

9 FAM 302.8

(U) PUBLIC CHARGE - INA 212(A)(4)

(CT:VISA-1133; 08-05-2020)

(Office of Origin: CA/VO/L/R)

(U) Note: The U.S. District Court for the Southern District of New York, in *Make the Road New York et al v. Pompeo et al*, has issued a preliminary injunction on July 29, 2020, enjoining the Department of State's October 2019 interim final rule and January 2018 FAM guidance on public charge. As a result of this ruling, the Department has rescinded the FAM guidance previously in 9 FAM 302.8 and replaced it with the revised version below. You should not rely on or refer to prior FAM guidance in evaluating the public charge ground of visa ineligibility, but instead apply the relevant provisions of the INA (see 9 FAM 302.8-1(A) below) and the text of 22 CFR 40.41 that was in place prior to October 11, 2019 (see 9 FAM 302.8-1(B) below). If during the course of a visa adjudication you believe that an applicant may be ineligible under INA 212(a)(4), or want to ensure that you are not relying on enjoined guidance, you must refuse the case under INA 221(g) rather than INA 212(a)(4) and request an advisory opinion from VO/L/A.

9 FAM 302.8-1 (U) STATUTORY AND REGULATORY AUTHORITY

9 FAM 302.8-1(A) (U) Immigration and Nationality Act

(CT:VISA-1133; 08-05-2020)

(U) INA 101(a)(15) (8 U.S.C. 1101(a)(15)); INA 101(b)(1)(E) (8 U.S.C. 1101(b)(1)(E)); INA 102 (8 U.S.C. 1102); INA 203(g) (8 U.S.C. 1153(g)); INA 212(a)(4) (8 U.S.C. 1182(a)(4)); INA 212(a)(5)(A) (8 U.S.C. 1182(a)(5)(A)); INA 213 (8 U.S.C. 1183); INA 213A (8 U.S.C. 1183a); 8 U.S.C. 1183a Note; INA 221(g) (8 U.S.C. 1201(g)); INA 245 (8 U.S.C. 1255); INA 248 (8 U.S.C. 1258); INA 316 (8 U.S.C. 1427); INA 317 (8 U.S.C. 1428); INA 319(b)(1) (8 U.S.C. 1430(b)(1)); INA 320 (8 U.S.C. 1431).

9 FAM 302.8-1(B) (U) Code of Federal Regulations

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(U) 8 CFR 103.6; 8 CFR 205.1(a)(3)(i)(C); 8 CFR 212.23; 8 CFR 213a; 8 CFR 213.1; 8 CFR 316.20; 22 CFR 40.41.

Prior to the October 11, 2019 revision, 22 CFR 40.41 read as follows:

(a) Basis for Determination of Ineligibility. Any determination that an alien is ineligible under INA 212(a)(4) must be predicated upon circumstances indicating that, notwithstanding any affidavit of support that may have been filed on the alien's behalf, the alien is likely to become a public charge after admission, or, if applicable, that the alien has failed to fulfill the affidavit of support requirement of INA 212(a)(4)(C).

(b) Affidavit of support. Any alien seeking an immigrant visa under INA 201(b)(2) [immediate relative classifications], 203(a) [family preference classifications], or 203(b) [employment preference classifications], based upon a petition filed by a relative of the alien (or in the case of a petition filed under INA 203(b) by an entity in which a relative has a significant ownership interest), shall be required to present to the consular officer an affidavit of support (AOS) on a form that complies with terms and conditions established by the Secretary of Homeland Security. Petitioners for applicants at a post

designated by the Deputy Assistant Secretary for Visa Services for initial review of and assistance with such an AOS will be charged a fee for such review and assistance pursuant to Item 61 of the Schedule of Fees for Consular Services ([22 CFR 22.1](#)).

(c) Joint Sponsors. Submission of one or more additional affidavits of support by a joint sponsor/sponsors is required whenever the relative sponsor's household income and significant assets, and the immigrant's assets, do not meet the Federal poverty line requirements of INA 213A.

(d) Posting of Bond. A consular officer may issue a visa to an alien who is within the purview of INA 212(a)(4) (subject to the affidavit of support requirement and attribution of sponsor's income and resources under section 213A), upon receipt of a notice from DHS of the giving of a bond or undertaking in accordance with INA 213 and INA 221(g), and provided further that the officer is satisfied that the giving of such bond or undertaking removes the likelihood that the alien will become a public charge within the meaning of this section of the law and that the alien is otherwise eligible in all respects.

(e) Prearranged Employment. An immigrant visa applicant relying on an offer of prearranged employment to establish eligibility under INA 212(a)(4), other than an offer of employment certified by the Department of Labor pursuant to INA 212(a)(5)(A), must provide written confirmation of the relevant information sworn and subscribed to before a notary public by the employer or an authorized employee or agent of the employer. The signer's printed name and position or other relationship with the employer must accompany the signature.

(f) Use of Federal Poverty Line Where INA 213A Not Applicable. An immigrant visa applicant, not subject to the requirements of INA 213A, and relying solely on personal income to establish eligibility under INA 212(a)(4), who does not demonstrate an annual income above the Federal poverty line, as defined in INA 213A (h), and who is without other adequate financial resources, shall be presumed ineligible under INA 212(a)(4).

9 FAM 302.8-1(C) (U) United States Code

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(U) 8 U.S.C. 1641(c); 28 U.S.C. 1746; 42 U.S.C. 9902(2).

9 FAM 302.8-1(D) (U) Public Laws

(CT:VISA-1133; 08-05-2020)

(U) Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public Law 104-193.

9 FAM 302.8-2 (U) PUBLIC CHARGE

9 FAM 302.8-2(A) (U) Grounds

(CT:VISA-1133; 08-05-2020)

- a. **(U)** INA 212(a)(4)(A) provides that an applicant who is likely at any time to become a public charge is inadmissible and, consequently, is ineligible for a visa. All immigrant visa (IV) and nonimmigrant visa (NIV) applicants, except those mentioned in [9 FAM 302.8-2\(B\)\(6\)](#), are subject to the public charge ground of ineligibility.
- b. **(U)** INA 212(a)(4)(B) provides that you must, at a minimum, take into consideration the applicant's age; health; family status; assets, resources, and financial status; and education and skills when examining the likelihood that an applicant will become a public charge after admission.
- c. **(U)** INA 212(a)(4)(C) provides that certain applicants who seek a visa pursuant to INA 201(b)(2) or 203(a) are inadmissible, and therefore ineligible for a visa, unless the applicant's petitioner (or any additional sponsor or alternative sponsor allowed under INA 213A) has executed an affidavit of support pursuant to INA 213A.
- d. **(U)** INA 212(a)(4)(D) provides that certain applicants who seek a visa issued pursuant to INA 203(b) are inadmissible, and therefore ineligible for a visa, if the petition was filed by a relative

of the alien (or by an entity in which such relative has a significant ownership interest) unless such relative has executed an affidavit of support pursuant to INA 213A.

9 FAM 302.8-2(B) (U) Application

9 FAM 302.8-2(B)(1) (U) Applying INA 212(a)(4) to Immigrants

(CT:VISA-1133; 08-05-2020)

a. (U) Effect of Affidavit of Support Requirement on Public Charge Determinations:

(1) (U) Under INA 213A, an I-864, Affidavit of Support, is a requirement for certain applicants as a part of the public charge inadmissibility determination under INA 212(a)(4).

(a) (U) The requirements under both INA 212(a)(4) and INA 213A must be satisfied when a Form I-864 is required.

(b) (U) If you have concerns about whether a particular Form I-864 may be "fraudulent," you should contact CA/FPP for guidance.

b. (U) **Applicants Without Sponsors:** Not all immigrant visa categories require or permit the applicants to have a sponsor (e.g., the diversity visa). As in other IV cases, you should review the factors discussed above to assess the likelihood of the applicant becoming a public charge. In the case of a DV applicant, the DV program requires a certain level of education or work experience (see [9 FAM 502.6-3](#)), which are minimum standards and must be considered in determining the applicant's likelihood of becoming a public charge at any time in the future.

9 FAM 302.8-2(B)(2) (U) Applying INA 212(a)(4) to Nonimmigrants

(CT:VISA-1133; 08-05-2020)

a. (U) NIV Applicants and INA 212(a)(4):

(1) (U) All NIV applicants, except those mentioned in [9 FAM 302.8-2\(B\)\(4\)](#) below, are subject to INA 212(a)(4).

(2) (U) If an applicant cannot overcome INA 214(b), you should not expend resources on pursuing a possible INA 212(a)(4) ineligibility, as the alien will be unable to travel to the United States and could not therefore become a public charge. Furthermore, an applicant's circumstances might be very different should he or she apply again in the future, so unlike some other grounds of ineligibility, public charge must be assessed independently upon each new visa application..

b. (U) **Additional Evidence of Support in NIV Cases:** If the evidence of nonimmigrant status submitted does not indicate adequate provision for the applicant's support while in the United States and for the return abroad, you may request specific financial evidence.

c. (U) **Aliens Seeking Admission For Medical Treatment:** If the personal resources of an applicant seeking admission to the United States for medical treatment are either not sufficient or are unavailable for use inside of the United States, detailed documentation regarding the arrangements made for the applicant's medical care and support may confirm the financial ability of the guarantor to pay for medical treatment. Normally, this would include letters from the treating physician or hospital explaining the course and cost of treatment, including financial arrangements for payment of treatment, and letters from family, friends, or charitable organizations undertaking to cover the costs of medical care and support.

d. (U) **Alien Seeking Admission as K Nonimmigrants:** K nonimmigrants and their petitioners are not permitted to complete form I-864. You may request additional documentation to assist in evaluating likelihood of becoming a public charge. Note that K applicants will again be assessed under the public charge ineligibility by USCIS at the time of adjustment of status

where the K nonimmigrant seeking adjustment of status will be required to submit a Form I-864.

9 FAM 302.8-2(B)(3) (U) INA 221(g) versus INA 212(a)(4) Refusals

(CT:VISA-1133; 08-05-2020)

(U) The determination of whether INA 221(g) or INA 212(a)(4) is the appropriate ground of refusal is determined by whether you have decided that you have enough information to make a finding of whether the applicant is likely to become a public charge under INA 212(a)(4).

- (1) **(U)** For example, if Form I-864 is submitted without a copy of the latest Federal income tax return filed prior to the signing of the Form I-864, then this is a documentary problem; the refusal should be INA 221(g). Similarly, if you request additional documents, the refusal should be INA 221(g).
- (2) **(U)** On the other hand, if the Form I-864, Affidavit of Support, is technically complete but does not reflect sufficient financial resources, even after any possible joint sponsors have submitted an Affidavit of Support; or the applicant has no Form I-864 because the petitioner or sponsor does not meet the qualifying criteria set forth in INA 213A, that is a substantive problem and you must refuse the visa under INA 212(a)(4).
- (3) **(U)** You should note that applications refused under INA 212(a)(4), unlike those refused under INA 221(g), are not subject to termination under INA 203(g). See [9 FAM 504.13](#), Termination of Immigrant Visa Registration for more information on termination.

9 FAM 302.8-2(B)(4) (U) Aliens Exempt from INA 212(a)(4)

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(U) The following aliens are exempt from INA 212(a)(4):

- (1) **(U)** Refugees at the time of admission under INA 207 and at the time of adjustment of status of lawful permanent resident under INA 209;
- (2) **(U)** Asylees at the time of granting of asylum under INA 208 and at the time of adjustment of status to lawful permanent resident under INA 209;
- (3) **(U)** Amerasian immigrants at the time of application for admission as described in section 584 of the Foreign Operations, Export, Financing, and Related Programs Appropriations Act of 1988, Public Law 100-202, 101 Stat. 1329-183, section 101(e) (December 22, 1987), as amended, 8 U.S.C. 1101 note;
- (4) **(U)** Afghan and Iraqi Interpreter, or Afghan or Iraqi national employed by or on behalf of the U.S. Government as described in section 1059(a)(2) of the National Defense Authorization Act for Fiscal Year 2006 Public Law 109-163 (Jan. 6, 2006), as amended, and section 602(b) of the Afghan Allies Protection Act of 2009, Public Law 111-8, title VI (Mar. 11, 2009), as amended, 8 U.S.C. 1101 note, and section 1244(g) of the National Defense Authorization Act for Fiscal Year 2008, as amended Public Law 110-181 (Jan. 28, 2008);
- (5) **(U)** Cuban and Haitian entrants applying for adjustment of status under section 202 of the Immigration Reform and Control Act of 1986 (IRCA), Public Law 99-603, 100 Stat. 3359 (Nov. 6, 1986), as amended, 8 U.S.C. 1255a note;
- (6) **(U)** Aliens applying for adjustment of status under the Cuban Adjustment Act, Public Law 89-732 (Nov. 2, 1992), as amended, 8 U.S.C. 1255 note;
- (7) **(U)** Nicaraguans and other Central Americans applying for adjustment of status under sections 202(a) and section 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA), Public Law 105-100, 111 Stat. 2681 (Oct. 21, 1998), as amended, 8 U.S.C. 1255 note;

- (8) **(U)** Haitians applying for adjustment of status under section 902 of the Haitian Refugee Immigration Fairness Act of 1998, Public Law 105-277, 112 Stat. 2681 (Oct. 21, 1998), as amended, 8 U.S.C. 1255 note;
- (9) **(U)** Lautenberg parolees as described in section 599E of the Foreign Operations Export Financing, and Related Programs Appropriations Act of 1990, Public Law 101-167, 103 Stat. 1195, title V (Nov. 21, 1989), as amended, 8 U.S.C. 1255 note;
- (10) **(U)** Special immigrant juveniles as described by INA 245(h);
- (11) **(U)** Aliens who entered the United States prior to January 1, 1972, and who meet the other conditions for being granted lawful permanent residence under INA 249 and 8 CFR 249;
- (12) **(U)** Aliens applying for or re-registering for Temporary Protected Status as described in INA 244 in accordance with INA 244(c)(2)(A)(ii) of the Act and 8 CFR 244.3(a);
- (13) **(U)** A nonimmigrant described in INA 101(a)(15)(A)(i) and (A)(ii), in accordance with INA 102 and 22 CFR 41.21(d);
- (14) **(U)** A nonimmigrant classifiable as a C-2 or C-3 under INA 101(a)(15)(C) and 22 CFR 41.21(d);
- (15) **(U)** A nonimmigrant described in INA 101(a)(15)(G)(i), (G)(ii), (G)(iii), and (G)(iv), in accordance with INA 102 and 22 CFR 41.21(d);
- (16) **(U)** A nonimmigrant classifiable as NATO-1, NATO-2, NATO-3, NATO-4, or NATO-6 visa, in accordance with 22 CFR 41.21(d)(2)(iii) and (v);
- (17) **(U)** An applicant for, or an individual who is granted, nonimmigrant status under INA 101(a)(15)(T), in accordance with INA 212(d)(13)(A);
- (18) **(U)** Except as provided in the NOTE below, an individual who is seeking an immigration benefit for which admissibility is required, including, but not limited to adjustment of status under INA 245(a) and INA 245(l) and who;
 - (a) **(U)** has a pending application that sets forth a prima facie case for eligibility for nonimmigrant status under INA 101(a)(15)(T);
 - (b) **(U)** has been granted T nonimmigrant status under INA 101(a)(15)(T), providing that the individual is in valid T nonimmigrant status at the time the benefit requested is properly filed with USCIS and at the time the benefit request is adjudicated;
- (19) **(U)** Except as provided in **NOTE** below,
 - (a) **(U)** A petitioner for nonimmigrant status under INA 101(a)(15)(U), in accordance with INA 212(a)(4)(E)(ii); or
 - (b) **(U)** An individual who is granted nonimmigrant status under INA 101(a)(15)(U) in accordance with INA 212(a)(4)(E)(ii), who is seeking an immigrant benefit for which admissibility is required, including, but not limited to, adjustment of status under INA 245(a), provided that the individual is in valid U nonimmigrant status at the time the benefit is properly filed with USCIS and at the time the benefit request is adjudicated;
- (20) **(U)** Except as provided in **NOTE** below, an alien who is a VAWA self-petitioner under INA 212(a)(4)(E)(i);
- (21) **(U)** Except as provided in **NOTE** below, a qualified alien described in section 431(c) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 8 U.S.C. 1641(c), under INA 212(a)(4)(E)(iii);
- (22) **(U)** Applicants adjusting status who qualify for a benefit under section 1703 of the National Defense Authorization Act, Public Law 108-136, 117 Stat. 1392 (Nov. 24, 2003), 8 U.S.C. 1151 note;
- (23) **(U)** American Indians born in Canada determined to fall under INA 289;

- (24)(U) Texas Kickapoo Indians of the Kickapoo Tribe of Oklahoma, Pub. L. 97-429 (Jan. 8, 1983);
- (25)(U) Nationals of Vietnam, Cambodia, and Laos applying for adjustment of status under section 586 of Public Law 106-429 under 8 CFR 245.21;
- (26)(U) Polish and Hungarian Parolees who were paroled into the United States from November 1, 1989 to December 31, 1991 under section 646(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Public Law 104-208, Div. C. Title VI, Subtitle D (Sept. 30, 1996), 8 U.S.C. 1255 note; and
- (27)(U) Any other category of aliens exempt under any other law from the public charge ground of inadmissibility provisions under INA 212(a)(4).
- (U) Note: Limited Exemption:** Aliens described in (18) through (21) must submit an Form I-864 as described in INA 213A if they are applying for an immigrant visa based on an employment-based petition that requires such an affidavit of support as described in section 212(a)(4)(D) of the Act.

9 FAM 302.8-2(C) (U) Advisory Opinions

(CT:VISA-1133; 08-05-2020)

(U) An AO is required for a potential INA 212(a)(4) ineligibility. For any case involving a potential INA 212(a)(4) ineligibility, you must refuse the case under INA 221(g) and submit a request for an Advisory Opinion to CA/VO/L/A, explaining the basis for your belief that the applicant may be ineligible under INA 212(a)(4). You may not find any applicants ineligible under INA 212(a)(4) until you have received a response from CA/VO/L/A.

9 FAM 302.8-2(D) (U) Waiver

9 FAM 302.8-2(D)(1) (U) Waivers for Immigrants

(CT:VISA-1133; 08-05-2020)

- a. **(U)** No waiver is available for immigrants seeking an immigrant visa ineligible under INA 212(a)(4). Applicants may overcome the finding by presenting evidence to convince you that the inadmissibility no longer applies. While there are provisions for overcoming the inadmissibility by posting a bond or undertaking with DHS, the applicant is still subject to an Affidavit of Support and income requirements. Consequently, there are few circumstances in which a bond would be offered as an alternative to the Affidavit of Support.
- b. **Unavailable.**

9 FAM 302.8-2(D)(2) (U) Waivers for Nonimmigrants

(CT:VISA-1133; 08-05-2020)

- a. **(U)** While a waiver is legally available for nonimmigrants ineligible under INA 212(a)(4), as a matter of policy, consular officers should generally not recommend an NIV waiver for an applicant who is ineligible on this ground. If you believe a case merits waiver recommendation, please contact your country analyst in CA/VO/F. In almost all cases, an NIV applicant who is ineligible under INA 212(a)(4) will likely also be ineligible under INA 214(b) for failing to establish that he or she is entitled to a nonimmigrant status under INA 101(a)(15); INA 214(b) is not waivable. Both grounds of refusal may be overcome in the future if an applicant presents evidence that convinces the consular officer that the ineligibility no longer applies.
- b. **Unavailable.**

9 FAM 302.8-2(E) Unavailable

9 FAM 302.8-2(E)(1) Unavailable

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Unavailable

9 FAM 302.8-2(E)(2) Unavailable

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Unavailable.

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