officials of organizations which are not directly engaged in functions of a governmental nature as measured by U.S. standards.

c. If any difficulty is encountered in resolving a particular case, the consular officer shall submit the case to the Department (CA/VO/L/A) for an advisory opinion. The advisory opinion request shall include a full report as to the nature, structure and purpose of the organization concerned, together with the consular officer's analysis and comments.

9 FAM 41.22 N3.2 Visa Stamped "Diplomatic" or "Official" for any Nonimmigrant Classification

(CT:VISA-1438; 06-02-2010)

An alien may be entitled to receive a visa stamped "diplomatic" or "official" in any of the nonimmigrant classifications provided in INA 101(a)(15) (8 U.S.C. 1101(a)(15)) without qualifying for an A-1 or A-2 classification. (See 9 FAM 41.26 and 9 FAM 41.27.)

9 FAM 41.22 N4 ALIENS ENTITLED TO A-3 OR G-5 CLASSIFICATION

(CT:VISA-1922; 10-05-2012)

You may issue an A-3 or G-5 visa to the personal employee of an alien of a foreign mission in the United States in the A-1 or A-2 category (A-3 visa) or G-1, G-2, G-3, or G-4 visa category (G-5 visa) if the applicant qualifies for the visa classification, the contract meets the requirements set out in N4.4 below, you ensure that the application is aware of rights set out in the WWTVPRA pamphlet notifications, and

(1) The diplomat or official employing the alien is in "A" or "G" visa status, or received an A or G visa and will be traveling with the domestic employee to take up a new diplomatic assignment; and

(2) The foreign mission or international organization submitted the necessary "Pre-Notification of a Domestic Worker" form to the Office of Protocol (DomesticWorkers@state.gov); and

(3) The applicant has been entered into The Office of Foreign Missions Information System (TOMIS) and shows as "pending", for new proposed employees, or "active" for renewing A-3 or G-5 employees continuing to work for the same employer. All family members accompanying or following to join the domestic employee also must be pre-notified to

Protocol, and if not included in the domestic employee's initial pre-notification request, need to be separately pre-notified to Protocol before visa issuance. Their names will be listed, once accepted and entered by Protocol, under the A-3 or G-5 principal's record in TOMIS.

(a) TOMIS is available in the Consular Consolidated Database (CCD) under the "*Other Agencies/Bureaus*" menu. To find a record in TOMIS, you may search by surname and either given name, nationality, visa, or country/organization; or with an eight-digit Personal Identification Number (PIN), if available, which is issued to each person registered with Protocol. If the employer is listed in TOMIS as active, but the personal employee does not show under that employer's "private servants" listing, refuse the case under INA 221(g) pending the employee's inclusion in TOMIS. Protocol will not notify post of a new "Pre-Notification of a Domestic Worker," so post must check periodically in TOMIS to see if the employee has been added. A "pending" entry indicates that Protocol has accepted and data-entered the pre-notification, and post may continue processing the case to conclusion. The record will be updated to "active" after the A-3 or G-5 visa holder enters the United States and Protocol is notified of his or her entry on duty by the diplomatic mission or international organization.

(b) You must wait until the pre-notification is accepted and entered by Protocol, and may not issue A-3 and G-5 visas upon mere presentation of a diplomatic note (see TDY exceptions in NOTE below), and also may not issue B-1 visas to allow a diplomat's domestic employee to travel on an "emergency" basis. It generally takes Protocol several days to review and enter pre-notifications into TOMIS. If the employer or applicant advises that the diplomatic mission or international organization sent a pre-notification request more than a week earlier, and it still is not showing in TOMIS, contact CA/VO/F/P or CA/VO/P/D. CA/VO will check with Protocol to see if there are technical problems or more serious problems which prevent Protocol from accepting the pre-notification, for example, complaints of abuse against the employer by previous A-3 or G-5 employees.

NOTE: The requirements for pre-notification and a TOMIS record for an A-3 or G-5 applicant do not apply in instances where the employee is on a temporary assignment of less than 90 days. In such cases, please see annotation instructions in 9 FAM 41.113 PN12.2. Pre-notification is not required for NATO-7 domestic employees, or for A-3 domestic employees of foreign military assigned to A-2 military training in the United States for periods of more than 90 days. However, if you receive an A-3 or NATO-7 application from a domestic employee planning to work for more than 90 days for an A-2 foreign military or NATO visa holders, request guidance from CA/VO/L/A (or CA/VO/P/D or CA/VO/F/P) before issuing the visa.

9 FAM 41.22 N4.1 Aliens Not Entitled to A-3 Classification

(TL:VISA-320; 09-27-2001)

If a staff member of a foreign mission in the United States is a legal permanent resident (LPR), then his or her domestic employee is not entitled to receive an A-3 visa. Such an employee must qualify for the appropriate H-2 or immigrant visa (IV).

9 FAM 41.22 N4.2 Qualifying for A-3 Visa

(CT:VISA-1438; 06-02-2010)

a. In order to benefit from A-3 status, the alien must be coming to the United States to perform a specific job, and must be capable of doing so, regardless of whether the alien has ever performed such a job in the past. For example, an alien with a degree in computer science who is coming to work as a domestic employee may be issued an A-3 visa if he or she clearly has the intent and ability to perform the job. However, if a consular officer believes that an applicant is presented as a domestic employee for someone in A-1 or A-2 status, but will actually work as a computer consultant for a private company, then the A-3 visa should be denied. The alien should be found ineligible under INA 214(b) (8 U.S.C. 1184(b)), as he or she has not established his or her eligibility in any nonimmigrant visa (NIV) category. Such an applicant may also be subject to a finding of ineligibility under INA 212(a)(6)(C) (8 U.S.C. 1182(a)(6)(C)). Similarly, an A-3 visa application on behalf of someone who has recently resided illegally in the United States, or who may have previously sought another visa status and was refused under INA 214(b) (8 U.S.C. 1184(b)), and who appears to be using the A-3 application to evade U.S. immigration requirements, should be carefully scrutinized to determine whether the applicant actually intends to take up the stated employment; however, the previous illegal status and change to A-3 status is not a basis in itself for refusal if you believe the applicant plans to take up the stated employment.

b. You may not issue or renew an A-3 visa unless the visa applicant has executed a contract with the employer or prospective employer containing detailed provisions described below as well as in 9 FAM 41.21 N6.2. You must conduct a personal interview with the applicant outside the presence of the employer or any recruitment agent. During that interview you will review the contract with the applicant and ensure that the applicant fully understands the terms of the contract and has received, has read, and fully understands the contents of the Department's information pamphlet regarding the alien's legal rights in the United States, as described in 9 FAM 41.21 N6.5-1 and 9 FAM 41.21 N6.5-2.

9 FAM 41.22 N4.3 Key Questions to be Addressed in A-

3 Applications

(CT:VISA-1438; 06-02-2010)

a. Several key questions should be addressed by the consular officer in cases involving A-3 applicants:

   (1) Is the applicant capable of performing the work required?;

   (2) Are the parties concerned entering into a true employee and/or employer relationship for a reasonable period of time? i.e., can it be reasonably assumed that the applicant's background, education skills, employment history, or relationship to the prospective employer will not preclude the parties from entering into a "true" employee and/or employer relationship? (See 9 FAM 41.22 N4.4.);

   (3) Is the applicant otherwise fully qualified? (See 9 FAM 41.21 N6.);

   (4) Will the applicant receive a fair wage by U.S. standards? Under the U.S. Fair Labor Standards Act (FLSA), all full-time, live-in domestic employees must be paid the prevailing or minimum wage per hour under Federal law, and in the jurisdiction which the domestic will be employed, for all hours on duty. Under prevailing practice, live-in domestics receive free room and board in addition to their salary. Although the employer is not required to pay for medical insurance, the employer is responsible for ensuring that the employee does not become a public charge while in his or her employ. (See 9 FAM 41.21 N6.2 and 9 FAM 41.22 N4.4.); and

   (5) Does the contract address all of the stipulated necessary minimum provisions outlined in 9 FAM 41.22 N4.4 below?

b. Provided the answer to each question above is yes, and the applicant is not inadmissible on independent grounds of the INA, an A-3 visa should be issued. If otherwise, the applicant should be denied the visa under INA 214(b) (8 U.S.C. 1184(b)) and/or any other appropriate section of the INA.

9 FAM 41.22 N4.4 Salary, Contracts, and Employer Obligations

(CT:VISA-1922; 10-05-2012)

a. As noted above, A-3 and G-5 employees are covered by the Fair Labor Standards Act (FLSA). In each case, you must request the employer to provide a contract, in both English and a language understood by the employee, to demonstrate that the employee will receive a fair wage, and that the employee understands his or her duties and rights regarding salary and working conditions (see 9 FAM 41.21 N6.2). In each case, an employee applying for an A-3 or G-5 visa must present a copy of the employment contract, in both English and (if the applicant does not understand English) a language understood by the applicant, that has been signed by both the applicant and

the employer. Post must scan the employment contract and attach the scanned document to the application record in NIV.

b. The contract must contain the following provisions:

(1) Description of Duties. The contract must describe the work to be performed, e.g., housekeeping, gardening, child care, and also must include a statement that the domestic employee shall work only for the employer who signed the contract.

(2) Hours of Work. The contract must state the time of the normal working hours and the number of hours per week. It is generally expected that domestic workers will be required to work 35-40 hours per week. It also must state that the domestic employee will be provided a minimum of one full day off each week. The contract must indicate the number of paid holidays, sick days, and vacation days the domestic employee will be provided.

(3) Minimum Wage. The contract must state the hourly wage to be paid to the domestic employee. The rate must be the greater of the minimum wage under U.S. Federal and state law, or the prevailing wage for all working hours. The contract must state that wages will be paid to the domestic employee either weekly or biweekly, and also state what deductions are to be taken from the wages. *As of April 2012, the deductions* taken for meals *are no longer allowed*. On March 22, 2011, the Department defined reasonable deductions as follows: Housing provided to A-3 and G-5 workers is for the benefit of the employer and thus it is not permissible to withhold from wages any amount for lodging. The Department does not allow deductions from wages for any other expenses, such as the provision of medical care, medical insurance, or travel. All contracts presented by A-3 and G-5 applicants should adhere to these standards for reasonable deductions.

(4) Overtime Work. The contract must state that any hours worked in excess of the normal number of hours worked per week are considered overtime hours, and that hours in which the employee is "on call" count as work hours. It also must state that such work must be paid as required by U.S. local laws.

NOTE: Under Federal law, the rate of overtime pay need not exceed the regular hourly rate if the employee resides in the home of the employer, but state law governing overtime rates also applies and must be checked. If the employee does not reside with the employer, overtime for hours in excess of 40 hours per week must be paid at the rate of time and a half.

(5) Payment. The contract must state that after the first 90 days of employment, all wage payments must be made by check or by electronic transfer to the domestic worker's bank account. Neither Mission members nor their family members should have access to domestic workers' bank

accounts. *In addition, the Department requires that records of employment and payment be retained for three years after the termination of the employment in order to address any complaints that may subsequently arise.*

(6) Transportation to and from the United States. The contract must state that the domestic employee will be provided with transportation to and from the United States.

(7) Other Required Terms of Employment. The contract must state that the employer agrees to abide by all Federal, State, and local laws in the United States. The contract also must include a statement that the domestic worker's passport and visa will be in the sole possession of the domestic worker. In addition, the contract must state that a copy of the contract and other personal property of the domestic employee will not be withheld by the employer for any reason.

(8) Other Recommended Terms of Employment. The contract must include a statement that the domestic worker's presence in the employer's residence will not be required except during working hours. The contract may include other agreed-upon terms of employment, if any, provided they are fully consistent with all U.S. Federal, State, and local laws. Any modification to the contract must be in writing.

If you request a contract and none is furnished, refuse the application under INA 214(b) (8 U.S.C. 1184(b)) (see 9 FAM 41.21 N6.2 paragraph b). If you routinely encounter A-3 or G-5 applications that do not meet FLSA standards, contact CA/VO/L/A for assistance.

c. A-3 and G-5 applicants are subject to all ineligibilities under INA 212(a) (8 U.S.C. 1182(a)), but are not required to have a foreign residence which they have no intention of abandoning. Therefore, bona fide A-3 and G-5 applicants may not be denied as intending immigrants under INA 214(b) provided a complying, credible contract is provided. A-3 and G-5 applicants are subject to INA 222(g) (8 U.S.C. 1202(g)).

d. In accordance with INA 291 (8 U.S.C. 1361), the burden of proof for A-3 or G-5 eligibility is on the applicant. You must assess the credibility of the applicant and the evidence submitted to determine qualification for an A-3 or G-5. The applicant must satisfy you that he or she will credibly engage in A-3 or G-5 activity under the contractual terms, and thereby maintain lawful status.

e. Do not issue a visa unless you can reasonably conclude that the employer will in fact provide the employee with the required wages and working conditions. You may presume that the applicant is not eligible if the employer does not carry the diplomatic rank of Minister or higher, or a position equivalent to Minister or higher. To rebut this presumption, the employer must demonstrate that he or she will have sufficient funds to comply with the FLSA, as reflected in the contract. You must deny the visa if you are not convinced the employer

can in fact meet the terms of the contract. Consideration also must be given to the number of employees a particular employer may reasonably be able to pay. Note that this presumption applies in all cases in which the applicant's employer is an employee of an international organization classifiable as G-4, and it therefore will be necessary for the employer to demonstrate that he or she has sufficient funds to provide the required wages and working conditions, as such employer and position would never be of the rank of Minister or higher.

f. If an employer has had previous instances of non-compliance with contracts with A-3 or G-5 employees or has a pattern of employee disappearance or credible abuse allegations, you may presume that the applicant is not eligible for the visa and refuse the application (see 9 FAM 41.21 N6.2 paragraph b). To rebut this presumption, the employer and the visa applicant would have to convince you that such an outcome is unlikely to recur; for example, by the employer establishing that he or she reasonably expected that previous employees would remain in A-3 or G-5 status, rather than suddenly cease working in the household and remain unlawfully in the United States; that the disappearances of the former employees were promptly reported; by presenting evidence establishing that the employer and the visa applicant intend to fulfill the provisions of the contract and enter into a bona fide employer-employee relationship; and that the applicant intends to maintain A-3 or G-5 visa status while in the United States. The burden of proof remains on the applicant and the employer to establish eligibility and future compliance with all requirements.

9 FAM 41.22 N4.5 A-3 and G-5 Domestic Worker Principal Applicants Under the Age of 18

(CT:VISA-1401; 02-24-2010)

Posts must obtain an advisory opinion (AO) from CA/VO/L/A before issuing an A-3 or G-5 visa to a domestic worker principal applicant under the age of 18.

9 FAM 41.22 N4.6 Refusals and Advisory Opinions (AO)

(CT:VISA-1038; 09-25-2008)

Posts are not required to obtain an advisory opinion before refusing an A-3 visa application under INA 214(b) in cases where the applicant does not intend to take up the position, or where a contract is not provided in accordance with the consular officer's request. Consular officers may not, however, refuse an A-3 visa applicant under INA 214(b) who meets the qualifications for A-3 status, but whom the consular officer believes is an intending immigrant. Posts should not hesitate to seek the Visa Office's advice in questions of eligibility. In addition, posts should report by cable to the Department any denials in the 'A' category which are likely to prompt inquiries or complaints from the applicant's host government. These cabled reports should be slugged for the Office of the Chief of Protocol (S/CPR)

and the Office of Foreign Missions (DS/OFM) in addition to the following Visa Office (CA/VO) addressees: CA/VO/L/A and CA/VO/F/P.

9 FAM 41.22 N5 HONORARY CONSULS

(CT:VISA-1038; 09-25-2008)

Honorary consuls are usually so designated because the performance of duties for the foreign government which appoints them is only incidental to the primary purposes of entry into, or presence in, the United States, typically for business, employment, study, or some other nongovernmental purpose. Therefore, an honorary consul does not usually seek to enter solely in order to perform governmental official duties and is not normally classifiable A-1 or A-2. However, the term "honorary" may be used in the consul's title even though the consul is coming solely to perform official duties. In such a case, the consular officer shall request the Department's (CA/VO/L/A) advisory opinion for the appropriate visa classification of the alien.