9 FAM 302.9

(U) INELIGIBILITY BASED ON ILLEGAL ENTRY, MISREPRESENTATION AND OTHER IMMIGRATION VIOLATIONS - INA 212(A)(6)

(CT:VISA-449; 09-26-2017)
(Office of Origin: CA/VO/L/R)

9 FAM 302.9-1 (U) STATUTORY AND REGULATORY AUTHORITY

9 FAM 302.9-1(A) (U) Immigration and Nationality Act

(CT:VISA-272; 12-20-2016)

(U) INA 101(a)(49) (8 U.S.C. 1101(a)(49)); INA 212(a)(6)(A) (8 U.S.C. 1182(a)(6)(A)); INA 212(a)(6)(B) (8 U.S.C. 1182(a)(6)(B)); INA 212(a)(6)(C) (8 U.S.C. 1182(a)(6)(C)); INA 212(a)(6)(D) (8 U.S.C. 1182(a)(6)(D)); INA 212(a)(6)(E) (8 U.S.C. 1182(a)(6)(E)); INA 212(a)(6)(F) (8 U.S.C. 1182(a)(6)(F)); INA 212(a)(6)(G) (8 U.S.C. 1182(a)(6)(G)); INA 212(d)(3) (8 U.S.C. 1182(d)(3)); INA 212(d)(ll) (8 U.S.C. 1182(d)(ll)); INA 212(d)(12) (8 U.S.C. 1182(d)(12)); INA 212(i) (8 U.S.C. 1182(i)); INA 214(m) (8 U.S.C. 1184(m)); INA 274A (8 U.S.C. 1324a); INA 274C (8 U.S.C. 1324c).

9 FAM 302.9-1(B) (U) Code of Federal Regulations

(CT:VISA-272; 12-20-2016)

(U) 22 CFR 40.61; 22 CFR 40.62; 22 CFR 40.63; 22 CFR 40.64; 22 CFR 40.65; 22 CFR 40.66; 22 CFR 40.67.

9 FAM 302.9-2 (U) PRESENT WITHOUT ADMISSION OR PAROLE - INA 212(A)(6)(A)

9 FAM 302.9-2(A) (U) Grounds

(CT:VISA-272; 12-20-2016)

(U) INA 212(a)(6)(A) provides that an alien who is present in the United States without being admitted or paroled, or who arrives in the United States at an undesignated time or place is inadmissible.

9 FAM 302.9-2(B) (U) Application

(CT:VISA-74; 03-03-2016)

(U) INA 212(a)(6)(A)(i) does not apply at the time of visa application because it applies only to aliens present or arriving in the United States.

9 FAM 302.9-3 (U) FAILURE TO ATTEND REMOVAL PROCEEDING - INA 212(A)(6)(B)

9 FAM 302.9-3(A) **(U)** Grounds

(CT:VISA-272; 12-20-2016)

(U) INA 212(a)(6)(B) provides that an alien who without reasonable cause failed to attend, or remain in attendance at, a hearing to determine inadmissibility or deportability is ineligible for a visa for five years following the alien's subsequent departure or removal from the United States.

9 FAM 302.9-3(B) **(U)** Application

9 FAM 302.9-3(B)(I) (U) Definitions

(CT:VISA-74; 03-03-2016)

a. **(U) Admission and Admitted:** INA 101(a)(13) defines the terms "admission" and "admitted" to mean the lawful entry of an alien into the United States after inspection and authorization by an immigration officer. An alien who is paroled under INA 212(d)(5) or permitted to land temporarily as an alien crewman shall not be considered to have been "admitted". Aliens who have entered without inspection are not considered to have been "admitted".

b. **(U) Application for Admission:** The term "application for admission" refers to an alien's application for admission into the United States and not to the alien's application for a visa.

9 FAM 302.9-3(B)(2) (U) Failure to Attend Removal Proceedings

(CT:VISA-272; 12-20-2016)

a. (U) An alien placed in removal proceedings on or after April 1, 1997, who without reasonable cause, fails or refuses to attend or remain in attendance at proceedings to determine the alien's inadmissibility or deportability is inadmissible under INA 212(a)(6)(B) for five years following the alien's departure or removal from the United States. Reasonable cause is defined as "something that is not within the reasonable control of the alien."

b. **(U)** Federal courts have found that the following were not "reasonable causes" for failing to attend removal proceedings:

(1) **(U)** Changes in venue;

(2) **(U)** The alien moving to a new residence;

(3) (U) Misplacing a hearing notice;

(4) **(U)** Claiming ineffective assistance of counsel without complying with the requirements of such a claim (e.g. filing a motion to reopen the proceedings

claiming ineffective assistance, etc.); and

(5) (U) Heavy traffic.

c. (U) The BIA has twice found that serious illness could be a reasonable cause for failing to attend or remain in attendance at removal proceedings.

9 FAM 302.9-3(C) (U) Advisory Opinions

(CT:VISA-272; 12-20-2016)

(U) An AO is not required for a potential INA 212(a)(6)(B) ineligibility; however, if you have a question about the interpretation or application of law or regulation, such as what constitutes "reasonable cause," you may request an AO from CA/VO/L/A.

9 FAM 302.9-3(D) (U) Waivers

9 FAM 302.9-3(D)(I) (U) Waivers for Immigrants

(CT:VISA-74; 03-03-2016)

(U) The INA does not provide a waiver of INA 212(a)(6)(B) for immigrant visa applicants.

9 FAM 302.9-3(D)(2) (U) Waivers for Nonimmigrants

(CT:VISA-369; 05-31-2017)

(U) You may, in your discretion, recommend that DHS grant a waiver under INA 212(d)(3)(A) for an alien inadmissible under INA 212(a)(6)(B) provided the alien meets the criteria specified in 9 FAM 305.4-3(C).

9 FAM 302.9-3(E) Unavailable

9 FAM 302.9-3(E)(I) Unavailable

(CT:VISA-272; 12-20-2016)

Unavailable

9 FAM 302.9-3(E)(2) Unavailable

(CT:VISA-272; 12-20-2016)

Unavailable

9 FAM 302.9-4 (U) MISREPRESENTATION - INA 212(A)(6)(C)(I)

9 FAM 302.9-4(A) (U) Grounds

(CT:VISA-74; 03-03-2016)

(U) INA 212(a)(6)(C)(i) provides an alien who seeks to procure, or has sought to procure, or has procured a visa, other documentation, or entry into the United States or other benefit provided under the INA by fraud or willfully misrepresenting a material fact at any time shall be ineligible for a visa.

9 FAM 302.9-4(B) (U) Application

9 FAM 302.9-4(B)(1) (U) Criteria for Finding

(CT:VISA-448; 09-22-2017)

(U) In order to find an alien inadmissible under INA 212(a)(6)(C)(i), it must be determined that:

(1) (U) There has been a misrepresentation made by the applicant (see 9 FAM 302.9-4(B)(3));

(2) (U) The misrepresentation was willfully made (see 9 FAM 302.9-4(B)(4));

(3) (U) The fact misrepresented is material (see 9 FAM 302.9-4(B)(5); and

(4) (U) The alien by using fraud or misrepresentation (see 9 FAM 302.9-4(B)(2)) seeks to procure, has sought to procure, or has procured a visa, other documentation, admission into the United States (see 9 FAM 302.9-4(B)(7) paragraph a), or other benefit provided under the INA (see 9 FAM 302.9-4(B)(7) paragraph b).

9 FAM 302.9-4(B)(2) (U) Different Standards for Finding of Fraud or Willfully Misrepresenting a Material Fact

(CT:VISA-74; 03-03-2016)

a. (U) Congress used the terms "fraud" and "willfully misrepresenting a material fact" in the alternative. For the purposes of this section, the Board of Immigration Appeals has determined that a finding of "fraud" requires a determination that the alien made a false representation of a material fact with knowledge of its falsity and with the intent to deceive a consular or immigration officer. Further, the representation must have been believed and acted upon by the officer. (See Matter of G, 7 I & N 161, 1956.) On the other hand, "material misrepresentation" includes simply a willful misrepresentation, which is relevant to the alien's visa entitlement. It is not necessary that an "intent to deceive" be established by proof, or that the officer believes and acts upon the false representation. (See Matter of S and B-C, 9 I & N 436, 448-449 (A.G. 1961) and Matter of Kai Hing Hui, 15 I & N 288 (1975)).

b. (U) Most cases of inadmissibility under this section will involve "material misrepresentations" rather than "fraud" since actual proof of an alien's intent to deceive may be hard to come by. As a result, the Notes in this section will deal principally with the interpretation of "material misrepresentation."

9 FAM 302.9-4(B)(3) (U) Interpretation of the Term Misrepresentation

(CT:VISA-449; 09-26-2017)

a. (U) "Misrepresentation" Defined: As used in INA 212(a)(6)(C)(i), a misrepresentation is an assertion or manifestation not in accordance with the facts. Misrepresentation requires an affirmative act taken by the alien. A misrepresentation can be made in various ways, including in an oral interview or in written applications, or by submitting evidence containing false information.

b. **(U) Differentiation Between Misrepresentation and Failure to Volunteer Information:** In determining whether a misrepresentation has been made, it is necessary to distinguish between misrepresentation of information and information that was merely concealed by the alien's silence. Silence or the failure to volunteer information does not in itself constitute a misrepresentation for the purposes of INA 212(a)(6)(C)(i).

c. **(U) Misrepresentation Must Have Been Before U.S. Official:** For a misrepresentation to fall within the purview of INA 212(a)(6)(C)(i), it must have been practiced on an official of the U.S. Government, generally speaking, a consular officer or a Department of Homeland Security (DHS) officer.

d. **(U) Misrepresentation Must be Made on Alien's Own Application:** The misrepresentation must have been made by the alien with respect to the alien's own visa application. Misrepresentations made in connection with some other person's visa application do not fall within the purview of INA 212(a)(6)(C)(i). Any such misrepresentations may be considered with regard to the possible application of INA 212(a)(6)(E).

e. **(U) Misrepresentation Made by Applicant's Agent or Attorney:** The fact that an alien pursues a visa application through an attorney or travel agent does not serve to insulate the alien from liability for misrepresentations made by such agents, if it is established that the alien was aware of the action being taken in furtherance of the application. This standard would apply, for example, where a travel agent executed a visa application on an alien's behalf. Similarly, an oral misrepresentation made on behalf of an alien at the port of entry by an aider or abettor of the alien's illegal entry will not shield the alien in question from inadmissibility under INA 212(a)(6)(C)(i), irrespective of what penalties the aider or abettor might incur, if it can be established that the alien was aware at the time of the misrepresentation made on his or her behalf.

f. **(U) Timely Retraction:** A timely retraction will serve to purge a misrepresentation and remove it from further consideration as a ground for INA 212(a)(6)(C)(i) and INA 212(a)(6)(C)(ii) inadmissibility. Whether a retraction is timely depends on the circumstances of the particular case. In general, it should be made at the first opportunity. If the applicant has personally appeared and been interviewed, the retraction must have been made during that interview. If the misrepresentation has been noted in a "mail-order" application, the applicant must be called in for an interview and the retraction must be made during the course thereof. For this reason, aliens must be warned of the penalty imposed by INA 212(a)(6)(C)(i) and INA 212(a)(6)(C)(ii) once you are aware that the applicant made a misrepresentation that might be material.

g. **(U) Activities that Indicate Violation of Status or Conduct Inconsistent with Status**

(1) (U) In General:

(a) **(U)** In determining whether a misrepresentation has been made, some of the most difficult questions arise from cases involving aliens in the United States

who conduct themselves in a manner inconsistent with representations they made to consular officers concerning their intentions at the time of visa application or to DHS when applying for admission or for an immigration benefit. Such cases occur most frequently with respect to aliens who, after having obtained visas as nonimmigrants and been admitted to the United States, either:

(i) (U) Apply for adjustment of status to lawful permanent resident; or

(ii) (U) Fail to maintain their nonimmigrant status (for example, by engaging in unauthorized study or employment).

(b) (U) Applications for adjustment or change of status in the United States are adjudicated by U.S. Citizenship and Immigration Services (USCIS), other than in those cases where the application is made before an Immigration Judge. If you become aware of derogatory information indicating that an alien in the United States who has a valid visa, may have misrepresented his or her intentions to you at the time of visa application, or to DHS at the port of entry or in a filing for an immigration benefit, you may bring the derogatory information to the attention of the Department for potential revocation. See 9 FAM 403.11-5. If you become aware of derogatory information indicating that an alien in the United States without a valid visa but who is not a Lawful Permanent Resident may have misrepresented his or her intentions to you at the time of visa application, or to DHS at the port of entry or in a filing for an immigration benefit, then you may enter a P6C1 lookout in CLASS with the appropriate information. See 9 FAM 403.10-3(C). Do not request an advisory opinion from the Advisory Opinions Division (CA/VO/L/A) in these cases, because it would not be binding on USCIS.

(c) (U) With respect to the second category referred to above in subparagraph g(l)(a)(ii), nonimmigrant visa holders who fail to maintain their nonimmigrant status, the fact that an alien's subsequent actions are inconsistent with those stated at the time of visa application or admission or in a filing for an immigrant benefit does not necessarily prove that the alien's intentions were misrepresented at the time of application or entry. You should consider carefully the precise circumstances of the change in activities when determining whether the applicant made a knowing and willful misrepresentation. To conclude there was a misrepresentation, you must have direct or circumstantial evidence sufficient to meet the "reason to believe" standard, which requires more than mere suspicion but less than a preponderance of the evidence.

(2) **(U) Inconsistent Conduct Within 90 Days of Entry:**

(a) **(U)** However, if an alien violates or engages in conduct inconsistent with his or her nonimmigrant status within 90 days of entry, as described in subparagraph (2)(b) below, you may presume that the applicant's representations about engaging in only status-compliant activity were willful misrepresentations of his or her intention in seeking a visa or entry. To make a finding of inadmissibility for misrepresentation based on conduct inconsistent with status within 90 days of entry, you must request an AO from CA/VO/L/A. As with other grounds that do not require a formal AO, the AO may be informal. See 9 FAM 304.3-2.

(b) (U) For purposes of applying the 90-day rule, conduct that violates or is otherwise inconsistent with an alien's nonimmigrant status includes, but is not limited to:

(i) (U) Engaging in unauthorized employment;

(ii (U) Enrolling in a course of academic study, if such study is not authorized for that nonimmigrant classification (e.g. B status);

(iii) (U) A nonimmigrant in B or F status, or any other status prohibiting immigrant intent, marrying a United States citizen or lawful permanent resident and taking up residence in the United States; or

(iv) (U) Undertaking any other activity for which a change of status or an adjustment of status would be required, without the benefit of such a change or adjustment.

(3) **(U) After 90 Days:** If an alien violates or engages in conduct inconsistent with his or her nonimmigrant status more than 90 days after entry into the United States, no presumption of willful misrepresentation arises. However, if the facts in the case give you reasonable belief that the alien misrepresented his or her purpose of travel at the time of the visa application or application for admission, you must request an AO from CA/VO/L/A. (See 9 FAM 302.9-4(C)(2)).

h. **(U) Evidence of Violation of Status:**

(1) **(U)** To find an alien inadmissible under INA 212(a)(6)(C)(i) based on a violation of status, there must be evidence that, at the time of the visa application, admission into the United States or in a filing for an immigration benefit (e.g., an application to change or extend a stay in nonimmigrant status), the alien stated orally or in writing to a consular or immigration officer that the purpose of the visit or the immigration benefit was *consistent* with the intended nonimmigrant classification. Ordinarily, such evidence would be in the form of an admission, from information taken from the alien's nonimmigrant visa (NIV) application, or a report by an immigration officer that the alien made such a statement (e.g., as would be found on the DHS Form I-275, Withdrawal of Application/Consular Notification).

(2) (U) The burden of proof falls on the alien to establish that his or her true intent at the time of the presumptive willful misrepresentation was permissible in his or her nonimmigrant status. You must give the alien the opportunity to rebut the presumption of willful misrepresentation by presentation of evidence to overcome it. In the absence of any further offering of proof by the alien to rebut the presumption of willful misrepresentation based on his/her activity within 90 days after entry to the United States, a finding of ineligibility will most likely result

(a) (U) If you are satisfied that the presumption is overcome, and the alien is otherwise eligible, process the case to conclusion.

(b) **Unavailable**

(i) Unavailable

(ii) Unavailable

9 FAM 302.9-4(B)(4) (U) Interpretation of the Term Willfully

(CT:VISA- ***74; 03-03-2016)***

a. **(U) Willfully Defined:** The term "willfully" as used in INA 212(a)(6)(C)(i) is interpreted to mean knowingly and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. In order to find the element of willfulness, it must be determined that the alien was fully aware of the nature of the information sought and knowingly, intentionally, and deliberately made an untrue statement.

b. **(U) Misrepresentation is Alien's Responsibility:** An alien who acts on the advice of another is considered to be exercising the faculty of conscious and deliberate will in accepting or rejecting such advice. It is no defense for an alien to say that the misrepresentation was made because someone else advised the action unless it is found that the alien lacked the capacity to exercise judgment.

9 FAM 302.9-4(B)(5) (U) Interpretation of the Term Material Fact

(CT:VISA-448; 09-22-2017)

a. **(U) Materiality Defined:** Materiality is determined in the context of the individual case as to whether the misrepresentation was of direct and objective significance to the proper resolution of the alien's application for a visa. The Attorney General has declared the definition of "materiality" with respect to INA 212(a)(6)(C)(i) to be as follows: "A misrepresentation made in connection with an application for a visa or other documents, or with entry into the United States, is material if either:

(1) (U) The alien is inadmissible on the true facts; or

(2) (U) The misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he or she be inadmissible." (Matter of S- and B-C, 9 I & N 436, at 447.)

b. **(U) Independent Ground of Inadmissibility:** The first part of the Attorney General's definition of materiality comprises those cases where the material facts disclose a situation rendering the alien ineligible for a visa as a matter of law. These are known as independent or objective grounds of inadmissibility. Objective grounds of inadmissibility are those encompassed within the provisions of INA 212(a)(1) through (10). Special circumstances are as follows:

(1) (U) There are grounds of inadmissibility that are not permanent and for which some aliens may be relieved of ineligibility by operation of law. For example, an alien who incurred an ineligibility under INA 212(a)(9)(B)(i)(I) and made a misrepresentation about prior unlawful presence in the United States would not be concealing an independent grounds of inadmissibility if more than three years had elapsed since the alien's departure from the United States.

(2) (U) As another example, INA 212(a)(2)(A)(i)(I) has the sentencing clause exception of INA 212(a)(2)(A)(ii)(II). An alien who lies about a criminal conviction that involves a crime involving moral turpitude but which comes under the sentencing clause exception would therefore not be ineligible under INA 212(a)(6)(C)(i) for concealing an independent grounds of inadmissibility.

(3) (U) In judicial and administrative decisions about the applicability of INA 212(a)(6)(C)(i), a distinction has been drawn between those other provisions of INA 212 which grant relief from ineligibility as a result of an evaluation of all relevant factors pro and con, on the one hand, and those which provide relief automatically by standard operation of law, as described above. The essence of these decisions, according to the Attorney General, is that:

(a) (U) The fact in question is material if the final determination of relief would depend on an exercise in judgment (i.e., one cannot predicate immateriality on the possibility that the exercise of judgment would have erased the ground of inadmissibility when it is also possible that the judgment could have gone the other way);

(b) (U) The fact is not material under the independent grounds of inadmissibility prong of INA 212(a)(6)(C)(i)'s materiality test if the relief stems from the automatic operation of law; and

c. **(U) "Rule of Probability" Defined:**

(1) (U) In General: The second part of the Attorney General's definition is directed to those cases when the alien's misrepresentation tended to shut off a line of inquiry which is relevant to visa eligibility. These are cases where the exercise of further consular judgment is required. Past judicial and administrative decisions concerning this part have evolved into what has become to be known as the "rule of probability."

(2) **(U) "Tends" Defined:** The word "tends" as used in "tended to cut off a line of inquiry" means that the misrepresentation must be of such a nature as to be reasonably expected to foreclose certain information from your knowledge. It does not mean that the misrepresentation must have been successful in foreclosing further investigation by you in order to be deemed material; it means only that the misrepresentation must reasonably have had the capacity of foreclosing further investigation.

(a) (U) If an alien's eligibility for a visa is resolved against the alien on the known circumstances of the case, a subsequent discovery that the alien had misrepresented certain aspects of the case would not be considered material since the misrepresented facts did not tend to lead you into making an erroneous conclusion. For example, an applicant for a nonimmigrant visa (NIV) falsifies the visa application by claiming to have a well-paying job in order to show that the applicant has a residence abroad, but before the misrepresentation was discovered, the visa was refused because the alien could not, on the known facts, qualify as a nonimmigrant. The subsequent ascertainment of the false statement would not support a finding of materiality because it had no objective significance to the finding that the alien was not a nonimmigrant.

(b) (U) If the truth of the fact being misrepresented is available to you through consular systems, or through reference to the post's own files, it cannot be said that the alien's misrepresentation tended to cut off a line of inquiry since the line of inquiry was readily available to you. While the availability of the true facts does not support the "materiality" of the misrepresentation under the "rule of probability" (part two of the Attorney General's definition), if those facts disclose an independent ground of ineligibility, then the misrepresentation is material under the first part of the Attorney General's definition. (See 9 FAM 302.9-4(B)(5) paragraph a).

(3) **(U) Questionable Cases:** Frequently, a question arises concerning the effect on ineligibility of a false document presented in support of an application, or a false statement made to you, each of which purports to establish a fact which is material to the application for a visa, but which, in the case of the document, is so poorly crafted, or in the case of the statement is so unbelievable as to lack

credibility. Despite the lack of credibility, if the document or statement is offered for the purpose of establishing a fact which would be material if the information in the document or statement were to be accepted as truthful, you may consider that the document or statement "tends" to cut off a line of inquiry.

(4) **(U) Facts Considered Material:**

(a) (U) Residence and Identity:

(i) **(U)** The Board of Immigration Appeals has held that misrepresentations of residence and identity are not automatically material and must be considered as any other misrepresentation. That means they can be material for purposes of 212(a)(6)(C)(i) if the alien is inadmissible on the true facts or the misrepresentation tends to cut off a relevant line of inquiry which might have led to a proper finding of ineligibility. Misrepresentations regarding identity may also involve an independent ground of ineligibility if they involve a false identity in a passport. INA 212(a)(7)(B) makes inadmissible any alien not in possession of a valid passport. The definition of a passport in INA 101(a)(30) requires that the document show the bearer's "identity." Therefore, an alien who applies using a passport issued in a false identity to which they have no legitimate claim would not have a valid passport as defined under the INA and would be inadmissible under the independent ground of INA 212(a)(7)(B) and thus also ineligible under INA 212(a)(6)(C)(i). This does not apply, however, where the alien uses a nickname, some other reasonable variant of a name, a legally changed name, or any other name for which the alien has some legitimate entitlement.

(ii) **Unavailable**

(iii) **Unavailable**

(b) (U) Misrepresentations Concerning Previous Visa Applications:

(i) **(U)** Applying for an immigrant visa or seeking adjustment of status in the United States does not render an alien ineligible for a nonimmigrant visa (NIV) in itself, but it does raise questions about the nonimmigrant intent of the applicant. Because a misrepresentation with respect to permanent status in the United States might tend to cut off the proper line of inquiry into the nonimmigrant intent of the alien, such a misrepresentation is normally considered to be of material importance. However, there may be factors, including events intervening between the registration and the nonimmigrant visa (NIV) application (DS-160 Online Non-Immigrant Visa Application) that must render a prior registration for an immigrant visa (IV) immaterial in connection with the NIV application at hand. Although no list of exemplary intervening events may be all-inclusive, one might include: a marriage; a purchase of a new home; a substantial investment in the local economy; and business or familial emergencies in the United States.

(ii) (U) A misrepresentation concerning a previous application on the part of an immigrant visa (IV) applicant would not be considered to be material unless the misrepresentation also concealed the existence of an independent ground of inadmissibility;

(iii) (U) A misrepresentation concerning a previous application for a nonimmigrant visa made on the part of an IV applicant is not in itself considered to be material; and

(iv) (U) A nonimmigrant visa (NIV) applicant's misrepresenting the fact that the applicant was previously refused an NIV is not, in itself, a material misrepresentation, even though you may feel that knowledge of the previous visa refusal might have been useful. In the absence of anything to the contrary, assume that the previous refusal was predicated on the previous interviewing officer's finding that the alien was not a qualified nonimmigrant at the time of that interview. Such an opinion is necessarily limited to the circumstances of the alien's prior application at that time. Since circumstances change, eligibility must be decided in light of the current situation in each application. Consequently, a misrepresentation which conceals only the fact of a previous refusal is not material. Where the misrepresentation conceals not only the fact of the previous refusal, but also objective information not otherwise known or available to you, there may be a basis for finding that the absence of such facts tended to cut off a line of inquiry and thus rendered the misrepresentation material.

(5) **(U) Application of Phrase "Which Might Have Resulted in a Proper Determination of Exclusion":** In order to sustain a finding of materiality, it must be shown that the information foreclosed by the misrepresentation was of basic significance to the alien's eligibility for a visa. A remote, tenuous, or fanciful connection between a misrepresentation and a line of inquiry which relevant to the alien's eligibility is insufficient to satisfy this aspect of the materiality test. The information concealed by the misrepresentation must, when balanced against all the other information of record, have been controlling or crucial to a final decision of the alien's eligibility to receive a visa. For example, if an alien was trying to establish a residence abroad by submitting false evidence of particular employment and it appeared that the alien had other ties meriting favorable consideration, then the misrepresentation would not be considered to be material.

(6) **(U) The True Facts:**

(a) **(U)** An applicant will never be ineligible under INA 212(a)(6)(C)(i) if he or she can demonstrate eligibility on the true facts. For this reason, an assessment of ineligibility under this ground is not complete until you have considered, to the extent possible in light of the applicant's misrepresentation, the true facts. "The applicant bears the burden of establishing the true facts and bears the risk that uncertainties caused by his or her misrepresentation may be resolved against the applicant, if the facts support a finding that the alien is eligible for a visa, the misrepresented fact is not material."

(i) (U) If an alien were to make a misrepresentation to establish an advantageous immigrant visa (IV) status and it were discovered that the alien was, in truth, entitled to another equally advantageous status, the misrepresentation would not be considered to be material. For example, if the son or daughter of a U.S. citizen were to misrepresent marital status as being unmarried for the purpose of qualifying for first preference status, and was, in fact, married and thus

qualified for only third preference consideration, but the third preference was currently available for the alien's state of chargeability, the misrepresentation should not be considered material. If, however, there were a waiting period for third preference applicants in the state of the alien's chargeability or world-wide, the alien must then be found to have sought an unwarranted advantage by means of a willful misrepresentation and the misrepresentation would, therefore, be material;

(ii) (U) If an alien were to make a misrepresentation in order to enhance or exaggerate the alien's qualifications for a visa, but the true facts alone were sufficient to establish qualifications, the misrepresentation would not be considered to be material. For example, if an alien were to misrepresent employment prospects in the United States as a means of establishing qualifications for a visa under INA 212(a)(4), and it were discovered that, in truth, the alien had other comparable employment or other satisfactory prospects, the misrepresentation is not considered material.

(b) (U) Once it has been established that a misrepresentation was made in securing a visa, the burden is on the person making the misrepresentation to establish that the facts support eligibility or that, had you known the truth, a refusal of a visa could not properly have been made. Be receptive to any further evidence the alien may provide in order to ensure that a proper finding has been made.

d. **(U) Cases Not Involving the "Rule of Probability":** The following cases do not involve the "rule of probability."

(1) (U) Cases where the alien has expressly admitted to you that, at the time the alien applied for a visa or entry into the United States as a visitor, it was the alien's intention to accept unauthorized employment in the United States or to reside indefinitely in the United States. A written confession is not required if:

(a) (U) The alien admitted under oath to the misrepresentation;

(b) (U) You have accurately recorded the statement in the notes of the interview;

(c) (U) You have signed and dated the notes; and

(d) (U) You have refused the visa and scanned the refusal into the CCD.

(2) (U) Cases where DHS has reported to you that an alien attempted to enter or procured entry into the United States by presenting to the inspecting officer at the port of entry (POE) forged or materially altered entry documentation. Such documentation may include a U.S. visa, a foreign passport, or a U.S. passport; if such documentation was required under the INA or other laws of the United States for the alien's entry, or, in the case of the U.S. passport, if the alien was posing as a U.S. citizen for the purpose of gaining illegal entry, see 9 FAM 302.9-5.

9 FAM 302.9-4(B)(6) (U) Cases Based on Evidence Developed at Port of Entry (POE)

(CT:VISA-272; ***12-20-2016)***

(U) DHS may provide post with evidence that a port-of-entry (POE) official denied an alien admission on the grounds of INA 212(a)(6)(C)(i). We consider these statements to reflect only the officer's opinion at the time. No entry by DHS should be found in the Consular Lookout and Support System (CLASS) unless the alien has formally been found inadmissible under INA 212(a)(6)(C)(i) either through removal proceedings or otherwise. However, if DHS has made a "6C1" or an "ER6" entry in the lookout system, the post may assume that a formal finding of inadmissibility was made, and you should refuse the visa application under INA 212(a)(6)(C)(i). If a CLASS check reveals no "6C1," or other entry by DHS, or only a P6C1 entry, the notation on the Form I-275, Withdrawal of Application/Consular Notification, alone, is insufficient to justify a determination of inadmissibility. However, you may use the factual evidence cited in the Form I-275 as the basis for a rule of probability determination if you believe that the evidence is sufficient to justify a finding of inadmissibility.

9 FAM 302.9-4(B)(7) (U) Interpretation of the Terms "Other Documentation" or "Other Benefit"

(CT:VISA-74; 03-03-2016)

a. **(U) Other Documentation:**

(1) **(U)** The "other documentation" mentioned in the text of INA 212(a)(6)(C)(i), in addition to visas, refers to documents required at the time of an alien's application for admission. This includes such documents as:

(a) (U) Reentry permits;

(b) (U) Border crossing identification cards;

(c) (U) U.S. Coast Guard identity cards; and

(d) (U) U.S. passports.

(2) (U) Such documents as applications for parole into the United States are not considered to be entry documents under INA 212(a)(6)(C)(i). Other types of documents, such as Form I-20, Certificate of Eligibility for Nonimmigrant (F-1) Student Status for Academic and Language Students, petitions, and labor certification forms are documents in support of a visa application. You must judge these documents in the light of their effect on a visa application. In themselves, they are not "other documentation" within the meaning of INA 212(a)(6)(C)(i).

(3) (U) As stated in 9 FAM 302.9-4(B)(3) paragraph c, in order for a misrepresentation to be considered within the purview of this section, the misrepresentation must have been made to an official of the U.S. Government. Counterfeit documents or documents obtained by fraud or willful misrepresentation presented to foreign government officials or other individuals are not relevant under INA 212(a)(6)(C)(i).

b. **(U) Other Benefit:** The term "other benefit" refers to any immigration benefit or entitlement provided for by the Immigration and Nationality Act, as amended, and may in a given case include:

(1) (U) Requests for extension of stay, change of status, permission to re-enter, waivers, alien authorization, advance parole, voluntary departure, adjustment of status, stay of deportation;

(2) (U) Application for Forms I-20, Certificate of Eligibility for Nonimmigrant (F-1) Student Status for Academic and Language Students, and DS-2019, Certificate of Eligibility for Exchange Visitor (J-1) Status; and

(3) (U) All immigrant and nonimmigrant petitions with respect to misrepresentations made by the petition's beneficiary or by an agent representing such beneficiary.

9 FAM 302.9-4(B)(8) (U) Additional Information

(CT:VISA-272; 12-20-2016)

a. **(U) Misrepresentations in Family Relationship Petitions:** USCIS retains exclusive authority to disapprove or revoke family-relationship IV petitions. Thus, a misrepresentation with respect to entitlement to the classification based on the relationship, e.g., sham marriage, cannot be deemed material as long as the petition is valid. Upon discovery of a misrepresentation, you must return the petition to the appropriate USCIS office. If the petition is revoked, the materiality of the misrepresentation is established. In some cases, the relationship and thus petition may still be valid, but the alien may misrepresent eligibility for the classification and still be ineligible under INA 212(a)(6)(C)(i).

b. **(U) Attempts to Obtain Visa by Bribery:** An attempt by an unqualified applicant to obtain a visa or entry to the United States through bribery of a U.S. Government employee is an attempt to perpetrate fraud on the U.S. Government and will result in ineligibility under INA 212(a)(6)(C)(i). The bribe must be directed to a consular officer, a member of post's Locally Employed Staff, or an immigration officer. Ordinarily, no advisory opinion is required, but posts should report the circumstances of all such cases to the appropriate Departmental offices; e.g., CA/VO/L/A, the Office of Fraud Prevention Programs (CA/FPP), and the Visa Fraud Branch (DS/CR/CFI).

9 FAM 302.9-4(C) (U) Advisory Opinions

9 FAM 302.9-4(C)(l) (U) Cases Involving the Rule of Probability

(CT:VISA-272; 12-20-2016)

(U) In view of the judicial and administrative uncertainties surrounding the rule of probability, and in order to achieve uniformity in the application of the rule throughout the world, certain cases falling under that rule must be submitted to the Department for an AO. Although you may submit any difficult cases, no AO is required for:

(1) (U) Cases decided in the applicant's favor;

(2) (U) Cases involving use of fraudulent documentation related to establishing qualification for a particular nonimmigrant category in order to overcome the presumption of intending immigration in INA 214(b). Such documents would include:

(a) (U) Fraudulent primary documentation, such as job letters;

(b) (U) School enrollment records;

(c) (U) Deeds; or

(d) (U) Bank or business statements relating to personal financial stability or to business ownership and activity, or similar documents, other than tax

records, which was determined material to the visa qualification of an applicant;

(3) (U) Cases in which the DHS has revoked a petition submitted to you for review on the basis of fraud;

(4) (U) Diversity visa (DV) cases, where there is a misrepresentation of the education or work requirements needed to qualify for the visa; or

(5) (U) Cases based on evidence developed at the port of entry (POE). (See 9 FAM 302.9-4(B)(6).)

9 FAM 302.9-4(C)(2) Unavailable

(CT:VISA-272; 12-20-2016)

Unavailable

(1) Unavailable

(2) Unavailable

(3) Unavailable

(4) Unavailable

(a) Unavailable

(b) Unavailable

9 FAM 302.9-4(C)(3) (U) Request for an Advisory Opinion in Other Benefit Cases

(CT:VISA-272; 12-20-2016)

(U) You must request an AO from CA/VO/L/A in those cases where you believe that some other item constitutes an "Other Benefit" under the Immigration and Nationality Act.

9 FAM 302.9-4(C)(4) (U) Cases Not Involving the Rule of Probability

(CT:VISA-272; 12-20-2016)

(U) You do not need to request an AO from CA/VO/L/A for cases not involved the rule of rule of probability as outlined in 9 FAM 302.9-4(B)(5) paragraph d above.

9 FAM 302.9-4(D) (U) Waiver

9 FAM 302.9-4(D)(I) (U) Waivers for Immigrants

(CT:VISA-74; 03-03-2016)

a. (U) An applicant for an immigrant visa (IV) who is inadmissible under provision (i) of INA 212(a)(6)(C) may seek a waiver from DHS under INA 212(i) if:

(1) (U) The alien is the spouse, son, or daughter of a U.S. citizen or a lawful resident; and

(2) (U) The Secretary of Homeland Security is satisfied that the refusal of the alien's admission to the United States would result in extreme hardship to the U.S. citizen or lawful resident spouse or parent of such alien.

9 FAM 302.9-4(D)(2) (U) Waivers for Nonimmigrants

(CT:VISA-74; 03-03-2016)

(U) You may, in your discretion, recommend that DHS grant a waiver under INA 212(d)(3)(A) for an alien inadmissible under INA 212(a)(6)(C)(i) provided the alien meets the criteria specified in 9 FAM 305.4-3(H).

9 FAM 302.9-4(E) Unavailable

9 FAM 302.9-4(E)(I) Unavailable

(CT:VISA-272; 12-20-2016)

Unavailable

9 FAM 302.9-4(E)(2) Unavailable

(CT:VISA-272; 12-20-2016)

Unavailable

9 FAM 302.9-5 (U) FALSELY CLAIMING CITIZENSHIP -INA 212(A)(6)(C)(II)

9 FAM 302.9-5(A) **(U)** Grounds

(CT:VISA-272; 12-20-2016)

(U) INA 212(a)(6)(C)(ii) renders inadmissible any alien who, after September 30, 1996, falsely claimed U.S. citizenship in order to obtain a U.S. passport, entry into the United States, or any other benefit under any U.S. State or Federal law. According to the BIA, "a false claim to United States citizenship falls within the scope of INA 212(a)(6)(C)(ii)(I) ...where there is direct or circumstantial evidence that the false claim was made with the subjective intent of obtaining a purpose or benefit under the (INA) or any other Federal or State law, and where United States citizenship actually affects or matters to the purpose or benefit sought." Matter of Richmond, 26 I&N Dec. 779 (BIA 2016).

9 FAM 302.9-5(B) (U) Application

9 FAM 302.9-5(B)(I) (U) In General

(CT:VISA-272; 12-20-2016)

a. (U) On December 6, 2014, the DHS Office of the General Counsel issued an opinion concluding that:

(1) (U) Only a knowingly false claim can support a charge that an individual is inadmissible under INA 212(a)(6)(C)(ii). The individual claiming not to know that the claim to citizenship was false has the burden of establishing this affirmative defense by the appropriate standard of proof (for applicants for admission or adjustment, "clearly and beyond doubt").

(2) (U) A separate affirmative defense is that the individual was (a) under the age of 18 at the time of the false citizenship claim; and (b) at that time lacked the capacity (i.e., the maturity and the judgment) to understand and appreciate the nature and consequences of a false claim to citizenship. The individual must establish this claim by the appropriate standard of proof (for applicants for admission or adjustment, "clearly and beyond doubt").

b. (U) An applicant who has been refused in the past and believes that their case meets the requirements above may follow standard post application procedures for a new visa application.

c. **Unavailable**

9 FAM 302.9-5(B)(2) (U) Not Retroactive

(CT:VISA-369; 05-31-2017)

(U) The provisions of INA 212(a)(6)(C)(ii) are not retroactive. It applies only to aliens who have made false claims to U.S. citizenship on or after September 30, 1996. An alien who has attempted or achieved entry to the United States before September 30, 1996, on a false claim of U.S. citizenship is not inadmissible under the terms of INA 212(a)(6)(C)(ii). They are, however, inadmissible under 212(a)(6)(C)(i), provided such claim was made to procure a visa, other documentation, or admission into the United states or other benefit under INA. This is a significant difference because the waiver provisions of INA 212(a)(6)(C)(iii) apply to aliens inadmissible under (6)(C)(i), but not to aliens inadmissible under (6)(C)(ii).

9 FAM 302.9-5(B)(3) (U) Scope

(CT:VISA-369; 05-31-2017)

(U) Inadmissibility under INA 212(a)(6)(C)(ii) applies not only to an alien who makes false claims to U.S. citizenship in order to obtain:

(1) (U) A U.S. passport;

(2) (U) Entry into the United States; or

(3) (U) Other documentation or benefit under the INA (provided such claim was made before a U.S. Government official);

but also applies to an alien who made false claims to U.S. citizenship for any purpose or benefit under any other Federal or State law. For example, an alien who made a false claim to U.S. citizenship to obtain welfare benefits or for the purpose of voting in a Federal or State election would be inadmissible under INA 212(a)(6)(C)(ii). (See also 9 FAM 302.12-5 regarding unlawful voters.) A false claim to citizenship to avoid removal proceedings would qualify as a "purpose" under U.S. law.

9 FAM 302.9-5(B)(4) (U) False Claims to U.S. Citizenship Under INA 274A

(CT:VISA-74; 03-03-2016)

(U) INA 212(a)(6)(C)(ii) also applies for the purposes of INA 274A, which makes it unlawful to hire an alien who is not authorized to work in the United States. Thus, an alien who makes false claims to U.S. citizenship to secure employment in violation of INA 274A would be inadmissible under INA 212(a)(6)(C)(ii).

9 FAM 302.9-5(B)(5) (U) Citizenship Claims Made to Other Than U.S. Government Officials

(CT:VISA-74; 03-03-2016)

(U) There is nothing in the language of INA 212(a)(6)(C)(ii) that would require that the false claim to U.S. citizenship be made to a U.S. official implementing the provisions of the INA. INA 212(a)(6)(C)(ii) specifically says "under this Act (including section 274A) or other Federal or State law." Thus, the language presupposes that the false claim may have been made to a State or Federal Government official outside the Department of State or DHS, or even to a prospective employer to circumvent INA 274A.

9 FAM 302.9-5(B)(6) (U) Exception

(CT:VISA-74; 03-03-2016)

(U) The Child Citizenship Act of 2000 (section 201(b) of Public Law 106-395) added an exception for inadmissibility under INA 212(a)(6)(C)(ii) for an alien who falsely claimed citizenship if:

(1) (U) Each parent is or was a U.S. citizen by birth or naturalization;

(2) (U) The alien resided permanently in the United States prior to the age of 16; and

(3) (U) The alien reasonably believed at the time of such violation that he or she was a U.S. citizen.

9 FAM 302.9-5(C) (U) Advisory Opinions

(CT:VISA-272; 12-20-2016)

(U) An AO is not required for a potential INA 212(a)(6)(C)(ii) ineligibility, unless the applicant was previously refused under INA 212(a)(6)(C)(ii) but believes that the case comes under the December 6, 2012 guidance from DHS Office of General Counsel. However, if you have a question about the interpretation or application of law or regulation, including those cases involving a false claim to U.S. citizenship to an employer on a Form I-9, Employment Eligibility Verification, you may request an AO from CA/VO/L/A.

9 FAM 302.9-5(D) (U) Waiver

9 FAM 302.9-5(D)(I) (U) Waivers for Immigrants

(CT:VISA-272; 12-20-2016)

(U) There is no immigrant visa waiver available for an alien who is inadmissible under INA 212(a)(6)(C)(ii).

9 FAM 302.9-5(D)(2) (U) Waivers for Nonimmigrants

(CT:VISA-74; 03-03-2016)

(U) You may, at your discretion, recommend that DHS grant a waiver under INA 212(d)(3)(A) for an alien inadmissible under INA 212(a)(6)(C)(ii) provided the alien meets the criteria specified in 9 FAM 305.4-3(H).

9 FAM 302.9-5(E) Unavailable

9 FAM 302.9-5(E)(l) Unavailable

(CT:VISA-272; 12-20-2016)

Unavailable

9 FAM 302.9-5(E)(2) Unavailable

(CT:VISA-272; 12-20-2016)

Unavailable

9 FAM 302.9-6 (U) STOWAWAYS - INA 212(A)(6)(D)

9 **FAM** 302.9-6(A) (U) Grounds

(CT:VISA-74; 03-03-2016)

(U) INA 212(a)(6)(D) provides that any alien who is a stowaway is inadmissible.

9 FAM 302.9-6(B) (U) Application

9 FAM 302.9-6(B)(l) (U) Defining "Stowaway"

(CT:VISA-74; 03-03-2016)

(U) INA 101(a)(49) defines "stowaway" as "...any alien who obtains transportation without the consent of the owner, charterer, master or person in command of any vessel or aircraft through concealment aboard such vessel or aircraft. A passenger who boards with a valid ticket is not to be considered as a stowaway."

9 FAM 302.9-6(B)(2) (U) Applying INA 212(a)(6)(D)

(CT:VISA-74; 03-03-2016)

(U) The fact that a person may have been a stowaway in the past does not in itself make the person ineligible to receive a visa.

9 FAM 302.9-6(C) (U) Advisory Opinions

(CT:VISA-74; 03-03-2016)

(U) INA 212(a)(6)(D) is not applicable at the time of visa application because it applies only to aliens arriving in the United States as stowaways.

9 FAM 302.9-6(D) (U) Waiver

9 FAM 302.9-6(D)(l) (U) Waivers for Immigrants

(CT:VISA-272; 12-20-2016)

(U) INA 212(a)(6)(D) is not applicable at the time of visa application.

9 FAM 302.9-6(D)(2) (U) Waivers for Nonimmigrants

(CT:VISA-272; 12-20-2016)

(U) INA 212(a)(6)(D) is not applicable at the time of visa application.

9 FAM 302.9-7 (U) SMUGGLERS - INA 212(A)(6)(E)

9 FAM 302.9-7(A) (U) Grounds

(CT:VISA-74; 03-03-2016)

(U) INA 212(a)(6)(E) provides that "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 302.9-7(B) (U) Application

9 FAM 302.97(B)(1) (U) Defining "Any Alien"

(CT:VISA-272; 12-20-2016)

(U) All aliens, including lawful permanent residents seeking reentry into the United States, are potentially subject to this provision. However, the Secretary of Homeland Security may waive inadmissibility (see 9 FAM 302.9-7(D)) for:

(1) (U) An immigrant visa applicant where the applicant sought to assist only an individual who was his spouse, child or parent at the time of the assistance, or

(2) (U) A permanent resident alien who is returning to the United States under the conditions found in INA 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).

9 FAM 302.9-7(B)(2) (U) Visa Ineligibility and Inadmissibility Covering "At Any Time..." Period Applies to Smuggling

(CT:VISA-74; 03-03-2016)

(U) 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.

9 FAM 302.9-7(B)(3) (U) Smuggler Must Act "Knowingly"

(CT:VISA-272; 12-20-2016)

(U) A key element of the new INA 212(a)(6)(E) provision is that the "smuggler" **must** act "knowingly" to encourage, induce, or assist an illegal alien to enter the United States. In other words, in order to find an alien inadmissible under this provision, the consular officer must find that the "smuggler" must be aware of sufficient facts such that a reasonable person in the same circumstances would conclude that his or her encouragement, inducement, or assistance could result in the entry of the alien into the United States illegally, 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 302.9-7(B)(4) (U) "Encourage, Induce, Assist, Abet, or Aid"

(CT:VISA-272; 12-20-2016)

(U) The actions for which a "smuggler" might be found inadmissible are numerous. The acts generally involve engagement in an "affirmative act of assistance," that is an act or acts that are of direct encouragement, inducement or assistance to the alien's attempted illegal entry:

(1) (U) 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) (U) Physically bringing an alien into the United States illegally (aid and assist);

(3) (U) With regard to a visa application, 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) (U) INA 212(a)(6)(E) 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 INA 212(a)(6)(C) finding; and

(5) (U) If an advisory opinion (AO) would be required for the materiality of a INA 212(a)(6)(C) finding in accordance with the guidelines in 9 FAM 302.9-7(C), an AO must be submitted before a INA 212(a)(6)(E) finding can be made.

9 FAM 302.9-7(B)(5) (U) "Any Other Alien"... Effect of Revision on Family Related Smuggling

(CT:VISA-74; 03-03-2016)

(U) 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."

9 FAM 302.9-7(C) (U) Advisory Opinions

(CT: VISA -448; 09-22-2017)

(U) Generally, an AO is not required for a potential INA 212(a)(6)(E) ineligibility. However, an AO must be submitted to CA/VO/L/A in order to establish that the alien's aid or assistance was material to the other alien's eligibility consistent with the guidance related to materiality for INA 212(a)(6)(C) as outlined in 9 FAM 302.9-4(B)(5) above.

9 FAM 302.9-7(D) (U) Waiver

9 FAM 302.9-7(D)(I) (U) Waivers for Immigrants

(CT:VISA-272; 12-20-2016)

a. (U) With respect to an immigrant, pursuant to INA 212(d)(II), 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. DHS has advised that a waiver under INA 212(d)(11) is only available to immigrant visa applicants in the following categories:

(1) (U) Immediate relatives (IR categories);

(2) (U) Unmarried sons and daughters of U.S. citizens;

(3) (U) Spouses and unmarried sons and daughters of permanent resident aliens; and

(4) (U) Married sons and daughters of U.S. citizens.

b. (U) The Secretary of Homeland Security may also waive inadmissibility for a lawful permanent resident 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 INA 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).

c. (U) Because a waiver is only available where the alien has encouraged, induced, assisted, abetted or aided an individual who at the time of such action was the alien's spouse, parent, son or daughter, it is of particular importance for consular officer to make specific factual findings to include the date of the smuggling act and the relationship, if known, to the individual(s) smuggled. The consular officer should document these findings in the case record and in the OF-194 refusal letter provided to the applicant.

9 FAM 302.9-7(D)(2) (U) Waivers for Nonimmigrants

(CT:VISA-74; 03-03-2016)

(U) You may, in your discretion, recommend that DHS grant a waiver under INA 212(d)(3)(A) for an alien inadmissible under INA 212(a)(6)(E) provided the alien meets the

criteria specified in 9 FAM 305.4-3(H).

9 FAM 302.9-7(E) Unavailable

9 FAM 302.9-7(E)(l) Unavailable

(CT:VISA-272; 12-20-2016)

Unavailable

9 FAM 302.9-7(E)(2) Unavailable

(CT:VISA-272; 12-20-2016)

Unavailable

9 FAM 302.9-8 (U) SUBJECT TO CIVIL PENALTY - INA 212(A)(6)(F)

9 FAM 302.9-8(A) (U) Grounds

(CT:VISA-272; 12-20-2016)

(U) INA 212(a)(6)(F) renders excludable any alien subject to a final order, rendered by an administrative law judge or by a court, of civil penalties for immigration related document fraud.

9 FAM 302.9-8(B) (U) Application

9 FAM 302.9-8(B)(l) (U) Section 274C

(CT:VISA-272; 12-20-2016)

(U) INA 274C, entitled "Penalties For Document Fraud" provides for civil penalties for persons determined by an administrative law judge to have been involved in virtually any activity regarding forged, altered or stolen documents for any purpose under the INA. The issuance of a final order under this section in the name of an alien renders the alien ineligible for visa issuance.

9 FAM 302.9-8(B)(2) (U) Final Order

(CT:VISA-74; 03-03-2016)

(U) An order of the administrative law judge under INA 274C becomes final thirty days after the date of issuance unless the Attorney General modifies or vacates the order within that period. A decision by the Attorney General modifying the original order shall be considered a final order.

9 FAM 302.9-8(B)(3) (U) Effect of Appeal

*(CT:VISA-272; **12-20-2016)***

a. (U) A final order under INA 274C may be appealed to the Court of Appeals within forty-five days of becoming final. Nevertheless, for the purpose of visa adjudication, the order must be considered final until such time as it is overturned.

b. (U) It is quite possible, depending upon the facts of the individual case, that an alien who is the subject of a final order under INA 274C might also be ineligible under INA 212(a)(6)(C) - Misrepresentation or INA 212(a)(9)(A) - Certain Aliens Previously Removed or INA 212(a)(6)(E) - Smuggling.

9 FAM 302.9-8(C) (U) Advisory Opinions

(CT:VISA-74; 03-03-2016)

(U) An AO is not required for a potential INA 212(a)(6)(F) ineligibility; however, if you have a question about the interpretation or application of law or regulation, you may request an AO from CA/VO/L/A.

9 FAM 302.9-8(D) (U) Waiver

9 FAM 302.9-8(D)(I) (U) Waivers for Immigrants

(CT:VISA-74; 03-03-2016)

(U) The Attorney General may, in his or her discretion, grant a waiver for humanitarian purposes to an alien ineligible to receive a visa under INA 212(a)(6)(F). The waiver under INA 212(d)(12) may be granted provided:

(1) (U) The alien is a lawful permanent resident alien who temporarily proceeds abroad voluntarily and is otherwise admissible as a returning resident under INA 211(b); or

(2) (U) The alien is seeking admission under INA 201(b)(2)(A) (as an immediate relative) or 203(a) (as family sponsored immigrant); and

(a) (U) The offense was solely to assist the alien's spouse or child; and

(b) (U) No previous money penalty was imposed under INA 274C.

9 FAM 302.9-8(D)(2) (U) Waivers for Nonimmigrants

(CT:VISA-74; 03-03-2016)

(U) You may, in your discretion, recommend that DHS grant a waiver under INA 212(d)(3)(A) for an alien inadmissible under INA 212(a)(6)(F) provided the alien meets the criteria specified in 9 FAM 305.4-3(H).

9 FAM 302.9-8(E) Unavailable

9 FAM 302.9-8(E)(I) Unavailable

(CT:VISA-272; 12-20-2016)

Unavailable

9 FAM 302.9-8(E)(2) Unavailable

(CT:VISA-272; 12-20-2016)

Unavailable

9 FAM 302.9-9 (U) STUDENT VISA ABUSERS - INA 212(A)(6)(G)

9 FAM 302.9-9(A) (U) Grounds

(CT:VISA-272; 12-20-2016)

(U) INA 212(a)(6)(G) renders inadmissible for five years any student who enters the U.S. to study at a private institution in F-1 status and then switches to a public school in violation of INA 214(m)(2).

9 FAM 302.9-9(B) (U) Application

9 FAM 302.9-9(B)(l) (U) In General

(CT:VISA-272; 12-20-2016)

(U) INA 214(m) prohibits an alien from obtaining F-l student status to pursue a course of study at a:

(1) (U) Public elementary school or publicly-funded adult education program; and

(2) (U) Public secondary school, unless the:

(a) (U) Aggregate period of study at such school does not exceed 12 months; and

(b) (U) The alien demonstrates reimbursement of the full, unsubsidized per capital cost of the education.

9 FAM 302.9-9(B)(2) (U) Date of Applicability

(CT:VISA-74; 03-03-2016)

(U) The provisions of INA 212(a)(6)(G) affect only aliens who received F-l status after November 30, 1996, or aliens whose status was extended on or after that date. It does not apply to aliens attending public schools or programs while in other nonimmigrant status (e.g., F-2, E, H-4, J, or B-2—even out-of-status B-2).

9 FAM 302.9-9(B)(3) (U) Definitions

(CT:VISA-74; 03-03-2016)

a. **(U) Defining "Elementary":** For the purposes of INA 214(m), the term "elementary" means grades kindergarten through eighth.

b. **(U) Defining "Secondary":** For the purposes of INA 214(m), the term "secondary" means grades ninth through twelfth.

c. **(U) Defining "Public":** A public school is any school that receives more than half of its financing through State or local taxes or through Federal grants. The definition of

"public" can encompass "alternative" or "charter" schools that allow parents to exercise extensive control over curriculum. It can also encompass the term "corporate charter school"—applied to schools that have received major grants and land, buildings, or educational materials from a corporation providing major employment opportunities in the local area, unless it can be established that the value of the grant on an ongoing annual basis exceeds the value of financing from public taxes and grants.

d. **(U) Defining "Publicly Funded Adult Education":** The Department of Homeland Security/U.S. Citizenship and Immigration Service (DHS/USCIS) defines "publicly-funded adult education" as programs run tuition-free at or in conjunction with public secondary schools. It does not apply to schools such as community colleges that receive public funds but charge students tuition.

9 FAM 302.9-9(B)(4) (U) Participation in Language Programs

(CT:VISA-74; 03-03-2016)

(U) The provisions of INA 214(m) prohibit an alien's participation in any publicly-funded language program.

9 FAM 302.9-9(B)(5) (U) Transferring Schools

(CT:VISA-74; 03-03-2016)

(U) An alien may transfer from public to private secondary school only if they reimburse the school as indicated in 9 FAM 302.9-9(B)(8) and do not exceed the one-year time limitation. Non-adherence to these requirements automatically voids the alien's visa and renders the alien subject to INA 212(a)(6)(G) as a student abuser.

9 FAM 302.9-9(B)(6) (U) Penalty for Violation of INA 214(m)

(CT: VISA- 74; 03-03-2016)

a. (U) An alien who violates the provisions of INA 214(m) becomes inadmissible under INA 212(a)(6)(G) and must remain outside the United States for a continuous period of five years before qualifying for another nonimmigrant visa (NIV).

b. (U) An alien who transfers from private to public school has, under INA 101(a)(15)(F), violated his and/or her status unless the student has reimbursed the school as noted in 9 FAM 302.9-9(B)(8).

9 FAM 302.9-9(B)(7) (U) Determining Whether School is Public or Private

(CT:VISA-74; 03-03-2016)

(U) The responsibility for documenting whether the school meets the definition of "public" rests with the applicant. For example, a letter from a responsible official from the public school district could resolve doubts as to whether a "corporate charter school" is private.

9 FAM 302.9-9(B)(8) (U) Determining Compliance With Financial Reimbursement Requirement

(CT:VISA-74; 03-03-2016)

a. **(U) In General** The school is responsible for determining what amount constitutes the "unsubsidized per capita cost of education", the school's estimate of their per student expenditure of public revenues (Federal, State, and local). This figure is not necessarily the school's nonresident tuition. You should not inquire into the calculation. However, you should not accept estimates that are unrealistically low. In such cases, you should request additional information from the school district. You must refer cases that appear to be deliberate attempts to circumvent the law to the Office of Field Operations (CA/VO/F).

b. **(U) Evidence of Financial Reimbursement:** The public school authority must actually collect the student's reimbursement before a visa can be issued. DHS/USCIS has instructed its ports of entry (POE) that, if the public school reimbursement is not entered on the student's Form I-20, Certificate of Eligibility for Nonimmigrant Student Status, with a notarized signature, the student must provide a notarized statement on school district letterhead. A school district official (usually the superintendent or someone designated by him or her) must sign the statement that reimbursement has been made. To avoid complications at the POE, visa applicants should provide the same evidence to qualify for an F-I visa.

c. **(U) Lack of Evidence of Financial Reimbursement:** You must refuse an applicant who cannot present evidence of financial reimbursement under INA 221(g). You should advise the applicant to arrange reimbursement directly with the school authority and return with proof of payment.

9 FAM 302.9-9(B)(9) (U) Twelve-Month Limit on School Attendance

(CT:VISA-74; 03-03-2016)

(U) INA 214(m) places a 12-month limit on attendance at public secondary schools while in F-I status. Attendance at a secondary public school, while in a status other than F-I, while in unlawful status, or prior to November 30, 1996, does not count against the 12-month limit. You must not issue an F-I visa if the proposed length of study would exceed the 12-month limit.

9 FAM 302.9-9(C) (U) Advisory Opinions

(CT:VISA-74; 03-03-2016)

(U) An AO is not required for a potential INA 212(a)(6)(G) ineligibility; however, if you have a question about the interpretation or application of law or regulation, you may request an AO from CA/VO/L/A.

9 FAM 302.9-9(D) (U) Waiver

9 FAM 302.9-9(D)(I) (U) Waivers for Immigrants

(CT:VISA-272; 12-20-2016)

(U) No waiver for immigrant visa applicants is available found inadmissible under INA 212(a)(6)(G).

9 FAM 302.9-9(D)(2) (U) Waivers for Nonimmigrants

(CT:VISA-272; 12-20-2016)

(U) You may, in your discretion, recommend that DHS grant a waiver under INA 212(d)(3)(A) for an nonimmigrant inadmissible under INA 212(a)(6)(G) provided the alien meets the criteria specified in 9 FAM 305.4-3(H).

9 FAM 302.9-9(E) Unavailable

9 FAM 302.9-9(E)(l) Unavailable

(CT:VISA-272; 12-20-2016)

Unavailable

9 FAM 302.9-9(E)(2) Unavailable

(CT:VISA-272; 12-20-2016)

Unavailable