

9 FAM 41.121 PROCEDURAL NOTES

(CT:VISA-895; 06-14-2007)
(Office of Origin: CA/VO/L/R)

9 FAM 41.121 PN1 REFUSAL PROCEDURES

9 FAM 41.121 PN1.1 Visa To Be Issued or Refused

(CT:VISA-806; 05-04-2006)
(Effective Date: 04-21-2006)

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.) is not an appropriate ground for a refusal (see 9 FAM 41.121 PN2 for quasi-refusal procedures).

9 FAM 41.121 PN1.2 Procedures When Alien Is Found Ineligible

(CT:VISA-806; 05-04-2006)
(Effective Date: 04-21-2006)

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

9 FAM 41.121 PN1.2-1 Inform Alien Orally and Return Certain Documents

(CT:VISA-895; 06-14-2007)

- a. The consular officer 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), the consular officer 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. (See also 9 FAM 41.121 PN3 for cases deferred for advisory opinions or other

reasons.)

- b. The consular officer 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 PN1.2-2 Inform Applicant and Attorney in Writing

(CT:VISA-806; 05-04-2006)

(Effective Date: 04-21-2006)

- 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, Visa Refusal Letter (see 9 FAM 41.121 Exhibit I), 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 the consular officer's 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 the consular officer 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 the consular officer has received specific approval from the Department not to provide a notice in a specific case or group of cases.

9 FAM 41.121 PN1.2-3 Refusal Letter in 214(b) and 221(g) Cases

(CT:VISA-806; 05-04-2006)

(Effective Date: 04-21-2006)

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, so long as 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 the consular officer is necessary must not discourage the applicant from appearing, even if the consular officer believes that eventual issuance of a visa is unlikely.

9 FAM 41.121 PN1.2-4 Annotate Refusal in Computer

(CT:VISA-895; 06-14-2007)

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

- (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 PN1.2-5 Category I and Category II Refusals

(CT:VISA-895; 06-14-2007)

If the case involves a Category I refusal (i.e., generally one involving a permanent ground of inadmissibility), the consular officer 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 PN1.2-6 Prepare Refusal Worksheet in Category I Cases

(CT:VISA-895; 06-14-2007)

- a. For all Category I cases, the consular officer must prepare page 2 of the Form OF-194 (the Refusal Worksheet; see 9 FAM 41.121 Exhibit II).

- b. The completed Refusal Worksheet 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 PN1.2-7 Initiate Internal Review of Refusal

(CT:VISA-895; 06-14-2007)

- 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 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, Refusal Worksheet, 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 PN1.2-8 Non-concurrence with Refusal by Reviewing Officer

(CT:VISA-895; 06-14-2007)

- a. If a reviewing officer with a consular commission and title does not concur with the refusal, he or she may assume responsibility and readjudicate 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 CA/VO/L/A and procedural questions to CA/VO/F/P).

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

9 FAM 41.121 PN1.2-9 Enter Refusal into Visa Lookout System

(CT:VISA-895; 06-14-2007)

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 PN1.2-10 File Relevant Material in Appropriate Post Refusal File

(CT:VISA-895; 06-14-2007)

- a. For Category I refusals, the Form DS-156, Nonimmigrant Visa Application, the Form DS-157, Supplemental Nonimmigrant Visa Application (if applicable), page 2 of the Form OF-194, Refusal Worksheet, a copy of page 1 of the Form OF-194, Visa Refusal Letter, and any other items relevant to the refusal are to be filed by the last name of the applicant in the post's Category I refusal file. For Category II refusals, the Form DS-156 and, if applicable, the Form DS-157 are to be filed chronologically in the post's Category II refusal file.
- b. Until further notice from the Department, posts must retain all visa refusal files indefinitely. In issued visa cases, posts must maintain the Form DS-156 (Form OF-156 in older cases) and, if applicable, the Form DS-157 indefinitely. (See also 9 FAM Appendix F, 101.)

9 FAM 41.121 PN1.2-11 Manner in Refusing Applicants

(CT:VISA-895; 06-14-2007)

- a. The manner in which visa applicants are refused can be very important in relations between the post and the host country. Consular officers 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. The interviewing officer 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 the applicant be told that the reason for the refusal is that he or she has not persuaded the consular officer 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 just optional forms; they can be an effective method of conveying information to the applicant.

9 FAM 41.121 PN1.2-12 Additional Procedure when Refusing Applicants who Possess a Valid Form I-94, Arrival and Departure Record

(CT:VISA-895; 06-14-2007)

- 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, SAO checks, etc.) from attempting to use 22 CFR 41.112(d) to enter the United States. In addition, in order to alert 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 PN1.3 Reactivation of Case Refused Under INA 221(g)

(CT:VISA-806; 05-04-2006)

(Effective Date: 04-21-2006)

An applicant who has been refused under INA 221(g) need not complete a new Form DS-156, Nonimmigrant Visa Application, 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 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-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 PN2 PROCEDURES IN QUASI-REFUSAL CASES

9 FAM 41.121 PN2.1 Inform Potential Applicant of Apparent Ineligibility

(CT:VISA-806; 05-04-2006)

(Effective Date: 04-21-2006)

If an alien who has not filed a formal application inquires about eligibility for a visa, and it appears from statements made or evidence presented that the alien would be ineligible to receive such a visa, the pertinent section of the

law should be pointed out to the alien. The alien should be informed that the evidence and general circumstances described appear to bring the case under the cited provision of the Immigration and Nationality Act (INA) or another statute. The consular officer should inform the alien that a decision to issue or refuse a visa can be made only after an application has been executed and all the required documentation submitted.

9 FAM 41.121 PN2.2 Enter Quasi-Refusal Into Consular Lookout and Support System (CLASS)

(CT:VISA-895; 06-14-2007)

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 PN2.3 Quasi-Refusal Where Alien Has Not Inquired About Visa Eligibility

(TL:VISA-359; 02-28-2002)

See 9 FAM 41.122 PN2.

9 FAM 41.121 PN3 PROCEDURES IN CASES DEFERRED FOR ADVISORY OPINIONS OR FOR OTHER REASONS

(CT:VISA-895; 06-14-2007)

- a. When, as a result of the visa interview, the consular officer decides that an advisory opinion 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 cases, the consular officer 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 advisory opinion 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, 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 PN4 CASES INVOLVING CLASSIFIED INFORMATION REPORTED TO DEPARTMENT

(TL:VISA-357; 02-25-2002)

See 9 FAM Appendix A for required reports.

9 FAM 41.121 PN5 REQUIRED REPORTS OF NONIMMIGRANT VISAS (NIV) ISSUED AND REFUSED

(CT:VISA-895; 06-14-2007)

See 9 FAM Appendix I, 400.