

name and position or other relationship with the employer must accompany the signature.

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

[62 FR 67564, Dec. 29, 1997]

§§ 40.42—40.49 [Reserved]

Subpart F—Labor Certification and Qualification for Certain Immigrants

§ 40.51 Labor certification.

(a) *INA 212(a)(5) applicable only to certain immigrant aliens.* INA 212(a)(5)(A) applies only to immigrant aliens described in INA 203(b)(2) or (3) who are seeking to enter the United States for the purpose of engaging in gainful employment.

(b) *Determination of need for alien's labor skills.* An alien within one of the classes to which INA 212(a)(5) applies as described in § 40.51(a) who seeks to enter the United States for the purpose of engaging in gainful employment, shall be ineligible under INA 212(a)(5)(A) to receive a visa unless the Secretary of Labor has certified to the Attorney General and the Secretary of State, that

(1) There are not sufficient workers in the United States who are able, willing, qualified, (or equally qualified in the case of aliens who are members of the teaching profession or who have exceptional ability in the sciences or the arts) and available at the time of application for a visa and at the place to which the alien is destined to perform such skilled or unskilled labor, and

(2) The employment of such alien will not adversely affect the wages and working conditions of the workers in the United States similarly employed.

(c) *Labor certification not required in certain cases.* A spouse or child accom-

panying or following to join an alien spouse or parent who is a beneficiary of a petition approved pursuant to INA 203(b)(2) or (3) is not considered to be within the purview of INA 212(a)(5).

[56 FR 30422, July 2, 1991, as amended at 61 FR 1835, Jan. 24, 1996]

§ 40.52 Unqualified physicians.

INA 212(a)(5)(B) applies only to immigrant aliens described in INA 203(b) (2) or (3).

[61 FR 1835, Jan. 24, 1996, as amended at 62 FR 67567, Dec. 29, 1997]

§ 40.53 Uncertified foreign health-care workers. [Reserved]

§§ 40.54—40.59 [Reserved]

Subpart G—Illegal Entrants and Immigration Violators

§ 40.61 Aliens present without admission or parole.

INA 212(a)(6)(A)(i) does not apply at the time of visa issuance.

[62 FR 67567, Dec. 29, 1997]

§ 40.62 Failure to attend removal proceedings.

An alien who without reasonable cause failed to attend, or to remain in attendance at, a hearing initiated on or after April 1, 1997, under INA 240 to determine inadmissibility or deportability shall be ineligible for a visa under INA 212(a)(6)(B) for five years following the alien's subsequent departure or removal from the United States.

[62 FR 67567, Dec. 29, 1997]

§ 40.63 Misrepresentation; Falsely claiming citizenship.

(a) *Fraud and misrepresentation and INA 212(a)(6)(C) applicability to certain refugees.* An alien who seeks to procure, or has sought to procure, or has procured a visa, other documentation, or entry into the United States or other benefit provided under the INA by fraud or by willfully misrepresenting a material fact at any time shall be ineligible under INA 212(a)(6)(C); *Provided*, That the provisions of this paragraph are not applicable if the fraud or misrepresentation was committed by

an alien at the time the alien sought entry into a country other than the United States or obtained travel documents as a bona fide refugee and the refugee was in fear of being repatriated to a former homeland if the facts were disclosed in connection with an application for a visa to enter the United States: *Provided further*, That the fraud or misrepresentation was not committed by such refugee for the purpose of evading the quota or numerical restrictions of the U.S. immigration laws, or investigation of the alien's record at the place of former residence or elsewhere in connection with an application for a visa.

(b) *Misrepresentation in application under Displaced Persons Act or Refugee Relief Act.* Subject to the conditions stated in INA 212(a)(6)(c)(i), an alien who is found by the consular officer to have made a willful misrepresentation within the meaning of section 10 of the Displaced Persons Act of 1948, as amended, for the purpose of gaining admission into the United States as an eligible displaced person, or to have made a material misrepresentation within the meaning of section 11(e) of the Refugee Relief Act of 1953, as amended, for the purpose of gaining admission into the United States as an alien eligible thereunder, shall be considered ineligible under the provisions of INA 212(a)(6)(C).

(c) *Waiver of ineligibility—INA 212(i).* If an immigrant applicant is ineligible under INA 212(a)(6)(C) but is qualified to seek the benefits of INA 212(i), the consular officer shall inform the alien of the procedure for applying to INS for relief under that provision of law. A visa may not be issued to the alien until the consular officer has received notification from INS of the approval of the alien's application under INA 212(i).

[56 FR 30422, July 2, 1991, as amended at 61 FR 1835, Jan. 24, 1996]

§ 40.64 Stowaways.

INA 212(a)(6)(D) is not applicable at the time of visa application.

§ 40.65 Smugglers.

(a) *General.* A visa shall not be issued to an 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.

(b) *Waiver of ineligibility—INA 212(d)(11).* If an immigrant applicant is ineligible under INA 212(a)(6)(E) but is qualified to seek the benefits of INA 212(d)(11), the consular officer shall inform the alien of the procedure for applying to INS for relief under that provision of law. A visa may not be issued to the alien until the consular officer has received notification from INS of the approval of the alien's application under INA 212(d)(11).

§ 40.66 Subject of civil penalty.

(a) *General.* An alien who is the subject of a final order imposing a civil penalty for a violation under INA 274C shall be ineligible for a visa under INA 212(a)(6)(F).

(b) *Waiver of ineligibility.* If an applicant is ineligible under paragraph (a) of this section but appears to the consular officer to meet the prerequisites for seeking the benefits of INA 212(d)(12), the consular officer shall inform the alien of the procedure for applying to INS for relief under that provision of law. A visa may not be issued to the alien until the consular officer has received notification from INS of the approval of the alien's application under INA 212(d)(12).

[62 FR 67567, Dec. 29, 1997]

§ 40.67 Student visa abusers.

An alien ineligible under the provisions of INA 212(a)(6)(G) shall not be issued a visa unless the alien has complied with the time limitation set forth therein.

[62 FR 67568, Dec. 29, 1997]

§ 40.68 Aliens subject to INA 222(g).

An alien who, under the provisions of INA 222(g), has voided a nonimmigrant visa by remaining in the United States beyond the period of authorized stay is ineligible for a new nonimmigrant visa unless the alien complies with the requirements in 22 CFR 41.101 (b) or (c) regarding the place of application.

[63 FR 671, Jan. 7, 1998]