

2 FAM 220

IMMUNITIES OF U.S. REPRESENTATIVES AND ESTABLISHMENTS ABROAD

(CT:GEN-366; 09-25-2009)
(Office of Origin: HR/CDA/SL/PAS)

2 FAM 221 DIPLOMATIC IMMUNITIES

2 FAM 221.1 Diplomatic Personnel

(CT:GEN-366; 09-25-2009)

- a. Diplomatic agents accredited to a foreign government as ambassadors or other public ministers are immune from the jurisdiction of all courts and tribunals of the receiving state, whether criminal or civil. They cannot be prosecuted, sued, punished, or compelled to testify in the country to which accredited. The families and *members of* households of such diplomatic agents enjoy the same immunity.
- b. Chiefs of mission are encouraged to request *that* the foreign ministry *provide formal notification of the privileges and immunities that host government accreditation* extends to the various categories of *mission* personnel, and *to* report such information to their post management officer in the Department.

2 FAM 221.2 Restriction on Diplomatic Privileges

(CT:GEN-366; 09-25-2009)

- a. Foreign Service posts must not, except as provided in this section, seek or assist in obtaining diplomatic privileges and immunities (by means of normal notifications to the host government or otherwise) for persons who are not assigned to official duty at the U.S. Government mission; physically residing at post; and working on mission premises, regardless of the status *that* may be accorded such persons by local authorities. Persons not normally entitled to privileges and immunities under the foregoing restrictions include but are not limited to international organization personnel, Federal agency personnel not meeting the above criteria, retired U.S. Government officials, contract personnel, private *U.S.* citizens (grantees, teachers, clergy, etc.), and representatives of State governments.

- b. The Department recognizes that under certain circumstances, it may be in the national interest to seek the accreditation of personnel other than those described in paragraph a of this section. In such cases, the Department may authorize limited exceptions to the general rule cited *in paragraph a of this section*, applicable to specific individuals or posts.
- c. Requests for the notification of U.S. Government employees abroad (see *paragraph e* of this section for non-U.S. Government employee notification standards) *should be made to the Bureau of Human Resources* (HR), which will consider the request, in light of U.S. national interests. HR may, at its discretion, grant requests when the following criteria are generally satisfied:
 - (1) The work is of at least 90 days' consecutive duration;
 - (2) The individual resides at post and works on mission premises;
 - (3) The activities support the function of the diplomatic mission (defined as representing the United States; protecting its interests and nationals; and negotiating with and/or ascertaining developments in the receiving state). Such activities usually include, or are characterized by, a liaison function in which the employee works out of the embassy and liaises with central government officials on policy issues, as distinct from directly engaging in programmatic activities;
 - (4) The individuals are in fact performing the functions commensurate with their titles (e.g., administrative and technical staff must be "employed in the administrative and technical service of the mission"); and
 - (5) Alternate means (such as a bilateral agreement) to secure privileges and immunities for the persons in question are not feasible.
- d. It may be in the national interest, under certain circumstances, to seek the accreditation of persons who are not U.S. Government employees (including U.S. Government personal services contractors; commercial contractors performing business on behalf of the U.S. Government; and grantees). For example, personnel performing such highly sensitive functions as embassy construction, security, or communications (who may be clear targets for hostile intelligence penetration) and narcotics eradication, enforcement, and interdiction in remote locations may present a compelling case for accreditation. Therefore, the Department may authorize limited exceptions to the general rule cited above, applicable to specific individuals or posts.
- e. Requests for the notification of persons who are not U.S. Government employees abroad *should be made to HR, who* will consider the request in light of U.S. national interests, including the following factors. Requests

may be granted at the discretion of HR when the following criteria are generally satisfied:

- (1) Accreditation of such personnel is necessary to overcome significant barriers to entry or residence in the receiving state;
 - (2) Security concerns warrant accreditation, as evidenced by the nature of the work performed and/or the level of security clearance;
 - (3) Such personnel will be performing diplomatic and consular support functions;
 - (4) The employment relationship, and in particular the provisions of the contract, provide adequate departmental and chief-of-mission control over either the personal services contractor or the commercial contract firm and its individual employees (non-personal services contractors) (and its subcontractors and their individual employees, where relevant), including in particular a right of withdrawal from the host country of individual personnel; and
 - (5) The projected length of stay is equal to or greater than the minimum length of stay for which diplomatic or consular personnel are accredited.
- f. Even where accreditation appears to satisfy the criteria in subparagraphs e(1) through e(5) *of this section*, the Department may decline a request to seek accreditation when it considers that the privileges and immunities that would be granted by the receiving state are inappropriate to such contract personnel or where accreditation would not otherwise serve national interests. The following factors may be relevant to declining such a request:
- (1) Seeking accreditation for such personnel will create obligations or expectations of reciprocal treatment for similar personnel assigned to the United States, and the likelihood of reciprocal treatment is small; or
 - (2) Host-state numerical limitations on diplomatic or consular personnel would or may be exceeded by the accreditation of contract personnel.
- g. Persons who are not U.S. Government employees but who are approved for notification will normally be notified at the administrative and technical staff or consular employee level. (For these procedures, see 3 FAH-1 Exhibit 2439.)
- h. The Department recognizes that under certain circumstances it may be in the national interest to seek privileges and immunities for persons other than those persons who can be accredited to a U.S. Government mission. In such cases, the Department may authorize negotiation and conclusion of an international agreement to provide such privileges and immunities.

Procedures governing negotiation of international agreements, which require advance Department approval, are set forth at 11 FAM 220 et seq.

2 FAM 221.3 Inviolability of Archives and Premises of Diplomatic Missions

(CT:GEN-366; 09-25-2009)

Embassies, chanceries, and all buildings used for diplomatic purposes, including residences of *some embassy personnel*, together with their contents and archives, are inviolable *in accordance with the Vienna Convention on Diplomatic Relations*. Such premises are immune from entry and search, and the premises, contents, and archives are not subject to the legal process of the receiving state.

2 FAM 221.4 Diplomatic Couriers

(TL:GEN-207; 04-25-1983)

Diplomatic couriers employed as such by their government and traveling through a foreign territory are considered privileged persons and are regarded as completely immune from civil and criminal jurisdiction. That part of their luggage which contains diplomatic material and is sealed with the official seal may not be opened or searched.

2 FAM 221.5 Waiver of Immunity

(CT:GEN-366; 09-25-2009)

- a. The immunities described in this section *will* not be waived by the post, except with the prior express consent of the Department, which normally *will be* requested via cable or other written correspondence and, in any event, *must* always be in writing. *Set forth* requests for waiver of immunity in sufficient factual detail to afford the Department an adequate basis to act thereon and *address them* to the Department to the attention of the Office of the Assistant Legal Adviser for Diplomatic Law and Legislation (L/DL) and to the executive director of the appropriate regional bureau. *List* other Department offices as addressees or *consult them*, as appropriate. *Forward* an information copy of the request, as well as the Department's response thereto, to the Chief of Protocol (S/CPR) and the Office of Foreign Missions (DS/OFM) for the purpose of evaluating the reciprocity factors applicable to foreign missions and their personnel in the United States. *For additional information, please see 09 STATE 1087*.
- b. *Follow* these guidelines in the types of cases described *in paragraphs (1)*,

(2), and (3):

- (1) In cases involving official activities of Department personnel, the key factor in determining whether or not immunity may be waived is the potential impact upon the interests of the U.S. Government. If the interests of the U.S. Government are not likely to be injured as a result of the waiver, and if the interests of the individual whose immunity is to be waived are not likely to be adversely affected, a presumption in favor of waiver will be authorized if the interests of justice will be served;
- (2) Except as provided in subparagraph (3) of this section, the immunity of a Department employee will not normally be waived in private cases unless the employee consents or unless there is evidence that the waiver is essential to protecting the interests of innocent third parties, the U.S. Government, or both; and
- (3) In private domestic relations matters (including divorce, separation, maintenance, child custody, and child support), the Department will adhere to the following guidelines:
 - (a) If both parties consent and the action is pursued in the United States, the Department will normally grant any necessary waiver of immunity;
 - (b) If one party is in the United States and the other party is at the post, a waiver will be granted for the purpose of allowing service of process on the latter if that party consents;
 - (c) If one party is in the United States and the other party is at the post, a waiver of immunity will be authorized to allow service on the party at post absent that party's consent only if the waiver is necessary in order to prevent undue hardship on the party seeking service, or family members, and if the action is to be pursued in the United States; and
 - (d) Waiver of immunity will normally be granted to allow a domestic relations action to be pursued in the host country if both parties consent and if the prosecution of the action will not adversely affect the interests of the U.S. Government.

2 FAM 222 EMPLOYEES OF DIPLOMATIC MISSIONS

2 FAM 222.1 Embassy Officers and Employees

(CT:GEN-366; 09-25-2009)

The status of employees accredited to the embassy is governed by the Vienna Convention on Diplomatic Relations, which provides different levels of immunities, depending on whether an individual is accredited to the embassy as a diplomatic agent, member of the administrative and technical staff, or as a member of the service staff.

2 FAM 222.2 Subject to Military Service

(TL:GEN-207; 04-25-1983)

Principal officers should not request exemptions from military service for Foreign Service national employees or servants.

2 FAM 222.3 Names Furnished to Local Governments

(TL:GEN-207; 04-25-1983)

A mission may, when requested, furnish to the local government a list of names of Foreign Service national employees. This is not in lieu of the usual practice of notifying the receiving state of the employment of its nationals, where notification to and acceptance by the receiving state is a condition of extending them immunity.

2 FAM 222.4 Protests When Immunities Are Violated

(CT:GEN-366; 09-25-2009)

When the local authorities refuse to recognize the immunities to which the U.S. Government considers its Foreign Service national employees are entitled, chiefs of mission shall make appropriate representations to the local authorities and shall report such action to the Department. Such representation should be based on the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations, or such bilateral agreement as may have provided the basis for privileges and immunities *in consultation with L/DL.*

2 FAM 223 CONSULAR IMMUNITIES

2 FAM 223.1 Consular Officers and Employees

(TL: GEN-310; 01-15-2004)

The status of consular officers and consular employees is usually governed by the Vienna Convention on Consular Relations, which generally provides

that officers and employees who are nationals of the sending state are immune from the local jurisdiction for all official acts. It must be ascertained in each instance whether a bilateral treaty or agreement about immunities of consular officers and employees is in effect, in which case the privileges and immunities granted by the terms of the treaty are applicable.

2 FAM 223.2 Inviolability of Consular Premises and Archives

(TL: GEN-310; 01-15-2004)

Consular archives are to be considered inviolable. The Vienna Convention on Consular Relations provides that those portions of the consular premises “that are used exclusively for the work of the consular post” are inviolable. The residences of consular officers, in the absence of a treaty or agreement so providing, are not inviolable.

2 FAM 223.3 Employees of Consular Posts

(TL:GEN-297; 11-15-1999)

Immunities should not be claimed for Foreign Service national employees or servants who are nationals of the country in which a consular post is located. When there is a consular convention between the United States and the country concerned, the local employee will be accorded the immunity specified in the convention.

2 FAM 223.4 Infringement of Consular Immunities To Be Protested

(CT:GEN-366; 09-25-2009)

Consular officers shall familiarize themselves with the pertinent treaties and agreements regarding consular privileges, rights, and duties in the country of assignment. A consular officer, *in consultation with L/DL*, must protest to the appropriate local authorities any infringement of the rights and privileges necessary to carry out the consular officer’s duties.

2 FAM 224 OTHER U.S. REPRESENTATIVES

(CT:GEN-366; 09-25-2009)

Immunities, if any, of U.S. representatives other than *individuals accredited to an embassy or consulate* depend primarily on specific treaties or agreements in each case and may vary accordingly from country to country. Questions concerning immunities of such representatives are referred to the

Department (L/DL), when necessary.

2 FAM 225 ABUSE OF PRIVILEGES AND IMMUNITIES

2 FAM 225.1 Evasion of Personal Obligations

(TL:GEN-206; 04-18-1983)

A diplomatic or consular officer, or other representative of the United States, shall not take advantage of the protection afforded by reason of the officer's official position nor should the officer evade the settlement of just obligations.

2 FAM 225.2 Property Held in Personal Capacity

(TL:GEN-206; 04-18-1983)

If a diplomatic officer holds real or personal property in a foreign country, in a personal as distinguished from an official capacity, such property, not necessary or incident to the officer's official assignment, may be subject to the local laws.

2 FAM 225.3 Importation and Sale of Personal Property

(CT:GEN-366; 09-25-2009)

(Uniform State/AID/Commerce/Agriculture)

- a. These provisions apply to the personal effects of all U.S. Government employees (including contractor employees) *and* their spouses and dependents, regardless of agency, under the jurisdiction of the chief of mission.
- b. Personal property imported into host countries by U.S. citizen employees under diplomatic privileges and immunities must be for their bona fide personal use or that of their dependents. The chief of mission shall establish procedures to ensure that subsequent sales of such property are in compliance with bilateral agreements, international treaties, and host government laws.
- c. In instances where there is reason to believe that bona fide personal use would not be or has not been the intended purpose of the importation, the Chief of Mission or designee, **after coordination with the Office of Inspector General/Office of Investigation (OIG/INV)**, will investigate the importation, or the request therefore if the importation

has not yet been authorized. If, based on the investigation, the chief of mission determines that the property was imported or intended to be imported under diplomatic privileges and immunities primarily for the purpose of sale at a profit, the chief of mission may take one or more of the following actions:

- (1) As appropriate, deny request to import the property or deny the sale;
 - (2) Require the employee to repay the U.S. Government the original cost of shipping the property to post;
 - (3) Deny use of embassy facilities for conversion or transfer of funds;
 - (4) Withhold certification of employee's diplomatic or official privileges to sell, register, or transfer title to the property;
 - (5) Require property to be reexported at employee's expense; *and*
 - (6) Take such other action as may be appropriate, including recommending disciplinary action against the employee.
- b. See also 3 FAM 4100, Employee Relations, and 14 FAM 615.7, Limitations at Specific Posts, for treatment of this subject.

2 FAM 225.4 Notifying the Office of Inspector General (OIG)

(TL:GEN-297; 11-15-1999)

Promptly notify the Office of Inspector General/Office of Investigations (OIG/NIV) if there is reason to believe that U.S. or host-country laws or regulations have been violated.

2 FAM 226 REPORTING ON LITIGATION

(CT:GEN-366; 09-25-2009)

- a. Each post shall inform the Department of any litigation in a local court in which a U.S. citizen employee may become involved in *the* employee's private capacity. The post's report should be in the form prescribed in 2 FAM 280 for reporting suits against the United States but should not be marked for the attention of the Justice Department. The post's initial report shall include full particulars regarding the accreditation of the employee to the foreign government for purposes of privileges and immunities. *For additional information, please see 09 STATE 1087, which provides comprehensive information on foreign litigation procedures.*
- b. Members of the Foreign Service are responsible for reporting to their posts of assignment litigation in foreign courts in which they may become

involved. Members shall avoid taking actions *that* may imply an unauthorized waiver of immunity in violation of 2 FAM 221.5.

- c. See 2 FAM 280, Claims Against the United States, for suits against a member of the Foreign Service in that member's official capacity.

2 FAM 227 REQUESTS FOR ASYLUM BY FOREIGN NATIONALS

2 FAM 227.1 Policy

(CT:GEN-366; 09-25-2009)

- a. *Due to the wide variety of circumstances that may be involved, requests for protection made by foreign nationals at posts should be dealt with on an individual basis. The ability of the U.S. Government to give assistance will vary with location and circumstances of the request.*
- b. *The Bureau of Intelligence and Research issues annual instructions to posts by cable on how to handle such requests. Appropriate officers, as identified in the telegram, should review that material.*
- c. *If after a thorough review of the instructions, a post feels it needs further guidance in an emergency situation, it should contact the Operations Center. The Operations Center will alert the appropriate Department personnel who will provide post with assistance on how to proceed.*

2 FAM 227.2 Background

(CT:GEN-366; 09-25-2009)

- a. **General Policy:** *The general policy of the United States is to encourage local or regional resettlement of refugees and international burden-sharing among governments providing third-country resettlement opportunities. Therefore, in routine cases involving asylum seekers from third countries, refer individuals to the United Nations High Commissioner for Refugees (UNHCR), or, if the host country has satisfactory asylum procedures, to the host government for adjudication of the refugee's asylum claim.*
- b. **Asylum:** *Posts may not grant or in any way promise "asylum" to any foreign national. Although foreign nationals may request "asylum," posts should be aware that the term has specific meaning in U.S. immigration law. Persons may apply for asylum under U.S. law only if they are physically present in the United States or at a land border or port of entry and may be granted asylum only if they meet the definition of a refugee under U.S. law and are otherwise admissible. The United States does not*

recognize the granting of asylum at posts abroad. Requests for asylum by persons in the United States are handled by the Department of Homeland Security (DHS) and the immigration courts of the Executive Office for Immigration Review within the Department of Justice. Refer questions relating to such procedures to the Department, Bureau of Democracy, Human Rights and Labor, Office of Multilateral and Global Affairs (DRL/MLGA).

- c. **Refugees:** *Posts may not in any way promise that an individual will be admitted to the United States as a refugee. A U.S. embassy may refer any individual who appears to meet the definition of a refugee to the U.S. Refugee Admissions Program for consideration. Embassies may refer someone to ensure protection or provide a durable solution in compelling circumstances. Due to resource constraints and other foreign policy concerns, posts usually refer individuals only because of a significant humanitarian concern; a particular U.S. Government interest; or an especially close link to the United States. Acceptance of a referral by the program does not guarantee that an individual will be admitted to the United States as a refugee. See 9 FAM APPENDIX O, 600, Processing Individual Refugee Cases, for guidance on embassy referrals.*

2 FAM 228 THROUGH 229 UNASSIGNED