

9 FAM 40.21(A) NOTES

*(CT:VISA-1318; 09-24-2009)
(Office of Origin: CA/VO/L/R)*

9 FAM 40.21(A) N1 APPLYING INA 212 INA 212(A)(2)(A)(I)(I)

9 FAM 40.21(a) N1.1 Determining Ineligibility

(CT:VISA-1318; 09-24-2009)

When adjudicating a visa application for an applicant whom *you (consular officer)* have reason to believe has committed a crime *involving moral turpitude*, the officer *must* determine whether:

- (1) The offense was purely political (see 9 FAM 40.21(a) N10)
- (2) The offense committed involves moral turpitude (See 9 FAM 40.21(a) N2);
- (3) The applicant has been convicted (see 9 FAM 40.21(a) N3); and
- (4) The applicant has admitted or may admit that he or she has committed acts which constitute the essential elements of a crime (see 9 FAM 40.21(a) N5.)

9 FAM 40.21(a) N1.2 Exceptions to Ineligibility

(CT:VISA-753; 06-29-2005)

Certain statutory exceptions may prevent a determination of ineligibility by reason of a conviction for a crime involving moral turpitude. These exceptions relate to:

- (1) Crimes committed prior to age 18 (see 9 FAM 40.21(a) N8 and N9)
or
- (2) Certain purely political offenses and convictions.

9 FAM 40.21(A) N2 MORAL TURPITUDE

9 FAM 40.21(a) N2.1 Evaluating Moral Turpitude Based Upon Statutory Definition of Offense and U.S. Standards

(CT:VISA-1318; 09-24-2009)

To render an alien *inadmissible* under INA 212(a)(2)(A)(i)(I), the conviction must be for a statutory offense, which involves moral turpitude. The presence of moral turpitude is determined by the nature of the statutory offense for which the alien was convicted, and not by the acts underlying the conviction. Therefore, evidence relating to the underlying act, including the testimony of the applicant, is not relevant to a determination of whether the conviction involved moral turpitude except when the statute is divisible (see 9 FAM 40.21(a) N5.2) or a political offense (see 9 FAM 40.21(a) N10). The presence of moral turpitude in a statutory offense is determined according to United States law.

9 FAM 40.21(a) N2.2 Defining “Moral Turpitude”

(CT:VISA-753; 06-29-2005)

Statutory definitions of crimes in the United States consist of various elements, which must be met before a conviction can be supported. Some of these elements have been determined in judicial or administrative decisions to involve moral turpitude. A conviction for a statutory offense will involve moral turpitude if one or more of the elements of that offense have been determined to involve moral turpitude. The most common elements involving moral turpitude are:

- (1) Fraud;
- (2) Larceny; and
- (3) Intent to harm persons or thing.

9 FAM 40.21(a) N2.3 Common Crimes Involving Moral Turpitude

(TL:VISA-29; 01-12-1990)

Categorized below are some of the more common crimes, which are considered to involve moral turpitude. Each category is followed by a

separate list of related crimes, which are held not to involve moral turpitude.

9 FAM 40.21(a) N2.3-1 Crimes Committed Against Property

(CT:VISA-1318; 09-24-2009)

- a. Most crimes committed against property that involve moral turpitude include the element of fraud. The act of fraud involves moral turpitude whether it is aimed against individuals or government. Fraud generally involves:
- (1) Making false representation;
 - (2) Knowledge of such false representation by the perpetrator;
 - (3) Reliance on the false representation by the person defrauded;
 - (4) An intent to defraud; and
 - (5) The actual act of committing fraud
- b. Other crimes committed against property involving moral turpitude involve an inherently evil intent, such as the act of arson. The following list comprises crimes frequently committed against property, which may be held to involve moral turpitude for the purposes of visa issuance:
- (1) Arson;
 - (2) Blackmail;
 - (3) Burglary;
 - (4) Embezzlement;
 - (5) Extortion;
 - (6) False pretenses;
 - (7) Forgery;
 - (8) Fraud;
 - (9) Larceny (grand or petty);
 - (10) Malicious destruction of property;
 - (11) Receiving stolen goods (with guilty knowledge);

- (12) Robbery;
 - (13) Theft (when it involves the intention of permanent taking); and
 - (14) Transporting stolen property (with guilty knowledge).
- c. Crimes against property which do not fall within the definition of moral turpitude include:
- (1) Damaging private property (where intent to damage not required);
 - (2) Breaking and entering (requiring no specific or implicit intent to commit a crime involving moral turpitude);
 - (3) Passing bad checks (where intent to defraud not required);
 - (4) Possessing stolen property (if guilty knowledge is not essential);
 - (5) Joy riding (where the intention to take permanently not required);
and
 - (6) Juvenile delinquency.

9 FAM 40.21(a) N2.3-2 Crimes Committed Against Governmental Authority

(CT:VISA-1318; 09-24-2009)

- a. Crimes committed against governmental authority which fall within the definition of moral turpitude include:
- (1) Bribery;
 - (2) Counterfeiting;
 - (3) Fraud against revenue or other government functions;
 - (4) Mail fraud;
 - (5) Perjury;
 - (6) Harboring a fugitive from justice (with guilty knowledge); and
 - (7) Tax evasion (willful).
- b. Crimes committed against governmental authority, which would not constitute moral turpitude for visa-issuance purposes, are, in general, violation of laws which are regulatory in character and which do not

involve the element of fraud or other evil intent. The following list assumes that the statutes involved do not require the showing of an intent to defraud, or evil *intent*:

- (1) Black market violations;
- (2) Breach of the peace;
- (3) Carrying a concealed weapon;
- (4) Desertion from the Armed Forces;
- (5) Disorderly conduct;
- (6) Drunk or reckless driving;
- (7) Drunkenness;
- (8) Escape from prison;
- (9) Failure to report for military induction;
- (10) False statements (not amounting to perjury or involving fraud);
- (11) Firearms violations;
- (12) Gambling violations;
- (13) Immigration violations;
- (14) Liquor violations;
- (15) Loan sharking;
- (16) Lottery violations;
- (17) Possessing burglar tools (without intent to commit burglary);
- (18) Smuggling and customs violations (where intent to commit fraud is absent);
- (19) Tax evasion (without intent to defraud); and
- (20) Vagrancy.

9 FAM 40.21(a) N2.3-3 Crimes Committed Against Person, Family Relationship, and Sexual Morality

(CT:VISA-1318; 09-24-2009)

a. Crimes committed against the person, family relationship, and sexual morality, which constitute moral turpitude as it relates to visa issuance, include:

- (1) Abandonment of a minor child (if willful and resulting in the destitution of the child);
- (2) Adultery (see INA 101(f)(2) repealed by Public Law 97-116);
- (3) Assault (this crime is broken down into several categories, which involve moral turpitude):
 - (a) Assault with intent to kill;
 - (b) Assault with intent to commit rape;
 - (c) Assault with intent to commit robbery;
 - (d) Assault with intent to commit serious bodily harm; and
 - (e) Assault with a dangerous or deadly weapon (some weapons may be found to be lethal as a matter of law, while others may or may not be found factually to be such, depending upon all the circumstances in the case. Such circumstances may include, but are not limited to, the size of the weapon, the manner of its use, and the nature and extent of injuries inflicted.);
- (4) Bigamy;
- (5) Contributing to the delinquency of a minor;
- (6) Gross indecency;
- (7) Incest (if the result of an improper sexual relationship);
- (8) Kidnapping;
- (9) Lewdness;
- (10) Manslaughter:
 - (a) Voluntary, *occurs when a person intentionally kills another person after "adequate provocation"; that is, there has been action that was sufficient to incite an "ordinary person" to "sudden and intense passion" such that s/he loses self-*

control. It should be noted that the time between provocation and the killing should not be long enough for the passion to have cooled off. In most states, "adequate provocation" is defined to be only situations in which there is a threat of deadly force, or in which a person finds his/her spouse in bed with another person. Verbal threats are usually not considered adequate provocation; and

- (b) Involuntary, where the statute requires proof of recklessness, which is defined as the awareness and conscious disregard of a substantial and unjustified risk which constitutes a gross deviation from the standard that a reasonable person would observe in the situation. A conviction for the statutory offense of vehicular homicide or other involuntary manslaughter only requires a showing of negligence will not involve moral turpitude even if it appears the defendant in fact acted recklessly.
- (11) Mayhem;
 - (12) Murder;
 - (13) Pandering;
 - (14) Prostitution;
 - (15) Rape (By statute, a person may be convicted of statutory rape even though the female consents and provided she is under the statutory age at the time of the commission of the act. "Statutory rape" is also deemed to involve moral turpitude.)
- b. Crimes committed against the person, family relationship, or sexual morality which do not involve moral turpitude include:
- (1) Assault (simple) (i.e., any assault, which does not require an evil intent or depraved motive, although it may involve the use of a weapon, which is neither dangerous nor deadly);
 - (2) Bastardy (i.e., the offense of begetting a bastard child);
 - (3) Creating or maintaining a nuisance (where knowledge that premises were used for prostitution is not necessary);
 - (4) Incest (when a result of a marital status prohibited by law);
 - (5) Involuntary manslaughter (when killing is not the result of recklessness);

- (6) Libel;
- (7) Mailing an obscene letter;
- (8) Mann Act violations (where coercion is not present);
- (9) Riot; and
- (10) Suicide (attempted).

9 FAM 40.21(a) N2.4 Attempts, Aiding and Abetting, Accessories and Conspiracy

(CT:VISA-1318; 09-24-2009)

- a. The following types of crimes are held to be crimes involving moral turpitude:
 - (1) An attempt to commit a crime deemed to involve moral turpitude;
 - (2) Aiding and abetting in the commission of a crime deemed to involve moral turpitude;
 - (3) Being an accessory (before or after the fact) in the commission of a crime deemed to involve moral turpitude; *or*
 - (4) Taking part in a conspiracy (or attempting to take part in a conspiracy) to commit a crime involving moral turpitude.
- b. Conversely, where an alien has been convicted of, or admits having committed the essential elements of, a criminal attempt, or a criminal act of aiding and abetting, accessory before or after the fact, or conspiracy, and the underlying crime is not deemed to involve moral turpitude, then INA 212(a)(2)(A)(i)(I) would not be applicable.

9 FAM 40.21(A) N3 CASES IN WHICH CONVICTION EXISTS

9 FAM 40.21(a) N3.1 Defining Conviction

(CT:VISA-753; 06-29-2005)

INA 101(A)(48) defines "conviction" as either:

- (1) A formal judgment of guilt entered by a court; or
- (2) If adjudication has been withheld,
 - (a) either:
 - A finding of guilty by judge or jury; or
 - A plea of guilty or nolo contendere by the alien; or
 - An admission from the alien of sufficient facts to warrant a finding of guilt; and
- (3) The imposition of some form of punishment, penalty or restraint of liberty by a judge

9 FAM 40.21(a) N3.2 Other Factors Bearing on Existence of Conviction

(TL:VISA-29; 01-12-1990)

The question of the presence of a conviction is a factual matter, independent of official record. An indication that an alien has been convicted of a crime may appear in:

- (1) Replies to questions;
- (2) Reports of investigative and other government activities;
- (3) Police records or other documents that the applicant may be required to submit or
- (4) Any other kind of information, which may be developed concerning the applicant.

9 FAM 40.21(a) N3.2-1 Evidence of Conviction

(CT:VISA-1318; 09-24-2009)

Official records generally suffice to establish the existence of a conviction. However, some convictions that would make INA 212(a)(2)(A)(i)(I) applicable are no longer a matter of record. It must be borne in mind that not all expungements or pardons serve to relieve the individual of the effects of the conviction for immigration purposes. Therefore, in cases where an expungement or pardon may have removed the record of conviction from official records, or where the accuracy of records is otherwise suspect, the

consular officer may require any evidence relevant to the alien's history which may appear necessary to determine the facts. *CA/VO/L/A can provide guidance in cases where a consular officer is unsure if a conviction exists for purposes of applying INA 212(a)(2)(A)(i).*

9 FAM 40.21(a) N3.2-2 Expunging Conviction Under U.S. Law

(CT:VISA-753; 06-29-2005)

- a. Prior to the passage of 101(a)(48) a full expungement of a conviction under U.S. law had been held to be equivalent in effect to a pardon granted under INA 237(a)(2)(A)(v) and served to eliminate the effect of the conviction for most immigration purposes. In light of the passage of 101(a)(48), the Board of Immigration Appeals in *Matter of Roldan*, 22 I & N. Dec. 512, determined that judicial expungements based on rehabilitative or ameliorative statutes (laws that allowed for expungement of a sentence by a court based on a showing that the defendant had been rehabilitated or was otherwise worthy of relief) would no longer be recognized as effective for eliminating the conviction for immigration purposes.
- b. The Ninth Circuit Court of Appeals, however, disagreed with this holding, and in a series of cases determined that state judicial expungements will be considered effective, for eliminating the conviction if the alien would have been eligible for relief under the Federal First Offender Act or similar statute (see 9 FAM 40. 21(b) N4.1-2) Federal First Offense Judicial Actions and State Equivalents). Because of the complexity of this issue, cases that involve claims for state judicial expungement relief, shall be submitted as an advisory opinion request to CA/VO/L/A.

9 FAM 40.21(a) N3.2-3 Expunging Conviction Under U.S. Federal Law

(CT:VISA-1318; 09-24-2009)

The Comprehensive Crime Control Act of 1984, effective October 12, 1984, repealed the Federal First Offender provisions cited as 21 U.S.C. 844(b)(1) and the Federal Youth Corrections Act provisions cited as 18 U.S.C. 5021. Both of these procedures expunged convictions for all purposes. You *should* honor certificates verifying expungement under either of these sections. 18 U.S.C. 3607 has replaced these procedures. An expungement under this section likewise vitiates a conviction for purposes of INA 212(a)(2)(A)(i)(I).

9 FAM 40.21(a) N3.3 “Convictions” Relating to Pre-trial Actions

(CT:VISA-1318; 09-24-2009)

- a. An applicant has not been convicted of a crime if he or she:
- (1) Is under investigation;
 - (2) Has been arrested or detained;
 - (3) Has been charged with a crime; or
 - (4) Is under indictment.
- b. However, such facts may indicate that some other basis of *inadmissibility* may exist (e.g., second clause of INA 212(a)(2)(C), INA 212(a)(1), etc.). *At your discretion, you may refuse any under INA 221(g) which involves an alien charged, but not convicted of a crime to await the outcome of the proceedings, if the outcome is imminent, or to permit local authorities in appropriate cases to take steps to prevent the departure of the alien from their jurisdiction. Where applicable, in the case of a nonimmigrant visa applicant charged with a crime, you should also consider how the charge may affect the applicant’s intention to return to his or her place of residence.*

9 FAM 40.21(a) N3.4 “Convictions” Relating to Actions During Trial

9 FAM 40.21(a) N3.4-1 “Nolo Contendere” Plea

(TL:VISA-1; 08-30-1987)

Court action following a plea of “nolo contendere” constitutes a conviction.

9 FAM 40.21(a) N3.4-2 Conviction in Absentia

(CT:VISA-1318; 09-24-2009)

A conviction in absentia does not constitute a conviction. However, any participation in judicial proceedings by the accused may imply that the conviction was not one made in absentia. For example, if a conviction in absentia has been appealed by the person convicted, the person has “appeared” for that purpose and the conviction has been affirmed, *so therefore* it is no longer considered a conviction in absentia. Similarly,

representation by the accused in a trial proceeding may preclude a finding that the trial was conducted in absentia. You *must* submit all cases where the facts suggest that a conviction may have been made in absentia to CA/VO/L/A for an advisory opinion.

9 FAM 40.21(a) N3.4-3 Conviction by Court-Martial

(CT:VISA-1318; 09-24-2009)

A conviction by court-martial has the same force and effect as a conviction by a civil court (Memorandum of December 7, 1938, to the Department from the Judge Advocate General of the Army).

9 FAM 40.21(a) N3.4-4 Judicial Recommendation Against Deportation (JRAD)

(CT:VISA-1318; 09-24-2009)

- a. Section 505 of the Immigration Act of 1990 Public Law 101-649 eliminated judicial recommendations against deportation (JRAD) for convictions, which occurred on, or after November 29, 1990, the date of enactment of Public Law 101-649. The Department of Homeland Security (DHS), and the Department of State will recognize jRADs granted prior to that date. Those issued on or after that date will not be recognized.
- b. Former INA 241(b)(2), repealed by Public Law 101-649, granted relief from deportation to an alien for whom the judge, at the time of sentencing or within thirty days thereafter, recommended to the Secretary of Homeland Security (DHS) that the alien not be deported. Such judicial recommendation granted prior to November 29, 1990, has "the effect of immunizing the alien" from the application of INA 212(a)(2)(A)(i) with regard to the conviction for which the JRAD was issued. It has no effect, however, on *inadmissibility* under INA 212(a)(2)(A)(ii) since 241(a)(2)(B) specifically exempted convictions for violations of drug laws from eligibility for a JRAD. JRADs affect convictions within the U.S. judicial system only. Convictions in foreign courts are not susceptible to a JRAD by either their own or by U.S. courts.

9 FAM 40.21(a) N3.4-5 Conviction While U.S. Citizen

(TL:VISA-129; 11-9-95)

- a. In view of the elimination of the judicial recommendation against deportation, the finding of the Supreme Court in *Costello v. INS*, 376 U.S. 120, is now in question. The Supreme Court held that a conviction of a

naturalized citizen did not invoke deportation under INA 241(a)(2)(A)(i) since the possibility of a judicial recommendation under INA 241(b) was not available for a citizen of the United States. Consequently, an alien who was convicted while a U.S. citizen was not ineligible to receive a visa under INA 212(a)(2)(A)(i) based solely upon such a conviction.

- b. You *must* submit all cases involving the conviction of an applicant while he or she was a citizen of the United States to CA/VO/L/A for an advisory opinion. (See 9 FAM 40.21(a) PN1.)

9 FAM 40.21(a) N3.5 Pardons Relating to Convictions

(CT:VISA-1318; 09-24-2009)

INA 237(a)(2)(A)(*vi*) provides that certain U.S. pardons remove deportability for U.S. convictions. Matter of H--, 6 I&N Dec. 90, holds that such pardons remove *inadmissibility* under INA 212(a)(2)(A)(i)(I). Pardons that have this mitigating effect must be of specific kinds. Generally, they must be pardons granted by the highest appropriate executive authority; a legislative pardon alone will not remove *inadmissibility*. More specifically, the pardon must be granted by the President, State Governor, or other person specified in 22 CFR 40.21(a) N5. A pardon granted by a mayor is acceptable if law, as the supreme pardoning authority under relevant municipal ordinances, has designated such official. A pardon will remove *inadmissibility* only when it is full and unconditional. The post *must* submit any case presenting a pardon, which bears limitations or restrictions to CA/VO/L/A for an advisory opinion. (See 9 FAM 40.21(a) PN1.) However, the provisions of INA 237(a)(2)(A)(*vi*) *may* not apply in the case of an alien who has been convicted of an aggravated felony.

9 FAM 40.21(a) N3.6 Suspending Sentence, Probation, etc., Relating to Convictions

(CT:VISA-1318; 09-24-2009)

An alien who has been convicted and whose sentence has been suspended or reduced, mitigated, or commuted, or who has been convicted and has been granted probation or parole or has otherwise been relieved in whole or in part of the penalty imposed, is nevertheless, considered to have been convicted. *Suspending or deferring a sentence and imposing probation is an act of clemency, not a right of the defendant alien.*

9 FAM 40.21(a) N3.7 Appeals Pertaining to Convictions

(CT:VISA-1318; 09-24-2009)

A conviction does not exist when the ruling of a lower court has been overturned on appeal to a higher court. You *must*, therefore, submit all cases involving convictions pending appeals at the time of visa application to CA/VO/L/A for an advisory opinion. (See 9 FAM 40.21(a) PN1.) A conviction is not considered final for immigration purposes during the pendency of a direct appeal.

9 FAM 40.21(a) N3.8 Vacating a Conviction

(CT:VISA-1318; 09-24-2009)

When a court acts within its jurisdiction and vacates its own original judgment of conviction, no conviction for the purposes of the immigration laws will exist. The vacating of a conviction on a writ of coram nobis eradicates the conviction for immigration purposes (Matter of Sirhan, 13 I&N Dec. 592).

Defining - Writ of coram nobis, from Latin "in our presence" an order by a court of appeal to a court which rendered judgment requiring that trial court to consider facts not on the trial record which might have resulted in a different judgment if known at the time of the trial.

9 FAM 40.21(a) N3.9 Absence of Conviction in Nolle Prosequi Cases

(TL:VISA-29; 01-12-1990)

The grant of a new trial by a judge following a conviction, together with a dismissal of cause nolle prosequi, eradicates the conviction for immigration purposes.

9 FAM 40.21(A) N4 INA 212(H) WAIVER

9 FAM 40.21(a) N4.1 Principal Alien

(CT:VISA-1318; 09-24-2009)

An immigrant alien who is *inadmissible* under INA 212(a)(2)(A)(i)(I) is

eligible to apply for a waiver of *inadmissibility* under INA 212(h) (see also 9 FAM 40.21(a) PN2) if it is established to the satisfaction of the Secretary of Homeland Security (DHS) that:

- a.
 - (1) The activities for which the alien is excludable occurred more than 15 years before the date of the alien's application for *a visa*;
 - (2) The alien's admission to the United States would not be contrary to the national welfare, safety, or security, and
 - (3) The alien has been rehabilitated; *or*.
- b. *In certain cases involving close relatives (see 9 FAM 40.21(a) N4.2); or*
- c. *If the alien is a WAVA self-petitioner.*

9 FAM 40.21(a) N4.2 Certain Relatives of U.S. Citizens or LPRs

(CT:VISA-753; 06-29-2005)

An alien immigrant who is the spouse, parent, son, or daughter of a U.S. citizen or an alien lawfully admitted for permanent residence in the United States may apply for a waiver under INA 212(h) (see also 9 FAM 40.21(a) PN2) if:

- (1) It is established to the Secretary of Homeland Security's (DHS) satisfaction that the exclusion of such alien would result in extreme hardship to the U.S. citizen or lawfully resident spouse, parent, son, or daughter; and
- (2) The Secretary of Homeland Security (DHS) has consented to the alien's applying or reapplying for a visa to the United States.

9 FAM 40.21(a) N4.3 Evidence of Eligibility to Apply for a Waiver

(CT:VISA-1318; 09-24-2009)

When the court records or statutes leave doubt concerning an alien's eligibility for a waiver, you *must* ensure that *you have obtained* complete records and copies of all relevant portions of the statute under which the conviction was obtained are assembled, as well as any available commentary

by authorities, prior judicial holdings and the like. The post *must* forward these documents to DHS together with the waiver application. (See 9 FAM 40.21(a) PN2 for waiver procedures.) Because DHS has exclusive authority for approving 212(h) waivers, any question concerning waiver eligibility *must* be submitted to DHS for resolution.

9 FAM 40.21(A) N5 ADMITTING CRIMES INVOLVING MORAL TURPITUDE

9 FAM 40.21(a) N5.1 Alien Admission to Crime Involving Moral Turpitude

(CT:VISA-1318; 09-24-2009)

If it is necessary to question an alien for the purpose of determining whether the alien is ineligible to receive a visa as a person who has admitted the commission of the essential elements of a crime involving moral turpitude, you shall make the verbatim transcript of the proceedings under oath a part of the record. In eliciting admissions from visa applicants concerning the commission of criminal offenses, you *must* observe carefully the following rules of procedure which have been imposed by judicial and Board of Immigration Appeals decisions:

- (1) You *should* give the applicant a full explanation of the purpose of the questioning. The applicant *must* then be placed under oath and the proceedings *must* be recorded verbatim.
- (2) The crime, which the alien has admitted, must appear to constitute moral turpitude based on the statute and statements from the alien. It is not necessary for the alien to admit that the crime involves moral turpitude.
- (3) Before the actual questioning, you *must* give the applicant an adequate definition of the crime, including all essential elements. You must explain the definition to the applicant in terms he or she understands; making certain it conforms to the law of the jurisdiction where the offense is alleged to have been committed.
- (4) The applicant must then admit all the factual elements, which constituted the crime (Matter of P--, 1 I&N Dec. 33).
- (5) The applicant's admission of the crime must be explicit, unequivocal and unqualified (Howes v. Tozer, 3 F2d 849).

9 FAM 40.21(a) N5.2 Admissions Relating to Acquittals or Dismissals

(TL:VISA-29; 01-12-1990)

An admission by an alien is deemed ineffective with respect to a crime for which the alien has been tried and acquitted, or, for which, charges have been dismissed by a court.

9 FAM 40.21(a) N5.3 Failing to Prosecute Charges Concerning Offense

(TL:VISA-29; 01-12-1990)

The failure of the authorities to prosecute an alien who has been arrested will not prevent a finding of ineligibility based upon an admission by the applicant.

9 FAM 40.21(a) N5.4 Guilty Plea Without Conviction

(TL:VISA-29; 01-12-1990)

A plea of guilty in a trial will not constitute an admission if a conviction does not result or if it is followed by a new trial and subsequent acquittal or dismissal of charges.

9 FAM 40.21(a) N5.5 Official Confessions Constituting Admission

(CT:VISA-753; 06-29-2005)

An official confession made in a prior hearing or to a police officer may constitute an admission if the statement meets the standards of these Notes.

9 FAM 40.21(a) N5.6 Cases Involving Retraction of Admission

(CT:VISA-753; 06-29-2005)

Once an admission has been made, attempts to retract it need not remove the basis of ineligibility. However, you must evaluate the truthfulness of

such an admission. If you believe the admission to be true despite the alien's retraction, a finding of inadmissibility is warranted. Conversely, if you believe the retraction to be justifiable, the alien's admission to a crime will have no effect on the case. (See 9 FAM 40.63 N4.6.)

9 FAM 40.21(a) N5.7 Coercing to Obtain Admission Prohibited

(CT:VISA-1318; 09-24-2009)

You *must* not resort to threats or promises in an attempt to extract an admission from an alien. Action that tends to induce an alien to make an admission may constitute entrapment, and any admission or confession obtained by such methods may have no legal force or effect.

9 FAM 40.21(a) N5.8 Admitting All Essential Elements

(CT:VISA-1318; 09-24-2009)

- a. In each case, the reviewing consular officer must keep in mind the essential elements of the offense. For example, the essential elements of the crime of perjury (*which is an offense involving moral turpitude*) as defined in 18 U.S.C. 1621 are:
 - (1) The taking of an oath;
 - (2) Duly administered by a competent authority;
 - (3) In a case in which an oath is required by law;
 - (4) A false statement;
 - (5) Knowingly or willfully made; and
 - (6) Regarding a material matter.
- b. To *legally* constitute the admission of the commission of the crime of perjury *in the example given above* an alien must fully, completely, and unequivocally admit elements (1), (4), and (5). Elements (2), (3), and (6) are primarily questions of law which the alien is not required to admit but which *you must find* to exist to constitute the crime of perjury.

9 FAM 40.21(a) N5.9 Quality of Admission

(CT:VISA-1318; 09-24-2009)

In any case where an admission is considered independent of any other evidence, you *must* develop that admission to a point where there is no reasonable doubt that the alien committed the crime in question. (See 9 FAM 40.63 N4.3 and 9 FAM 40.63 N4.4)

9 FAM 40.21(A) N6 DETERMINING WHETHER CONVICTION IS CRIME INVOLVING MORAL TURPITUDE

9 FAM 40.21(a) N6.1 Provisions of Law Defining Particular Offense

(TL:VISA-129; 11-09-1995)

Where the record clearly shows the conviction to be predicated on a specific provision of law, whose terms necessarily embrace only acts that are offenses involving moral turpitude, the fact that the conviction was so predicated supports a conclusion that the conviction was of a crime that involves moral turpitude. Since the ineligibility relates to the conviction of a crime, rather than a commission of a crime, involving moral turpitude, the statutory definition of the offense will determine whether the conviction involves moral turpitude. Each separate provision of law defining an offense must be read in conjunction with such other provisions of law as are pertinent to its interpretation.

9 FAM 40.21(a) N6.2 Divisible Statutes Under U.S. and Foreign Law

(CT:VISA-753; 06-29-2005)

- a. If the provision of law on which a conviction is predicated has multiple sections, only some of which involve moral turpitude, you must evaluate the nature of the act to determine if the conviction was predicated on the section of the statute involving moral turpitude. If the divisible statute in question is part of the law of one of the states you may only examine the charge, plea, verdict, and sentence in assessing the presence of moral turpitude in the act for which the conviction was obtained.
- b. If the statute in question is foreign, you may assess the presence of moral turpitude in the act for which conviction has been obtained by

reference to any part of the record or from admissions of the alien.

9 FAM 40.21(A) N7 SENTENCING CLAUSE

(TL:VISA-384; 04-03-2002)

The Public Law 104-208 amended the sentencing clause by removing the term "sentence actually imposed." The emphasis of the exculpatory provisions, INA 212(a)(2)(A)(i)(I), remains on the length of the term of imprisonment to which the alien was sentenced. Yet, the provision only applies to crimes for which the maximum penalty possible does not exceed imprisonment for one year.

9 FAM 40.21(a) N7.1 Provisions of INA 212(a)(2)(A)(ii)

(CT:VISA-1318; 09-24-2009)

As amended, a conviction or admission of the commission of a crime of moral turpitude will not serve as the basis of ineligibility under INA 212(a)(2)(A)(i), if the following conditions have been met:

- (1) The applicant has been convicted of or has admitted to the commission of only one crime;
- (2) The maximum penalty possible for the crime of which the alien was convicted *or for which the alien legally admitted to did not exceed imprisonment for one year and, if the alien was convicted and the alien was not sentenced to a term of imprisonment in excess of six months; or*
- (3) *The crime was committed when the alien was under 18 years of age and the crime was committed (and the alien was released from confinement if applicable) more than 5 years before the date of the visa application. (See 9 FAM 40.21(a) N8, below.)*

9 FAM 40.21(a) N7.2 Applying the Exception of the Sentencing Clause

(CT:VISA-1318; 09-24-2009)

The language that the alien was not sentenced to a term of imprisonment in excess of six months *refers to how long the alien was originally sentenced for* regardless of the extent to which the sentence was ultimately executed

the "term of imprisonment" *that you need to analyze* constitutes the specific sentence meted out by the court prior to the imposition of any suspension. For example, if a court imposes a sentence of nine months of imprisonment, but suspends all nine months and imposes two years of probation, the alien, can not benefit from the sentencing clause because the nine months term of imprisonment exceeds the statutory six months maximum.

9 FAM 40.21(a) N7.3 Applicability of Law, Foreign or Domestic, Relevant to Crime

(CT:VISA-753; 06-29-2005)

In assessing the applicability of this provision to an applicant who has admitted the commission of acts constituting a crime of moral turpitude, it is necessary only to look to the law, foreign or domestic, of the jurisdiction where the acts were committed. It is not necessary to refer to federal or other U.S. standards to distinguish between felonies and misdemeanors.

9 FAM 40.21(a) N7.4 Early Release, Parole

(CT:VISA-1318; 09-24-2009)

An applicant whose imposed sentence exceeds imprisonment for a period of six months cannot receive consideration under this provision of INA 212(a)(2)(A)(ii)(II) even though the applicant was released early on parole or for good behavior. (*See 9 FAM 40.21(a) N7.2 above*).

9 FAM 40.21(a) N7.5 Applying Sentencing Clause in INA 212(a)(2)(A)(ii)(II)

(CT:VISA-1318; 09-24-2009)

Since the sentencing clause is to be applied retrospectively as well as prospectively, aliens previously found to be *inadmissible* under INA 212(a)(2)(A)(i)(II) might no longer be *inadmissible* under the terms *of a statute if that statute is amended or changed*. All visa applications, therefore, must be assessed under the current statute without regard to any previous finding(s) of *inadmissibility*.

9 FAM 40.21(a) N7.6 Distinguishing Between Single Offense and Single Conviction

(CT:VISA-753; 06-29-2005)

The INA language requires that the sentencing clause exemption is applicable only if the alien has committed only one crime involving moral turpitude. You must determine, as a matter of fact, whether despite the fact that there is a single conviction, the alien may have committed more than one crime.

9 FAM 40.21(a) N7.6-1 Multiple Counts

(CT:VISA-753; 06-29-2005)

An alien convicted on two counts in one indictment is ineligible for the sentencing clause exemption even though only one conviction exists and the two offenses constituted a single scheme of criminal misconduct.

9 FAM 40.21(a) N7.6-2 Relevant Facts

(TL:VISA-29; 01-12-1990)

In Matter of S. R., 7 I&N Dec. 495; Matter of DeM., 9 I&N Dec. 218, it has been held that when an alien's conviction has been expunged under a state expungement preceding, you may use the conviction as evidence that the alien committed more than one crime of moral turpitude and is therefore ineligible for relief under the sentencing clause.

9 FAM 40.21(A) N8 SINGLE CRIME INVOLVING MORAL TURPITUDE WHILE UNDER AGE 18 INA 212(A)(2)(A)(II)(I)

(CT:VISA-1318; 09-24-2009)

- a. The exception found in INA 212(a)(2)(A)(ii)(I) for an alien who has committed a single crime involving moral turpitude while under the age of 18 allows the issuance of a visa to the alien although the alien was convicted while over the age of 18 if the:
- (1) Crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than five years before the date of application for a visa or other documentation and the date of application for admission to the United States, or
 - (2) Maximum penalty possible for the crime of which the alien was

convicted (or for which the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of six months (regardless of the extent to which the sentence was ultimately executed). *(See 9 FAM 40. 21(a) N7.1 above).*

- b. In some instances, court records in a case might show that an alien under the age of 18 years had committed more than one crime involving moral turpitude although only one conviction resulted. In such a case, the alien is ineligible for the exception.

9 FAM 40.21(A) N9 JUVENILE DELINQUENCY

9 FAM 40.21(a) N9.1 Definition

(TL:VISA-29; 01-12-1990)

The Federal Juvenile Delinquency Act (FJDA) defines a juvenile as a “person who has not attained his 18th birthday” and defines juvenile delinquency as “the violation of a law of the United States committed by a person prior to his or her 18th birthday which might have been considered a crime if committed by an adult.”

9 FAM 40.21(a) N9.2 Using U.S. Standards

(CT:VISA-1318; 09-24-2009)

A foreign conviction based on conduct which constitutes an act of juvenile delinquency under U.S. standards, however treated by the foreign court, is not a conviction for a “crime” for the purpose of INA and, accordingly, may not serve as the basis for a finding of *inadmissibility* under INA 212(a)(2)(A)(i)(I).

9 FAM 40.21(a) N9.3 Controlling Legislation

(TL:VISA-1; 08-30-1987)

The standards embodied in the Federal Juvenile Delinquency Act (FJDA), as amended, govern whether an offense is considered a delinquency or a crime by U.S. standards. The FJDA, set forth in 18 U.S.C 5031, was amended by the Juvenile Justice and Delinquency Act of 1974 (Public Law 93-415) and the Comprehensive Crime Control Act of 1984 (Public Law 98-473).

9 FAM 40.21(a) N9.4 Two Classes of Juvenile

Delinquents

(TL:VISA-46; 08-26-1991)

The Federal Juvenile Delinquency Act (FJDA) differentiates between two classes of juvenile delinquents. Therefore, each must be analyzed differently for the purposes of INA 212(a)(2)(A)(i)(I).

9 FAM 40.21(a) N9.4-1 Under Age 15

(CT:VISA-1318; 09-24-2009)

Juveniles, who were under the age of 15 at the time of omission of acts constituting a delinquency, are not to be considered as having been convicted of a crime. Therefore, no alien may be found *inadmissible* under INA 212(a)(2)(A)(i)(I) by reason of any offense committed prior to the alien's 15th birthday.

9 FAM 40.21(a) N9.4-2 Between Ages 15 and 18

(CT:VISA-1318; 09-24-2009)

Juveniles between the ages of 15 and 18 at the time of commission of an offense will not be considered to have committed a crime, and thus be *inadmissible* under INA 212(a)(2)(A)(i)(I), unless tried and convicted as an adult for a felony involving violence. A felony is defined in 18 U.S.C 1(1) as an offense punishable by death or imprisonment for a term exceeding one year. A crime of violence is defined in 18 U.S.C 16 as:

- (1) An offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another; or
- (2) Any offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

9 FAM 40.21(a) N9.5 Juveniles Demonstrating Patterns of Criminal Behavior

(CT:VISA-1318; 09-24-2009)

Any case in which an alien's misconduct as a juvenile over a period of time has demonstrated a pattern of criminal behavior must be brought to the attention of the examining physician for a possible finding of *inadmissibility*

under INA 212(a)(1).

9 FAM 40.21(A) N10 POLITICAL OFFENSES

(CT:VISA-1318; 09-24-2009)

- a. 22 CFR 40.21(a) states that the term political offenses includes “offenses that resulted in convictions obviously based on fabricated charges or predicated upon repressive measures against racial, religious, or political minorities.” This regulation incorporates language from the legislative history of the 1952 Act, and therefore reflects to some extent the original Congressional intent in adopting the political offense exemption. Based on this regulation, most political offense exemptions will involve cases where you determined that the alien was not guilty of the charges but was wrongly prosecuted because of political repression against racial, religious, or political minorities.
- b. The imposition of a cruel or unusual punishment, or of a punishment which is clearly disproportionate to the offense, can also be relevant to this consideration when there is evidence that the applicant was innocent of the charges. Absent evidence of political motivation for a wrongful prosecution, you cannot look behind a conviction to determine whether the applicant was guilty of the offense for purposes of determining 212(a)(2)(A)(i)(I) inadmissibility, although evidence of a wrongful conviction can be relevant to waiver considerations. The mere fact that an alien is or was a member of a racial, religious, or political minority shall not be considered as sufficient in itself to warrant a conclusion that the crime for which the alien was convicted was purely a political offense.
- c. It has been generally considered that the crimes of espionage, treason and sedition are “pure” political offenses. Convictions for these crimes will generally be eligible for the political offense exemption.
- d. You *may* request CA/VO/L/A to make a determination where there is any indication that the offense for which the alien was convicted was of a political nature, or prosecution and therefore was politically motivated.
- e. Many offenses that are political in nature do not involve moral turpitude. If the offense does not involve moral turpitude or the provisions of 212(a)(2)(B) (multiple criminal convictions), the applicant is not ineligible and it is not necessary to determine whether the offense is political in nature. Moreover, the Board of Immigration Appeals has determined that convictions for statutory crimes that are not crimes in the United States will not be recognized for U.S. immigration purposes. Therefore, many offenses with political implications such as illegal political campaigning or

labor organizing will not result in immigration consequences because they do not constitute crimes in the United States.

9 FAM 40.21(A) N11 CONVICTED WAR CRIMINALS

(CT:VISA-1318; 09-24-2009)

See 9 FAM 40.35(a) N3 *and* N6 for cases of persons convicted of war crimes.

9 FAM 40.21(A) N12 DEFINITIONS UNDER THE USA PATRIOT ACT

(CT:VISA-753; 06-29-2005)

The Department of Homeland Security (DHS) has established the following definitions for the purpose of adjudicating applications under the USA Patriot Act (Public Law 107-56).

9 FAM 40.21(a) N12.1 Specified Terrorist Attack

(TL:VISA-384; 04-03-2002)

Section 428 of the Patriot Act defines "specified terrorist activity" as any terrorist activity conducted against the government or people of the United States on September 11, 2001. This includes the attacks on the World Trade Center area and the Pentagon, as well as the crash of Flight 93 in Pennsylvania. It does not include the subsequent anthrax attacks or other previous or subsequent terrorist activities.

9 FAM 40.21(a) N12.2 Death as Defined Under the USA Patriot Act

(TL:VISA-384; 04-03-2002)

To demonstrate that a person was killed in the terrorist attacks against the United States on September 11, 2001, the following may be used:

- (1) Official death certificate listing the date of death as September 11, 2001, accompanied by other documents attributing the death to the attacks of September 11.

- (2) Interim death certificate issued by the State of New York listing the date of death as September 11, 2001.
- (3) Flight records, for deceased passengers on one of the four planes used in the attacks.
- (4) Public records listing the deceased as a victim of the September 11 attacks.
- (5) Other official or non-official documents.

9 FAM 40.21(a) N12.3 Disability as Defined Under the USA Patriot Act

(TL:VISA-384; 04-03-2002)

A licensed medical doctor or licensed psychiatrist must provide documentation that the physical or mental impairment of the principal applicant meets the definition of the term "disability" in section 12102(a)(2) of the Americans with Disability Act. "Disability" is therein defined as a "physical or mental impairment that substantially limits one or more of the major life activities of such individual."

9 FAM 40.21(a) N12.4 Loss of Employment as Defined Under the USA Patriot Act

(TL:VISA-384; 04-03-2002)

- a. The following may be used to demonstrate loss of employment due to the physical damage to, or destruction of, a business, which directly resulted from the terrorist attacks of September 11, 2001:
 - (1) Letter from the employer;
 - (2) Official records indicating that the business was completely destroyed; or
 - (3) Other documentation showing the complete destruction of the business.
- b. The Patriot Act notes that if the principal alien is able to continue in the employment of the business at a different location, after destruction on September 11, such an alien is not considered to have lost employment as a result of the September 11 attacks.

9 FAM 40.21(a) N12.5 Circumstances Preventing Timely Action in Applying For or Using Visas

(CT:VISA-1318; 09-24-2009)

Department of Homeland Security (DHS) has compiled a list of various events that aliens may use to support a claim for benefits under the Patriot Act:

- (1) Office closures;
- (2) Mail or courier service cessations or delays;
- (3) Airline flight cessations or delays; or
- (4) Other closures or delays affecting case processing or travel.