9 FAM 302.9

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

(CT:VISA-610; 06-27-2018)
(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)(11) (8 U.S.C. 1182(d)(11)); 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-543; 03-27-2018)

(U) INA 212(a)(6)(A)(i) does not apply at the time of visa application because it applies only to aliens who are either 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)(1) (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-543; 03-27-2018)

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)** Serious illness in some cases may be considered 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)(1) (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-543; 03-27-2018)

(U) You may, in your discretion, recommend that DHS grant a waiver under INA 212(d)(3)(A) for an alien who is ineligible 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)(1) 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-543; 03-27-2018)

(U) INA 212(a)(6)(C)(i) provides that "any alien who by fraud or willfully misrepresenting a material fact seeks to procure (or sought to procure or has procured) a visa, other documentation, or admission into the United States or some other benefit provided under" the INA is ineligible.

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

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

(CT:VISA-543; 03-27-2018)

a. **(U)** In order to find an alien inadmissible under INA 212(a)(6)(C)(i), the consular officer must determine that the following four elements have been satisfied:

(1) **(U)** There has been an affirmative act of 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).

b. **(U)** Some common INA 212(a)(6)(C)(i) scenarios that consular officers may see involve intentional, material misrepresentations related to:

(1) **(U)** An alien's purpose of travel at the time of any visa application and/or at the time admission to the United States is sought;

(2) **(U)** An alien's identity;

(3) **(U)** An alien's qualifications for the visa classification sought or granted; or

(4) **(U)** Concealment of an independent ineligibility.

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

(CT:VISA-543; 03-27-2018)

a. **(U)** The text of INA 212(a)(6)(C)(i) refers to both "fraud" and "willfully misrepresenting a material fact," which are two distinct things. The Board of Immigration Appeals determined that "fraud" typically means 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 a consular officer or other U.S. official (see Matter of G, 7 I. & N. Dec. 161 (BIA 1956)). On the other hand, a "willful misrepresentation" does not require either an intent to deceive or that the officer either believes or acted upon the false representation. (See Matter of S and B-C, 9 I. & N. Dec. 436, 448-449 (A.G. 1961) and Matter of Kai Hing Hui, 15 I. & N. Dec. 288 (BIA 1975)).

b. **(U)** Most cases of INA 212(a)(6)(C)(i) ineligibility involve "material misrepresentations" rather than "fraud" since determining that an alien had the intent

to deceive an officer and that the fraud was believed and acted upon is a higher legal standard. 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-543; 03-27-2018)

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 a U.S. Official:** For a misrepresentation to fall within the purview of INA 212(a)(6)(C)(i), it must have been made to an official of the U.S. Government; generally speaking, the official will normally be either 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 or application for admission to the United States. Misrepresentations made in connection with some other person's visa application or application for admission to the United States 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 other third party does not serve to insulate the alien from liability for misrepresentations made by such agents, if the consular officer finds 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 by another person on behalf of an alien at the time of application for admission to the United States does not shield the alien from ineligibility under INA 212(a)(6)(C)(i), if the consular officer finds that the alien was aware at the time of the misrepresentation made on his or her behalf.

f. **(U) Timely Retraction:**

(1) **(U) In General:** A retraction that is timely and voluntary may serve to purge a misrepresentation and remove it from further consideration as a ground for the INA 212(a)(6)(C)(i) and INA 212(a)(6)(C)(ii) inadmissibilities. Whether a retraction is timely depends on the circumstances of the particular case. Generally, a retraction is timely if it is made at the first opportunity and before the conclusion of the same proceeding during which an individual made the

misrepresentation. A determination of whether a retraction is timely is made on a case-by-case basis. If the applicant has personally appeared and been interviewed, the retraction must have been made during the initial interview with the officer. If the misrepresentation has been noted in a visa application that was not submitted in person by the applicant, the applicant must be called in for a personal interview and the retraction must be voluntarily made during that interview. In all cases in which you become aware that the applicant made a misrepresentation that might be material, you should warn the applicant of a potential ineligibility under INA 212(a)(6)(C)(i) and INA 212(a)(6)(C)(ii) and confront the applicant with the misrepresentation. The applicant must correct his or her representation before being exposed by the U.S. Government official and before the conclusion of the proceeding during which he or she made the false statement. A retraction can be found to be voluntary and timely if it was made in response to an officer's questions during which the officer gave the applicant a chance to explain or correct a potential misrepresentation.

(2) **(U) Specific Examples:** A retraction made before primary inspection by a DHS officer at a port of entry may be timely, depending on the nature, circumstances, and timing of the specific retraction. Generally, retractions in secondary inspection based on a misrepresentation in or before primary inspection at a port of entry would not be considered timely. Some ports will refer aliens to secondary inspection without much questioning or without providing an alien an opportunity to retract a misrepresentation. Willful material misrepresentations made as part of a petition filing(such as, for example, signing a fraudulent marriage certificate that supports the petition or submitting a fraudulent degree in connection with an employment petition) which are then used subsequently either in support of an adjustment of status application filed with USCIS or in an immigrant visa application cannot be considered to be timely retracted by the applicant at the time of the adjustment of status or visa application interview.

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 questions may arise from cases involving aliens in the United States who have performed activities that are inconsistent with representations they made to consular officers or DHS officers when applying for admission to the United States, for a visa, or for another immigration benefit. Such cases occur most frequently with respect to aliens who, being admitted to the United States, either:

(i) **(U)** Apply for adjustment of status to that of a lawful permanent resident; and/or

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

(b) **Unavailable**

(c) **(U)** With respect to nonimmigrants who fail to abide by their nonimmigrant status, the fact that an alien's subsequent actions are inconsistent with what was represented at the time of visa application, admission to the United States, or in a filing for another type of benefit does not automatically mean

that the alien's intentions were misrepresented at the time of either the visa application or application for entry to the United States. 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. However, if the activities happened within the 90 days after the visa application and/or application for admission to the United States, please see the FAM note below.

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

(a) **(U)** If an alien violates or engages in conduct inconsistent with his or her nonimmigrant status within 90 days of visa application or 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 automatic 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 either orally or in writing to a consular or immigration officer that the purpose of the travel and/or the immigration benefit was consistent with the intended

nonimmigrant classification. Ordinarily, such evidence would be in the form of a statement from the alien, from information taken from the alien's visa 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-543; 03-27-2018)

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 person 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-564; 04-04-2018)

a. **(U) Materiality Defined:** 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) "[**T]he 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. Dec. 436, at 447.) This is also often referred to as "The Rule of Probability."

(U) Note: 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, admission to the United States, or other immigration benefit.

b. **(U) Ineligible Under The True Facts (AKA "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 wherein the alien is actually ineligible for a visa as a matter of law. These are known as independent or objective grounds of ineligibility. Independent grounds of ineligibility are those encompassed within the provisions of INA 212(a)(1) through (10). Special circumstances are as follows:

(1) **(U)** There are grounds of ineligibility that are not permanent and which might be removed by operation of law. For example, let us consider the case of an alien who was ineligible under INA 212(a)(9)(B)(i)(I) and more than three years after departing from the United States, made a misrepresentation about his or her prior unlawful presence in the United States. He or she would not be concealing an independent ground of ineligibility because by that point, three years had passed meaning the alien was no longer ineligible under INA 212(a)(9)(B)(i)(I).

(2) **(U)** As another example, INA 212(a)(2)(A)(i)(I) has the sentencing clause exception found at INA 212(a)(2)(A)(ii)(II).An alien who lies about a criminal conviction regarding a crime involving moral turpitude but who benefits from the sentencing clause exception would therefore not be ineligible under INA 212(a)(2)(A)(i)(I) and also not ineligible under INA 212(a)(6)(C)(i) for concealing an independent ground of ineligibility..

(3) **(U)** In judicial and administrative decisions about the applicability of INA 212(a)(6)(C)(i), a distinction has been drawn between the INA 212 ineligibilities which, due to the passage of time, may not be permanent and the other INA 212 ineligibilities which involve some measure of judgment on the part of the consular or immigration officer. 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 from the ineligibility depends on an exercise in judgment (i.e., one cannot assume that something is not material on the mere possibility that the exercise of judgment may or may not have erased the ground of ineligibility.);

(b) **(U)** The fact in question is not material under the independent ground of inadmissibility prong of INA 212(a)(6)(C)(i)'s materiality test if the relief from the ineligibility is by the automatic operation of law.

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

(1) **(U) In General:** The second part of the Attorney General's definition refers to a "misrepresentation which 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. "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 was found ineligible for a visa under a different and unrelated ground of ineligibility (for example under INA 214(b)) 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. Let us use the example of an applicant for a nonimmigrant visa (NIV) who made a misrepresentation on 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 discovery that the applicant misrepresented his well-paying job and is in truth unemployed would not support a finding of materiality because it had bearing on the properly-resolved adjudication of the case.

(b) **(U)"The Post Files Exception"** If the truth of the fact being misrepresented is readily 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. However, while the availability of the true facts does not support the "materiality" prong of 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 indeed 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:** Questions sometimes arise concerning the effect on INA 212(a)(6)(C)(i) 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 from the time it was first presented. Even in cases where there is an obvious 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 often also involve an independent ground of ineligibility if they involve the use of 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 for a visa or for entry to the United States 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 then 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)** A misrepresentation by an immigrant visa applicant concerning a previous visa application would not be considered to be material unless the misrepresentation also concealed the existence of an independent ground of inadmissibility or the misrepresentation is now directly relevant to the current visa case;

(ii) **(U)** A nonimmigrant visa (NIV) applicant's misrepresentation of the fact that the applicant was previously refused an NIV under INA 214(b) 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, you may assume that the previous visa refusal was predicated on the previous 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 INA 214(b) 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.

(iii) **(U) Electronic System for Travel Authorization (ESTA):** A misrepresentation made to obtain ESTA may be material if it tends to shut off a line of inquiry that is relevant to the alien’s admissibility or eligibility for an ESTA authorization and would predictably have disclosed other facts relevant to such admissibility or eligibility.

(5) **(U) Application of Phrase “Which Might Have Resulted in a Proper Determination of Exclusion”:** As mentioned above, the second part of the Attorney General's definition refers to a "misrepresentation which 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." In order to sustain a finding of materiality, it must be shown that the misrepresentation

was of basic significance to the alien's eligibility for a visa. A remote or tenuous connection between a misrepresentation and a line of inquiry which may or may not have been 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 proof of a residence abroad by submitting false evidence of employment, but the officer found that the alien had other ties which were more relevant to the outcome of the visa adjudication , 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) the true facts in light of the applicant's misrepresentation. 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. However, if the true facts support a finding that the alien is eligible for a visa, the misrepresented fact is not material.

(i) **(U)** If an alien was to make a misrepresentation to attempt to qualify for immigrant visa (IV) status and it was discovered that the alien was, in truth, entitled to another equally advantageous immigrant visa 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, and 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 committed a willful, material misrepresentation since the alien was trying to qualify for a more advantageous immigrant visa status by committing a misrepresentation.

(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 his or her 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 the consular officer finds that a misrepresentation was made by an alien, , the burden is on that alien to establish that the true facts support eligibility or that, had you known the truth, a visa refusal would not properly have been made. Consular officers should 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" (i..e. a "misrepresentation which 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.").

(1) **(U)** Cases where the alien has expressly admitted to you or to an immigration officer that, at the time the alien applied for a visa or entry into the United States using a B1/B2 visa or another temporary nonimmigrant visa class, it was the alien's intention to accept unauthorized employment in the United States and/or to reside indefinitely in the United States.

(2) **(U)** Cases where DHS has reported that an alien attempted to enter or procured entry into the United States by presenting to the immigration officer forged or materially altered entry documentation. Such documentation may include but is not limited to a U.S. visa, a foreign passport, or a lawful permanent resident card; if such documentation was required under the INA or other laws of the United States for the alien's entry. If an alien committed such a misrepresentation by using a U.S. passport, INA 212(a)(6)(C)(ii) may also apply , see 9 FAM 302.9-5.

9 FAM 302.9-4(B)(6) Unavailable

(CT:VISA-543; 03-27-2018)

Unavailable

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

(CT:VISA-543; 03-27-2018)

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

(1) **(U)** The "other documentation" mentioned in the text of INA 212(a)(6)(C)(i) refers to any document relating to an application, admission, grant of deferred action, or any other immigration benefit. This includes, but is not limited to, such documents as:

(a) **(U)** Reentry permits;

(b) **(U)** Border crossing identification cards;

(c) **(U)** Electronic System for Travel Authorization (ESTA);

(d) **(U)** U.S. Coast Guard identity cards; and

(e) **(U)** U.S. passports (which also may result in a finding of INA 212(a)(6)(C)(ii)**).**

(2) **(U)** Documents, such as Form I-20, Certificate of Eligibility for Nonimmigrant (F-1) Student Status for Academic and Language Students; petitions; and labor authorization or certification forms; among others, are considered documents in support of a visa application. If a visa applicant makes a willful and material misrepresentation to obtain such a document they will be ineligible under INA 212(a)(6)(C)(i).

(3) **(U)** Misrepresentations made by the petitioner or by an agent or other party representing the beneficiary with respect to all immigrant and nonimmigrant petitions if the beneficiary then uses the petition to apply for an immigrant visa or adjustment of status.

(4) **(U)** As stated in 9 FAM 302.9-4(B)(3) paragraph c, in order for a misrepresentation to fall 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 not relevant under INA 212(a)(6)(C)(i).

b. **(U) Other Benefit Provided Under This Act:** The term "other benefit provided under this Act" refers to any immigration benefit listed in the INA, including, but not limited to requests for extension of stay, change of status, consent to reapply for admission, waivers, employment authorization, advance parole, voluntary departure under INA 240B, and adjustment of status.

c. **(U) Other Forms:** If you determine a visa applicant made a material misrepresentation in an application or request submitted to DHS that is not listed above as "other documentation" and is not another benefit provided under this Act (e.g., Form I-20, labor certification), the alien may be inadmissible for fraud and/or willful misrepresentation of a material fact under the following conditions:

(1) **(U)** If the form was submitted in support of an immigration benefit under the INA, such as an employment authorization, or was subsequently used to gain another immigration benefit, such as parole under INA 212(d)(5), including advance parole, then such fraud or material misrepresentation will render the applicant ineligible under INA 212(a)(6)(C)(i).

(2) **(U)** If the submission of the form was not submitted in support of an immigration benefit under the INA AND did not result in the applicant being granted employment authorization or advance parole, then you must submit an AO describing the nature of the misrepresentation and the form submitted to DHS by the visa applicant.

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

(CT:VISA-610; 06-27-2018)

a. **(U) Misrepresentations in Family Relationship Petitions:** USCIS retains exclusive authority to deny or revoke family-relationship immigrant visa (IV) petitions. Thus, a misrepresentation with respect to entitlement to the classification based on the relationship, e.g., a sham marriage in an IR-1 case, cannot be deemed material as long as the petition remains valid. Upon discovery of a misrepresentation, you must return the petition to the appropriate USCIS office via the National Visa Center. If the petition is revoked, the materiality of the misrepresentation is established. In some cases, the relationship and petition may still be valid, but the alien may misrepresent eligibility for the classification in a different way that is not relevant to the petition's validity, and would thus still be ineligible under INA 212(a)(6)(C)(i).

b. **(U) DS-160 Question on a Visa Petition Being Filed on Your Behalf: The Form DS-160 asks "Has anyone ever filed an immigrant petition on your behalf with the United States Citizenship and Immigration Services?" An applicant who is the principal beneficiary (i.e., the individual for whom the petition was filed), such as the**

family member in a Form I-130 petition or the intended employee in a Form I-140 petition, who answers "no" to this question should generally be considered to have made a misrepresentation. Similarly, an applicant who has self-petitioned (i.e., filed an immigrant petition on their own behalf), such as an alien of extraordinary ability or self-petitioning special immigrant, who answered the question "no" should generally be considered to have made a misrepresentation. In either case (whether as a beneficiary or self-petitioner), you must still determine whether such a misrepresentation was willfully made and whether it was material per 9 FAM 302.9-4(B)(1) above. For example, an applicant who credibly claimed that she was unaware that her brother filed a fourth preference family petition 10 years ago may have made a misrepresentation (i.e., it was a statement not in accordance with the truth), but it would not be considered a willful misrepresentation. An applicant who is the spouse or child of the principal beneficiary of a petition, even when named in the petition, would not make a misrepresentation by answering "no" to this question.

c. **(U) Attempts to Obtain Visa by Bribery:** An attempt by an 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) due to fraud. 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)(1) (U) AO Required

(CT:VISA-564; 04-04-2018)

(U) You are only required to submit an AO for a 6C1 finding where the FAM specifically states that an AO is required. An AO is required in the following cases:

(1) **(U)** Where an applicant engaged in inconsistent conduct within 90 days (the 90 day rule);

(2) **(U)** Where the applicant presented fraudulent documentation related to establishing qualification for a particular visa classification but such documentation is not normally required to qualify for such visa classification (e.g., if an applicant presents a false bank statement or employment letter which are not strictly required to qualify for a B visa, then post would need to submit an AO);

(3) **(U)** Where you find the applicant has a legitimate claim to an alternate identity used (except you not need to submit an AO if the alternate identity involved use of a maiden name, a nickname, or a legal and well-documented name change; and

(4) **(U)** Where you believe that the applicant made a misrepresentation related to some benefit under the INA other than seeking a visa or admission at a port of entry.

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

(CT:VISA-564; 04-04-2018)

Unavailable

(1) **Unavailable**

(2) **Unavailable**

(3) **Unavailable**

(4) **Unavailable**

(a) **Unavailable**

(b) **Unavailable**

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

9 FAM 302.9-4(D)(1) (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) in general 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.

b. **(U)** If the applicant has any questions about submitting an Immigrant Visa waiver he or she should be directed to contact DHS.

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

(CT:VISA-543; 03-27-2018)

(U) You may, in your discretion, recommend that DHS grant a waiver under INA 212(d)(3)(A) for an alien ineligible 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)(1) 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-543; 03-27-2018)

(U) INA 212(a)(6)(C)(ii) renders ineligible 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)(1) (U) In General

(CT:VISA-543; 03-27-2018)

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 ("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 ("clearly and beyond doubt").

b. **(U)** An applicant who has been refused under INA 212(a)(6)(C)(ii) in the past and believes that their case meets the requirements above may follow standard post application procedures for submitting a new visa application.

c. Unavailable

d. **Unavailable**

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

(CT:VISA-543; 03-27-2018)

(U) The provisions of INA 212(a)(6)(C)(ii) are not retroactive. It applies only to aliens who made false claims to U.S. citizenship on or after September 30, 1996. An alien who attempted or achieved entry to the United States before September 30, 1996, with a false claim of U.S. citizenship is not ineligible under the terms of INA 212(a)(6)(C)(ii). They are, however, ineligible under 212(a)(6)(C)(i), provided such claim was made to

procure a visa, other documentation, admission into the United States, or other benefit under INA. This is a significant difference because the immigrant visa waiver provisions relating to INA 212(a)(6)(C)(i) and INA 212(a)(6)(C)(ii) are not the same.

9 FAM 302.9-5(B)(3) (U) Applies to Any Benefit Under Any U.S. Federal or State Law

(CT:VISA-543; 03-27-2018)

(U) A major difference between INA 212(a)(6)(C)(ii) and INA 212(a)(6)(C)(i) is that 212(a)(6)(C)(ii) applies to false claims to U.S. citizenship "for any purpose or benefit" under Federal or State law, while 212(a)(6)(C)(i) is limited to fraud or misrepresentation in trying to procure a benefit under the INA. Like INA 212(a)(6)(C)(i), INA 212(a)(6)(C)(ii) applies to an aliens 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).

(U) However, INA 212(a)(6)(C)(ii) 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 also qualify as a "purpose" under U.S. law.

9 FAM 302.9-5(B)(4) (U) False Claims to U.S. Citizenship and Working in the United States

(CT:VISA-543; 03-27-2018)

(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 a false claim to U.S. citizenship to secure employment in violation of INA 274A would be ineligible 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-543; 03-27-2018)

(U) INA 212(a)(6)(C)(ii) does not require that the false claim to U.S. citizenship be made to a U.S. official.. INA 212(a)(6)(C)(ii) specifically says "under this Act (including section 274A) or other Federal or State law." Thus, the false claim may have been made to a State or Federal Government official outside the Department of State or DHS, a prospective employer to circumvent INA 274A, or any other relevant person in the effort to obtain a benefit under U.S. Federal or State law.

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) Unavailable

(CT:VISA-543; 03-27-2018)

Unavailable

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

9 FAM 302.9-5(D)(1) (U) Waivers for Immigrants

(CT:VISA-543; 03-27-2018)

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

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

(CT:VISA-543; 03-27-2018)

(U) You may, at your discretion, recommend that DHS grant a waiver under INA 212(d)(3)(A) for an alien ineligible 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)(1) 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)(1) (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) Not Applicable at the time of Visa Application

(CT:VISA-543; 03-27-2018)

(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)(1) (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" OR ALIENS ASSISTING OTHER ALIENS TO ENTER THE USA IN VIOLATION OF LAW - 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 302.9-7(B)(1) (U) Defining "Any Alien"

(CT:VISA-543; 03-27-2018)

(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 ineligibility (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).

(U) Note: If an alien has a question regarding immigrant visa waivers or waivers for legal permanent residents, the alien should be directed to contact DHS directly.

9 FAM 302.9-7(B)(2) (U) Visa Ineligibility Applied Retroactively

(CT:VISA-543; 03-27-2018)

(U) The conduct which is proscribed under this section may have occurred at any time in the past. Therefore, there will be cases in which an alien who was previously not ineligible under INA 212(a)(6)(E)(including prior to June 1, 1991) may currently be ineligible for a visa for the same conduct. .

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

(CT:VISA-543; 03-27-2018)

(U) A key element of the new INA 212(a)(6)(E) provision is that the "smuggler" (e.g., an alien who is attempting to assist or assisting another alien) must act "knowingly" to encourage, induce, or assist an alien to enter the United States in violation of law. In other words, in order to find an alien ineligible under this provision, the consular officer must find that the "smuggler" is or was 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 in violation of law., Further, the "smuggler" must act with intention of encouraging, inducing, or assisting the alien to achieve the entry in violation of law.

9 FAM 302.9-7(B)(4) (U) "Encourage, Induce, Assist, Abet, or Aid"

(CT:VISA-543; 03-27-2018)

a. **(U)** The actions for which a "smuggler" might be found ineligible are numerous. The acts generally involve an "affirmative act of assistance," that is, an act or acts that are of direct encouragement, inducement or assistance to the alien's attempted entry in violation of law. Some examples include but are not limited to**:**

(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, or

(2) **(U)** physically bringing an alien into the United States in violation of law.

b. **(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 ineligible under this section, provided the false statement was material under the INA 212(a)(6)(C)(i) standards for materiality);

c. **(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 admission to the United States, it would only be considered a violation of law if the misrepresentation meets the standards for a INA 212(a)(6)(C)(i) finding; and

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

(CT:VISA-543; 03-27-2018)

(U) Encouraging, inducing, or assisting any other alien, even close family members, to enter the United States illegally can result in ineligibility y under INA 212(a)(6)(E). . This is in contrast to the previous version of this law (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) Unavailable

(CT:VISA-543; 03-27-2018)

Unavailable

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

9 FAM 302.9-7(D)(1) (U) Waivers for Immigrants

(CT:VISA-543; 03-27-2018)

a. **(U)** With respect to an immigrant, pursuant to INA 212(d)(11), 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.

d. **(U)** If the applicant has any questions about submitting an Immigrant Visa waiver he or she should be directed to contact DHS.

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

(CT:VISA-543; 03-27-2018)

(U) You may, in your discretion, recommend that DHS grant a waiver under INA 212(d)(3)(A) for an alien ineligible 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)(1) 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)(1) (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)(1) (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)(1) 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)(1) (U) In General

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

(U) INA 214(m) prohibits an alien from obtaining F-1 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-1 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-1 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-1 status. Attendance at a secondary public school, while in a status other than F-1, while in unlawful status, or prior to November 30, 1996, does not count against the 12-month limit. You must not issue an F-1 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)(1) (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)(1) Unavailable

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

Unavailable

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

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

Unavailable