9 FAM 41.121
NOTES

(CT:VISA-1621; 01-27-2011)
(Office of Origin: CA/VO/L/R)

9 FAM 41.121 N1 GROUNDS FOR REFUSAL

(CT:VISA-1621; 01-27-2011)

a. Most refusals of nonimmigrant visas (NIV) are made under INA 214(b) which requires that every visa applicant is presumed to be an immigrant until he or she establishes entitlement to nonimmigrant status under INA 101(a)(15) at the time of application for a visa. There is no waiver of this ground of ineligibility, nor are there any provisions under INA 214(b) for permanent refusals. The determination that the alien is not a nonimmigrant can be made only on the basis of the facts existing at the time of a specific visa application. The fact that a visa applicant was unable to establish nonimmigrant status at one time would not preclude such applicant from subsequently qualifying for a visa by showing a change in circumstances.

b. Certain grounds of ineligibility found in INA 212(a) do not apply to nonimmigrants. For example, nonimmigrants are exempt from the provisions of INA 212(a)(3)(D), (5)(A), (5)(B), (5)(C), (7)(A), (8)(A), and (10)(A). INA 102 provides broad exemptions for "A" and "G" category aliens, except domestics and personal employees. Upon a basis of reciprocity, INA 212(d)(8) also provides broad exemptions for foreign government officials in transit. These are not in the nature of waivers or other discretionary acts; they provide statutory immunity from ineligibility under the special provisions. INA 212(d)*(8)* does not provide exemption for INA 212(a)(3)(A), (3)(B), (3)(C), or (7)(B).

c. For aliens found ineligible under non-exempted provisions of INA 212(a), the consular officer has discretionary authority under INA 212(d)(3)(A) to recommend to the Department of Homeland Security (DHS) a waiver of the specific ground of ineligibility.

9 FAM 41.121 N2 REFUSAL PROCEDURES

9 FAM 41.121 N2.1 Noting Refusals in the CCD

(CT:VISA-1514; 09-13-2010)

Remarks attached to a case reside in the CCD and are accessible to posts worldwide. Your notes must be written in a professional manner: clearly and legally valid. Avoid using post-specific notations, non-English words, and making irrelevant remarks. If the issuance seems counterintuitive, you should comment on the factors that led to the issuance. You should continue to annotate the comment field of Form DS-160, Electronic Nonimmigrant Visa Application, or the upper right hand section of page one of the Form DS-156, Nonimmigrant Visa Application, with the date of issuance and your initials (See 9 FAM 41.121 N2.3-4).

9 FAM 41.121 N2.2 Visa To Be Issued or Refused

(CT:VISA-1514; 09-13-2010)

A nonimmigrant visa (NIV) must be issued or refused in all cases once an application is executed. Visa refusals must be based on legal grounds; that is, on the provisions of INA 212(a), (e), or (f), INA 214(b) or (l), INA 221(g), INA 222(g), or some other specific legal provision. A quasi-refusal (e.g., P6C, P6E, etc.) may not be used as the sole ground for a refusal.

9 FAM 41.121 N2.3 Procedures When Alien Is Found Ineligible

(CT:VISA-1251; 07-17-2009)

When an alien is found ineligible to receive a visa, you must take the steps listed in the following notes.

9 FAM 41.121 N2.3-1 Inform Alien Orally and Return Certain Documents

(CT:VISA-1514; 09-13-2010)

a. You must inform all visa applicants orally of both the section of law under which the visa was refused and the factual basis for the refusal, unless the information is classified, sensitive but unclassified (SBU), or obtained from another agency of the U.S. Government. If the case is sent to the Department for an advisory opinion (other than a security advisory opinion), you must so inform the applicant, and unless the matter is classified or SBU, he or she must indicate why the case has been referred to the Department.

b. You must return to the applicant all documents not pertinent to the refusal or indicative of possible ineligibility. Letters and other documents addressed to an officer or the post should be retained and either filed or destroyed.

9 FAM 41.121 N2.3-2 Inform Applicant and Attorney in Writing

(CT:VISA-1251; 07-17-2009)

a. In any NIV case involving a refusal under any provision of the law, the post must also provide the applicant and any attorney of record with a completed page 1 of Form OF-194, The Foreign Service of the United States of America Refusal Worksheet (see 9 FAM 41.121 Exhibit III), setting forth the ground(s) of refusal. Posts may also draft their own non-standard, case-specific refusal letters in high profile or otherwise sensitive cases, to lay out the specific factual basis for the finding or to address rebuttal points made by an applicant. Such letters may be used at your discretion and may be drafted without Departmental approval. However, any such letters are to be used in addition to, not in lieu of, page 1 of the Form OF-194 (see 9 FAM 41.121 Exhibits III and IV).

b. Posts should reproduce page 1 of the Form OF-194 in the language of the host country, and the letter should be addressed to the applicant using the applicant's complete name. Posts may translate the Form OF-194 without prior approval of the Department, provided that any translation accurately conveys the English language text.

c. INA 212(b), which requires that you provide the applicant with a timely written notice in most cases involving a 212(a) refusal, also provides for a waiver of this requirement. Consular officers are reminded that only the Department may grant a waiver of the written notice requirement. Furthermore, although 212(b) also exempts findings of ineligibility under INA 212(a)(2) and (3) from the written notice requirement, the Department expects that, in accordance with the Department's regulations and these notes, such notices will be provided to the alien in all 212(a)(2) and (3) cases unless you have received specific approval from the Department not to provide a notice in a specific case or group of cases.

9 FAM 41.121 N2.3-3 Refusal Letter in 214(b) and 221(g) Cases

(CT:VISA-1514; 09-13-2010)

A written notification must be given in the case of an NIV refusal based on Sections 214(b) or 221(g) of the INA. Posts may draft optional refusal letters in the manner they deem appropriate and without Departmental approval, provided that the letter explicitly states the provision of the law under which the visa is refused. (Examples are located at 9 FAM 41.121 Exhibit III and IV). 214(b) refusal letters must neither encourage nor discourage the applicant from reapplying, but rather should explain the post's reapplication procedures. 221(g) letters which inform the applicant

that a personal appearance before a consular officer is necessary must not discourage the applicant from appearing; even if you believe that eventual issuance of a visa is unlikely.

9 FAM 41.121 N2.3-4 Annotate Refusal in Computer

(CT:VISA-1621; 01-27-2011)

The reason(s) for the refusal (the officer's notes) must be entered directly into the NIV computer system in the "remarks" section. *In the limited circumstances under which we accept the Form* DS-156*, Nonimmigrant Visa Application,* you must also annotate the following on the upper right hand section of page 1 :

(1) The date of the refusal;

(2) The initials of the refusing officer; and

(3) The section of the law under which the applicant was refused.

9 FAM 41.121 N2.3-5 Category I and Category II Refusals

(CT:VISA-1251; 07-17-2009)

If the case involves a Category I refusal (i.e., generally one involving a permanent ground of inadmissibility), you must explain whether or not administrative relief (usually a waiver) is available. If the refusal falls within Category II (non-permanent grounds of inadmissibility), the officer should explore the availability of any means of relief, and inform the applicant of such. 9 FAM Appendix D Exhibit I contains a list of lookout codes and states whether the codes are Category I or Category II.

9 FAM 41.121 N2.3-6 Prepare Refusal Worksheet in Category I Cases

(CT:VISA-1251; 07-17-2009)

a. For all Category I cases, you must prepare page 2 of the Form OF-194 (see 9 FAM 41.121 Exhibit III).

b. The completed Form OF-194 must include:

(1) Internal data regarding the reason(s) for the refusal;

(2) Reference to relevant classified documents;

(3) Data regarding review of the refusal within the office; and

(4) Notations regarding documents subsequently submitted to overcome the refusal.

9 FAM 41.121 N2.3-7 Initiate Internal Review of Refusal

(CT:VISA-1251; 07-17-2009)

a. Consular supervisors must review as many nonimmigrant visa (NIV) refusals as is practical but not fewer than 20% of such refusals. Such a review is a significant management and instructional tool useful in maintaining the highest professional standards of adjudication. It ensures uniform and correct application of the law and regulations.

b. Reviewing officers should pay particular attention to refusals of inexperienced officers. The less visa adjudication experience an officer has, the greater the percentage of refusals that should be reviewed. As an officer gains experience and competence over time, the percentage of issuances reviewed should decline as determined appropriate by the reviewing officer.

c. The reviewing officer should be the adjudicating consular officer's direct supervisor. If the adjudicating consular officer's direct supervisor has a consular commission and title, he or she must review the case and either confirm or disagree with the refusal. The reviewing officer must indicate his or her decision for all refusals reviewed by marking the appropriate box in the NIV Adjudication Review report in the Consular Consolidated Database (CCD). Additionally, he or she must also indicate his or her decision on page 2 of the electronic version of Form OF-194 for Category I cases. The Department's regulation at 22 CFR 41.121(c) specifies that a refusal must be reviewed without delay; that is, on the day of the refusal or as soon as is administratively possible.

d. If the chain of command rule of the previous paragraph results in a reviewing officer who does not have a consular commission and title (some deputy chiefs of mission, for example, may not be authorized to adjudicate visas), that officer must nevertheless review refusals, following the guidelines in paragraphs b and c above. In order to evaluate performance, the supervisor needs to see a regular and representative sampling of the adjudicating officer's work. The review should focus on, but not necessarily be limited to, the potential over-use of 221(g) refusals when 214(b) should be applied, the clear articulation of 214(b) refusals, and verification that 212(a) refusals satisfy applicable law and regulations. While reviewing officers without recent consular experience cannot be expected to know the breadth and depth of visa statutes and regulations, the adjudicating officer should be able to cite Departmental guidance (the INA, FAM, ALDACs, etc.) in support of the refusal. The Regional Consular Officer (RCO) for posts with a single consular officer should review all Category I refusals. This review can be completed via the NIV Adjudication Review Report in the CCD. The RCO must also review a random sample of at least 20% of the refusals adjudicated during the RCO's visit to post, and the RCO must include the quality of

adjudication as a regular topic of discussion. The RCO must meet with the adjudicating officer and his or her supervisor and review with them a sampling of refused NIV cases.

e. If a reviewing officer as described in the above paragraph concurs with the refusal, he or she, like any other reviewing officer, must indicate his or her decision in the NIV Adjudication Review report in the CCD for all refusals and on page 2 of the electronic Form OF-194 for Category I cases.

9 FAM 41.121 N2.3-8 Non-Concurrence with Refusal by Reviewing Officer

(CT:VISA-1251; 07-17-2009)

a. If a reviewing officer with a consular commission and title does not concur with the refusal, he or she may assume responsibility and re-adjudicate the case. The reviewing officer must discuss the case fully with the original adjudicating officer before taking any action. The reviewing officer must not reverse a 214(b) refusal without re-interviewing the applicant, as subtle information gained during the interview is an essential component of any 214(b) decision. If the disagreement involves a matter of law, the reviewing officer may assume personal responsibility for the case and reverse the decision, after discussing with the original adjudicating officer.

b. A reviewing officer without a consular commission and title may not issue or refuse a visa. Therefore, if such a reviewing officer does not concur with the refusal, he or she must:

(1) Discuss the basis for the original refusal, especially elements of fact, with the adjudicating officer in a good faith attempt to arrive at a mutually acceptable final adjudication of the application.

(2) If such a discussion cannot resolve the issue, the RCO should be consulted for his or her insight with a view to coming to a mutually agreed upon adjudication.

(3) If the difference of opinion turns on a legal or procedural issue that cannot be resolved by consulting Departmental guidance at post (the INA, FAM, CMH, cable guidance, etc.), post should seek Visa Office guidance (legal questions should be referred to the Advisory Opinions Division (CA/VO/L/A) and procedural questions to the Post Liaison Division (CA/VO/F/P)).

(4) If, despite these efforts, no mutually agreed upon adjudication can be achieved, the refusal stands. In any case, a note of discrepancy must be made on the Form DS-156, Nonimmigrant Visa Application, Form OF-194, and in the NIV Adjudication Review in the CCD. If the

applicant utilizes Form DS-160, Electronic Nonimmigrant Visa Application, a note of discrepancy must still be made in the comment field.

9 FAM 41.121 N2.3-9 Enter Refusal into Visa Lookout System

(CT:VISA-1251; 07-17-2009)

All refusals must be entered into the Consular Lookout and Support System (CLASS). (See 9 FAM Appendix D, 200 for procedures.)

9 FAM 41.121 N2.3-10 File Relevant Material in Appropriate Post Refusal File

(CT:VISA-1514; 09-13-2010)

a. The introduction of the Form DS-160, Online Application for Nonimmigrant Visa, and the Form DS-260, Electronic Application for Immigrant Visa and Alien Registration, will largely eliminate the requirement for posts to maintain paper files of visa records.

b. See 9 FAM Appendix F, 100 for proper filing and storage procedures of visa refusals.

9 FAM 41.121 N2.3-11 Manner in Refusing Applicants

(CT:VISA-1514; 09-13-2010)

a. The manner in which visa applicants are refused can be very important in relations between the post and the host country. You must be careful not to appear insensitive and should be courteous at all times.

b. The need for clear language is essential; however, explanations of why a visa could not be issued need not be lengthy. You should provide the precise legal citation relied upon and explain the law and the refusal politely and in clear layman's terms. Use of jargon or terms not familiar to the average person can create confusion, frustration and, often, additional work in the form of congressional and public inquiries. An example: In a case involving a refusal under INA 214(b), it is essential that you tell the applicant that the reason for the refusal is that he or she has not persuaded you that he or she will return to his or her country. Fitting a certain demographic profile ("young", "single", etc.) is not grounds for a visa refusal. In a 214(b) refusal, the denial must always be based on a finding that the applicant’s specific circumstances failed to overcome the intending immigrant presumption. Written 214(b) and 221(g) refusal letters are more than mere formalities; they can be an effective method of conveying information to the applicant.

c. You must not discourage the visa applicant from reapplying, even if you believe that eventual issuance of a visa is unlikely. You should make clear to applicants that they may reapply if they believe they genuinely qualify since there is no formal appeal of an NIV refusal. Efforts to control previous refusals must not unduly restrict applicants' ability to reapply, though they may be warned that applicants who have not yet had the opportunity to apply may be scheduled before they are rescheduled.

9 FAM 41.121 N2.3-12 Additional Procedure when Refusing Applicants who Possess a Valid Form I-94, Arrival and Departure Record

(CT:VISA-1251; 07-17-2009)

a. In addition to recording the refusal electronically, you should take additional steps in certain cases involving aliens who might seek to take advantage of the automatic visa revalidation provisions of 22 CFR 41.112(d) but who are not eligible to do so due to their unsuccessful visa application.

b. On April 1, 2002, 22 CFR 41.112(d) was amended to remove applicants who apply for but do not receive visas from the provision for automatic extension of visa validity (and, in some cases, conversion of visa category) for persons entering the United States from contiguous territory provided they have a valid Form I-94, Arrival and Departure Record. Because applying for a visa automatically excludes applicants from using the revalidation option, you should collect any valid corresponding Form I-94 from the applicant. This action prevents refused applicants (including those subject to mandatory waiting periods, Security Advisory Opinion (SAO) checks, etc.) from attempting to use 22 CFR 41.112(d) to enter the United States. In addition, in order to alert the Department of Homeland Security (DHS) to any such attempt, you should mark the back of the Form I-94 with the date and post name and return the form to DHS. If there is a DHS office at post, the Form I-94 must be turned over to that office. In other cases, the form should be sent as expeditiously as possible to:

When using the U.S. mail or pouch
ACS, Inc.
P.O. Box 7125
London, KY 40743

When using another delivery method
ACS, Inc.
1084 South Laurel Road
London, KY 40744

c. If the Form I-94 cannot be collected, you should reflect this in the case notes.

d. You may only revoke an unexpired visa if the grounds set forth in 22 CFR 41.122(a) and 9 FAM 41.122 are present.

9 FAM 41.121 N2.4 Reactivation of Case Refused Under INA 221(g)

(CT:VISA-1514; 09-13-2010)

An applicant who has been refused under INA 221(g) need not complete a new NIV application form, or pay the machine readable visa (MRV) fee again, if less than one year has elapsed since the latest refusal. When the requested documentation is submitted by the applicant or the necessary clearances received, the original Form DS-156 or Form DS-160 is to be retrieved from post's files, the new information noted, and the visa either issued or refused. If one year or more has elapsed since the latest refusal, the applicant must submit a new Form DS-160 or Form DS-156 and pay the MRV fee again in order for the case to proceed. If the cause of the delay leading to the 221(g) refusal is a lack of U.S. Government action, or U.S. Government error, the period of reapplication is extended indefinitely. Hence, the MRV fee is not charged again when the application is pursued.

9 FAM 41.121 N2.5 Nonimmigrant Visa Reapplication Procedures

(CT:VISA-1251; 07-17-2009)

a. Previously refused visa applicants may reapply any time, using the same procedures as first-time applicants. Posts are not authorized to institute a written re-application procedure. Such procedures interpose an unnecessary step in the visa process, which does not result in a visa adjudication and for which no fees are collected.

b. Post may want to consider the following strategies to manage workload from previously refused applicants:

(1) Ensure that post is collecting MRV fees according to policy. A 214(b) refusal is a final adjudication. Using 221(g) to avoid decisions or hold open reapplication invites abuse. A new application and new fee is required for reconsideration;

(2) Stress NIV statutory requirement and explain 214(b) during outreach. Dispel the notion that there is an element of luck in visa processing and that applicants may be lucky the following weeks and be issued a visa. Emphasize the importance of facts. This may be a particularly useful tactic in countries aspiring to the Visa Waiver Program. Emphasize that repeat refusals contribute to the overall refusal rate in a country;

(3) Use the appointment system to triage previously denied applicants by limiting the number of slots for them;

(4) Alternatively, schedule previously refused applicants on only a few days a month or only during traditionally lower-volume periods of the year (i.e., not during summer work-travel season or pre-holidays peak season);

(5) Revise the 214(b) handout (see exemplar in 9 FAM 41.121 Exhibit IV) and review practices to make sure every refused applicant gets a copy. Train officers to emphasize the need for applicants to wait until there has been a significant change in circumstances before re-applying;

(6) Leave re-applications until all the day's new cases are complete; and

(7) Possibly assign one experienced officer to all reapplications who can move through these promptly once new applications are complete.

9 FAM 41.121 N3 PROCEDURES IN QUASI-REFUSAL CASES

9 FAM 41.121 N3.1 Inform Alien Orally and Return Certain Documents

(CT:VISA-1514; 09-13-2010)

a. You must inform all visa applicants orally of both the section of law under which the visa was refused and the factual basis for the refusal (except that in some cases we may instruct you not to inform an applicant of the specific grounds of a refusal under INA 212(a)(2) or 212(a)(3)), unless the information is classified, sensitive but unclassified (SBU), or obtained from another agency of the U.S. Government. If the case is sent to the Department for an advisory opinion (AO) (other than a security advisory opinion (SAO)), you must so inform the applicant, and unless the matter is classified or SBU, must also indicate the reason or the referral to the Department.

b. You must return to the applicant all documents not pertinent to the refusal or indicative of possible ineligibility. Letters and other documents addressed to an officer or the post should be retained and either scanned into the NIV system or destroyed.

c. You must not discourage the visa applicant from reapplying, even if you believe that eventual issuance of a visa is unlikely. You must explain that previously refused applicants who reapply must follow the same steps as first-time applicants: paying the MRV fee; submitting a new visa application form and photo; having their biometric data taken; and being interviewed by a consular officer. You may advise them that their interview may be delayed to accommodate applicants who have not yet applied. You must also emphasize that previously refused applicants who choose to reapply must be prepared to provide information that was not presented in their original application, or to demonstrate that their circumstances have changed since that application. Finally, you must emphasize that there is no guarantee that previously refused applicants who reapply will be successful in qualifying for a visa.

9 FAM 41.121 N3.2 Enter Quasi-Refusal Into Consular Lookout and Support System (CLASS)

(CT:VISA-1251; 07-17-2009)

If, after being informed of apparent ineligibility, the alien decides not to make a formal application, then that particular situation does not constitute a formal refusal, and it must not be reported as such by the post. A quasi-refusal entry, however, may be appropriate. If so, the post must enter the name of the alien into Consular Lookout and Support System (CLASS) as indicated in 9 FAM Appendix D, 200.

9 FAM 41.121 N4 PROCEDURES IN CASES DEFERRED FOR ADVISORY OPINIONS OR FOR OTHER REASONS

(CT:VISA-1621; 01-27-2011)

a. When, as a result of the visa interview, you decide that an advisory opinion (AO) is necessary, the officer must first refuse the visa under INA 221(g). The officer must not inform the applicant that he or she has been refused under any other specific ground of inadmissibility, other than INA 221(g), even if the officer believes there is substantial evidence to sustain a refusal under INA 212(a) or some other substantive ground. However, in non-security advisory opinion (SAO) cases, you generally should inform the alien of what the suspected substantive ineligibility is

and the underlying reason why post believes the ineligibility applies, unless the information is classified, SBU, or other-agency-derived, or unless revealing the information would compromise an ongoing investigation. The officer must record the refusal as being based on INA 221(g) only, pending a response to the AO request. The file copy of the request for advisory opinion is to be attached to the documents retained and filed in the post's A-Z file. Documents submitted are not to be returned until final action is taken.

b. The post should use a tickler system as a reminder to send the Department a follow-up request for a response after a reasonable period of time has elapsed. If it is later determined on the basis of the Department's advisory opinion that the alien is ineligible under a provision of INA 212(a), 212(e), 214(b), or some other specific legal provision, the alien must be formally refused under the pertinent section of the law. Under no circumstances may a final resolution of the question of eligibility be made before the Department's advisory opinion is received. (See 9 FAM 40.6 N1 and 9 FAM 40.6 N2.2.)

c. This same procedure is to be followed; that is, a refusal of the visa under INA 221(g) and an annotation of the Form DS-156, Nonimmigrant Visa Application or the *Form* DS-160, Electronic Nonimmigrant Visa Application, in other situations where the alien has formally applied, but a final determination is deferred for additional evidence, further clearance, namecheck, or some other reason.

9 FAM 41.121 N5 CASES INVOLVING CLASSIFIED INFORMATION REPORTED TO DEPARTMENT

(CT:VISA-1251; 07-17-2009)

See 9 FAM Appendix A for required reports.

9 FAM 41.121 N6 REQUIRED REPORTS OF NONIMMIGRANT VISAS (NIV) ISSUED AND REFUSED

(CT:VISA-1251; 07-17-2009)

See 9 FAM Appendix I, 400.

9 FAM 41.121 N7 REFUSED APPLICANTS HAVE REASONABLE OPPORTUNITY TO ESTABLISH ELIGIBILITY

(CT:VISA-1251; 07-17-2009)

INA 291 places the burden of proof upon the applicant to establish eligibility to receive a visa. However, the applicant is entitled to have full consideration given to any evidence presented to overcome a presumption or finding of ineligibility. It is the policy of the U.S. Government to give the applicant every reasonable opportunity to establish eligibility to receive a visa. This policy is the basis for the review of refusals at consular offices and by the Department. It is in keeping with the spirit of American justice and fairness. With regard to cases involving classified information, the cooperation accorded the applicant must, of course, be consistent with security considerations, within the reasonable, non-arbitrary, exercise of discretion in the subjective judgments required under INA 214(b) and 221(g).

9 FAM 41.121 N8 TEMPORARY ADMISSION OF INELIGIBLE ALIENS

(CT:VISA-1251; 07-17-2009)

See 9 FAM 40.301.

9 FAM 41.121 N9 POWER TO GRANT OR REFUSE VISAS MAY NOT BE DELEGATED

(CT:VISA-1514; 09-13-2010)

The determination of an alien’s classification and eligibility to receive a visa is the statutory responsibility of the consular officer and may not be delegated to any other officer (except as provided in 22 CFR 41.111(b)) or to a member of the clerical staff.

9 FAM 41.121 N10 APPLICANTS INELIGIBLE TO RECEIVE VISAS

(CT:VISA-1251; 07-17-2009)

See 9 FAM 40.11 through 9 FAM 40.208 for ineligible classes—immigrant and nonimmigrant.