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Part IV

Department of State

Bureau of Consular Affairs

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22 CFR Parts 40 and 42

Visas: Documentation of Immigrants Under the Immigration and Nationality Act and Registration for the Diversity Immigrant (DV-1) Visa Program; Final Rule and Notice

DEPARTMENT OF STATE

Bureau of Consular Affairs

22 CFR Parts 40 and 42

[Public Notice 1973]

Visas: Documentation of Immigrants Under the Immigration and Nationality Act As Amended

AGENCY: Bureau of Consular Affairs, Department of State.

ACTION: Final rule.

SUMMARY: This final rule promulgates regulations to implement sections 201(a)(3), 201(e), 203(c) and 204(a)(1)(G) of the Immigration and Nationality Act, as amended. These sections of law establish, effective for Fiscal Year 1995 and thereafter, an annual immigration limit of 55,000 for diversity immigrants, aliens who are natives of countries determined by specified mathematical computations based upon population totals and totals of specified immigrant admissions over a five-year period.

EFFECTIVE DATE: May 2, 1994.

FOR FURTHER INFORMATION CONTACT: Cornelius D. Scully, III, Director, Office of Legislation, Regulations, and Advisory Assistance, Bureau of Consular Affairs, (202) 663-1184.

SUPPLEMENTARY INFORMATION:

Background

Public notice 1925 at 58 FR 68791, December 29, 1993, proposed amendments to 22 CFR part 42 to implement section 201(a)(3), 201(e), 203(c), 203(e)(2), and 204(a)(1)(G) of the Immigration and Nationality Act, as amended. These sections were added to the Act by Public Law 101-649, the Immigration Act of 1990, but with a delayed effective date. Taken together, they establish, effective for Fiscal Year 1995 and thereafter, an annual numerical limitation of 55,000 for diversity immigrants.

Aliens who are natives of countries determined by specified mathematical computations based upon population totals and totals of specified immigrant admissions will be able to compete for immigration under this limitation. Selection of immigrants under this limitation will be at random from among those who submit petitions for consideration during the application period established by the Department and who meet certain requirements as to education or occupational qualification.

The Public notice which accompanies this Final Rule includes (1) the dates of the application period for Fiscal Year 1995; (2) the exact mailing addresses to be used; (3) a detailed description of the application process; (4) a listing of the countries whose natives may compete for visas for Fiscal Year 1995, including the region in which each country is located for this purpose; and (5) the apportionment of the 55,000 overall limitation among the six regions specified by statute. The list of participating countries and the apportionment of the overall limitation among the various regions were prepared by the Immigration and Naturalization Service, as contemplated by section 203(c)(1).

Analysis of Comments

During the comment period the Department received five timely comments. A discussion of the comments, by topic, is set forth below.

Size of Mailing Envelopes

One commenter noted that the requirements concerning the size of the envelope in which applications for selection must be mailed do not comport with the size of standard business envelopes generally available in office supply and stationery stores in the United States. Upon inquiry, the Department has confirmed that the commenter is correct and is amending that portion of the regulations to provide that the envelope must be between 6 and 10 inches (15 cm to 25 cm) in length. The requirements as to width--3 and one-half to 4 and one-half inches (9 cm to 11 cm) remain unchanged.

Education Requirement

Two commenters found it unfair and unduly restrictive that the proposed definition of ``high school education or its equivalent'' excluded from consideration passage of the G.E.D. (General Educational Development) test. The proposed definition of this phrase was formulated specifically to require actual successful completion of a twelve year course of elementary and secondary education in the United States or successful completion of a comparable course of elementary and secondary study in a foreign country. After consideration of the comments, the Department has decided not to modify the proposed definition.

As was pointed out in the discussion of the proposed regulations, the Department believes that requiring successful completion of a formal course of study is consistent with Congressional intent in this respect because of the inclusion of two years experience in an occupation requiring two years experience or training as an alternative basis for qualification. The Department does not believe that the Congress intended to allow aliens who had neither completed elementary and secondary education nor had such work experience to qualify under this program.

Moreover, the G.E.D. is an American test. The Department does not know whether there are counterparts in other countries and, if so, in how many countries, nor do the commenters address this question. If it should turn out that few, if any, foreign countries have counterparts of the G.E.D., the only class of aliens who would be affected in any way by a failure to recognize passage of the G.E.D. as the equivalent of a high school education would be those in the United States who were not permanent residents, who had failed to complete high school, whose occupations did not meet the work experience requirement, but who had passed the G.E.D., almost certainly a statistically insignificant class when compared with the total number of potential applicants world-wide. For these reasons, and in light of the added administrative

complications which might result, the Department does not believe that an amendment of the definition of ``high school education or its equivalent'' is warranted.

One commenter was concerned that the Department had failed to make provision for a student who is able to complete his or her elementary and secondary education in fewer than the normal twelve years. The Department finds this concern to be unfounded, even puzzling. It is true that occasionally a student may do so. It is also true that some students, for a variety of reasons, require thirteen or fourteen years to complete a twelve-year course of study. The proposed definition does not require that the course of study have been completed in twelve years; merely that it have been successfully completed. Thus, the genius who completes it more quickly, the student who completes it in the normal time period, and the student experiencing difficulties who requires more than the normal time to do so will all have met the requirement.

It had not occurred to the Department that the words employed in the proposed definition would be interpreted to mean that the twelve-year course of elementary and secondary study must have been completed in precisely twelve years, neither more nor less. Since, however, at least one reader of the proposed definition did so interpret them, the Department has decided to amend the definition to eliminate this interpretation by substituting for ``completion of twelve years of elementary and secondary education in the United States'' the phrase ``completion of a twelve-year course of elementary and secondary education in the United States.''

The same commenter also suggested that the Department should allow for findings that the course content and quality of instruction in a particular foreign school system might make eight or nine years of schooling in that system the qualitative equivalent of twelve years of instruction in the United States school system. The Department categorically rejects the notion of introducing into this program value judgments of that kind. The Department does not believe that the Congress intended that such value judgments be made. In any event, the Department wishes to make it absolutely clear that under no circumstances will it entertain any such claims.

Two commenters voiced concern over the question of what documentation will constitute evidence of successful completion of the required course of study. A primary document would obviously be a certificate of completion--in the United States, a high school diploma. School transcripts would serve the same purpose. In general, any documentation on this point will be acceptable provided that it was issued by the person or organization responsible for maintaining such records and describes with specificity the course of study completed.

One commenter asked for confirmation that the ``Junior Certificate'' issued by the school system in the Republic of Ireland will constitute evidence of completion of a foreign course of study comparable to twelve years of elementary and secondary education in the United States. Information available to the Department indicates that the Junior Certificate is issued to those who have completed only eleven years of the normal twelve year course of elementary and secondary education in the Republic of Ireland. In light of this information, the Department cannot accept the representation that the Junior Certificate meets the requirements set forth in the regulations.

Work Experience

Two commenters addressed the work experience requirement. One commenter felt that the requirement that the experience have been gained during the five-year period immediately preceding application for a visa was unduly restrictive. Whether or not that is so, the requirement is a statutory one and not one which the Department is entitled to modify or eliminate by regulation.

The other commenter objected to the Department's proposal to rely upon the Department of Labor's Dictionary of Occupational Titles (DOT) in determining which occupations meet the statutory requirement that the occupation be one requiring ``at least two years training or experience.'' The commenter urged that an applicant be allowed to present evidence in support of the proposition that his or her occupation is such an occupation. The Department rejects this suggestion.

This requirement is clearly modelled upon the distinction provided in section 203(b)(3) of the Act between ``skilled workers'' and ``other workers.'' In implementing that distinction, the Immigration and Naturalization Service relies upon determinations made with reference to the DOT. The Department can find no basis for adopting a different standard here.

The Department does recognize that there could be occupations of such recent vintage (because of technological change) that they are not listed in the most recent edition of the DOT. In such a case, but only in such a case, the Department will consider documentation submitted by

the applicant on the question.

Submission of Supporting Documents

Two commenters suggested that all aliens competing for selection be required to submit documentation of their education or work experience with the application for selection. One of the two asserted that such a requirement would deter frivolous applications; the other did not recite a reason for the suggestion.

As was pointed out in the discussion of the proposed regulations, the Department considered this option as one possible way to implement the education/work experience requirement. It is possible that some frivolous applications would thereby be deterred, although the Department is less sanguine on that point than is the commenter. Nonetheless, the administrative considerations which led to the earlier rejection of that alternative are so strong that the Department feels it necessary to again reject the suggestion.

Definition of ``Native''

One commenter again requested that the definition of ``native'' be amended to allow for considering citizens of a country as ``natives'' of that country. This issue has previously been raised and discussed in connection with the promulgation of regulations implementing the earlier time-limited programs to which this program is similar. As it has on the earlier occasions, the Department rejects the suggestion, since it is inconsistent with the intent of the Congress in this respect and would, in any event, substantially complicate the administration of the numerical limitations and become an inducement to fraud. Because of the persistence of this issue, the Department believes it appropriate to discuss it in some detail.

Numerical limitations on immigration to the United States were first imposed by the First Quota Act, the Act of May 19, 1921. That Act specified that ``quota nationality'' was to be determined by country of birth. The Immigration Act of 1924 continued that basic rule, while allowing for according a parent's quota nationality to an accompanying child or a husband's quota nationality to an accompanying wife.

The same rule was carried forward into the Immigration and Nationality Act of 1952, except that the phrase ``quota nationality'' was replaced by ``quota chargeability.''. The two earlier exceptions were modernized to remove discrimination because of sex--the benefit which had flowed only to a wife from a husband was expanded to flow to either spouse from the other--and a third was added to allow an alien born in a quota area in which neither parent was born or had a residence to be charged against the quota of either parent. These rules were carried forward into the current numerical limitation system in the basic reform of the numerical limitations in 1965, except that the phrase ``quota chargeability'' was replaced by ``foreign state chargeability.''

Thus, it is clear that the Congress has always intended that quota nationality, quota chargeability, foreign state chargeability be determined by place of birth with exceptions only as specifically defined by law. The word ``native'' made its appearance in 1965 and in the context clearly means ``chargeable to'' a foreign state according to the rules, as described.

Until the establishment of the NP-5 program in 1986, foreign state chargeability was not tied to qualification to compete for immigration, but rather to possible variations in the length of time a qualified immigrant would have to wait for his or her turn to be reached under the applicable numerical limitation. Under the NP-5, OP-1, AA-1, and now the forthcoming DV-1 programs, however, entitlement to compete for consideration itself is based upon foreign state chargeability. Only natives of specified foreign states have been entitled even to compete for consideration. It is this fact that heightened interest in the definition of ``native'' and which motivated the Department, first, to discuss the subject in the commentary accompanying its implementing regulations and, then, to incorporate a definition of the word into the regulations implementing the AA-1 program. Now that the AA-1 program is drawing to a close and since the implementing regulations will be revoked after the program ends, the Department concluded that the definition should be incorporated into the basic immigrant visa regulations in part 42.

Because of the long history set forth briefly above, the Department believes that it lacks the authority to define ``native'' otherwise than it has done. In addition, the Department believes that to define ``native'' as based upon citizenship would substantially complicate the administration of the numerical limitations on immigration and could even be an inducement to fraudulent activity. An individual may have or acquire several citizenships during a lifetime and can also lose citizenships previously acquired, but can have only one place of birth. An attempt to keep track of changes in citizenship in the numerical

limitation system would complicate the system. Moreover, allowing citizenship to become the basis for foreign state chargeability could motivate schemes to grant or obtain citizenship for the sole purpose of gaining benefits under the immigration law. The Department has already noted a number of cases in which countries seeking foreign investment have, in effect, sold citizenship to foreign investors as an inducement to invest. Interestingly enough, in several of these situations there are documented cases of aliens using such schemes for the primary purpose of obtaining the citizenship as part of a scheme to procure entry into the United States fraudulently.

In summary, the Department believes (1) that defining ``native'' as proposed herein is most consistent with the intent of the law as it now stands; and (2) that introducing citizenship into the definition or otherwise making it a basis for determining foreign state chargeability would have adverse consequences for the orderly and effective administration of the immigration laws. In this connection, the Department has decided to modify 22 CFR 33(b) to add to the items of information to be included on the petition the country of which the alien claims to be a native, if other than the country of birth.

Confidentiality of Applications

One commenter repeated a request that has been made in connection with the NP-5, OP-1, and AA-1 programs--that the Department guarantee that no information from application forms will be given to anyone outside the Department of State, including the Immigration and Naturalization Service. The Department has previously taken the position that applications for such programs constitute records relating to the issuance and refusal of visas within the meaning of section 222(f) of the Immigration and Nationality Act. Information from such applications will not, therefore, be made available except as authorized therein. This generally means that such information will not be made public except in connection with court proceedings.

On the other hand, section 222(f) authorizes the use of such information for the formulation, amendment, administration, and enforcement of the immigration and other laws of the United States. Accordingly, should the Immigration and Naturalization Service desire such information for such purposes, the Department would ordinarily furnish it.

Marking of Envelopes

One commenter expressed the view that an applicant should not be disqualified for failure to list on the mailing envelope the country of which he or she is a native. In past programs of this kind, the Department has not been punctilious about disqualifying applications which did not have this information on the mailing envelope. The public should understand, however, that in the DV-1 program the Department will disqualify all such applications.

The entire system for processing applications depends upon the presence of this information, since envelopes received during the mail-in period must be sorted into batches according to region and assigned sequential numbers by region. Without the country of which the applicant is a native on the mailing envelope the sorting and numbering process would become unbearably burdensome. Thus, envelopes which do not bear this item of information cannot, and will not, be processed for consideration under the program.

Other Matters

One commenter urged that applications be accepted by FAX during the application periods. The Department declines to consider such a procedure and will require that all applications be mailed as specified.

One commenter noted that there appears to be no special provisions for waiving normally applicable grounds of exclusion for DV-1 applicants, as there were under the NP-5 extension and AA-1 programs. In addition, the Department has received a number of telephone inquiries on this subject. It is important to understand that there are, indeed, no such provisions. Specifically, applicants under the NP-5 program extension and under the AA-1 program were not subject to section 212(e) of the Act (the two-year foreign residence requirement applicable to some nonimmigrant exchange visitors) and could receive waivers of ineligibility under section 212(a)(6)(C) unless the Attorney General found it in the national interest to deny a waiver in an individual case. Neither of these provisions applies to DV-1 applicants who will have to meet all normally applicable rules for qualification to receive an immigrant visa.

This final rule is not expected to have a significant impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. In addition, this rule does not impose

information collection requirements under the provisions of the Paperwork Reduction Act of 1980. This regulation is exempt from review under Executive Order 12866, but was reviewed in the proposed rule stage by OMB under Executive Order 12866 and has been reviewed internally by the Department to ensure consistency with the objectives thereof.

List of Subjects in 22 CFR Parts 40 and 42

Aliens, Definitions, Documentation, Immigrants, Numerical limitations, Registration, Visas.

Accordingly, 22 CFR parts 40 and 42 are amended to read as follows:

PART 40--[AMENDED]

1. The authority citation for part 40 continues to read as follows:

Authority: Sec. 104, 66 Stat. 174, 8 U.S.C. 1104; Sec. 109(b)(1), Sec. 131 of Public Law 101-649, 104 Stat. 4997.

2. Section 40.1 is amended by redesignating paragraphs (l) through (r) as paragraphs (m) through (s), respectively, and by adding a new paragraph (l) to read as follows:

Sec. 40.1 Definitions.

* * * * *

(l) Native shall mean born within the territory of a foreign state, or entitled to be charged for immigration purposes to that foreign state pursuant to section 202(b) of the Immigration and Nationality Act, as amended.

PART 42--[AMENDED]

3. The authority citation for part 42 is revised to read as follows:

Authority: Sec. 104, 66 Stat. 174, 8 U.S.C. 1104; Sec. 109(b)(1); 91 Stat. 847; Sec. 131, 104 Stat. 4997. 8 U.S.C. 1153 note.

Section 42.33 is added to read as follows:

Sec. 42.33 Diversity Immigrants.

(a) General. (1) Eligibility to compete for consideration under section 203(c). An alien shall be eligible to compete for consideration for visa issuance under INA 203(c) during a fiscal year only if he or she is a native of a low-admission foreign state, as determined by the Attorney General pursuant to INA 203(c)(1)(E)(i), with respect to the fiscal year in question; and if he or she has at least a high school education or its equivalent or, within the five years preceding the date of application for a visa, has two years of work experience in an occupation requiring at least two years training or experience.

(2) Definition of high school education or its equivalent. For the purposes of this section, the phrase high school education or its equivalent shall mean successful completion of a twelve-year course of elementary and secondary education in the United States or successful completion in another country of a formal course of elementary and secondary education comparable to completion of twelve years' elementary and secondary education in the United States.

(3) Determinations of work experience. The most recent edition of the Dictionary of Occupational Titles published by the Employment and Training Administration, United States Department of Labor, shall be controlling in determining whether a particular occupation is one ``which requires at least 2 years of training or experience'' as provided in INA 203(c)(2).

(4) Limitation on number of petitions per year. No more than one petition may be submitted by, or on behalf of, any alien for consideration during any single fiscal year. If two or more petitions for any single fiscal year are submitted by, or on behalf of, any alien, all such petitions shall be void and the alien by or for whom submitted shall not be eligible for consideration for visa issuance during the fiscal year in question.

(5) Northern Ireland. For purposes of determining eligibility to file a petition for consideration under INA 203(c) for a fiscal year, the districts comprising that portion of the United Kingdom of Great Britain and Northern Ireland, known as ``Northern Ireland'', shall be

treated as a separate foreign state. The districts comprising ``Northern Ireland'' are Antrim, Ards, Armagh, Ballymena, Ballymoney, Banbridge, Belfast, Carrickfergus, Castlereagh, Coleraine, Cookstown, Craigavon, Down, Dungannon, Fermanagh, Larne, Limavady, Lisburn, Londonderry, Magherafelt, Moyle, Newry and Mourne, Newtownabbey, North Down, Omagh, and Strabane.

(b) Petition for consideration--(1) Form of Petition. An alien claiming to be entitled to compete for consideration under INA 203(c) shall file a petition for such consideration. The petition shall consist of a sheet of paper on which shall be typed or legibly printed in the Roman alphabet the petitioner's name; date and place of birth (including city and county, province or other political subdivision, and country); the country of which the alien claims to be a native, if other than the country of birth; name[s] and date[s] and place[s] of birth of spouse and child[ren], if any; a current mailing address and location of consular office nearest to current residence or, if in the United States, nearest to last foreign residence prior to entry into the U.S.

(2) Submission of petition--(i) General. A petition for consideration for visa issuance under INA 203(c) shall be submitted by mail to the address designated by the Department for that purpose. The Department shall establish a period of not less than thirty days during each fiscal year during which petitions for consideration during the next following fiscal year may be submitted. Each fiscal year, the Department shall give timely notice of both the mailing address and the exact dates of the application period, through publication in the Federal Register and such other methods as will ensure the widest possible dissemination of the information, both abroad and within the United States.

(ii) Form of mailing. Petitions for consideration under this section shall be submitted by normal surface or air mail only. Petitions submitted by hand, telegram, FAX, or by any means requiring any form of special handling or acknowledgement of receipt will not be given consideration. The petitioner shall type or print legibly, using the Roman alphabet, on the upper left-hand corner of the envelope in which the petition is mailed his or her full name and mailing address, and the name of the country of which the petitioner is a native, as shown on the petition itself. Envelopes shall be between 6 and 10 inches (15 cm to 25 cm) in length and between 3 and one-half and 4 and one-half inches (9 cm to 11 cm) in width. Envelopes not bearing this information and/or not conforming to the restrictions as to size shall not be processed for consideration.

(c) Processing of petitions. Envelopes received at the mailing address during the application period established for the fiscal year in question and meeting the requirements of subsection (b) shall be assigned a number in a separate numerical sequence established for each regional area specified in INA 203(c)(1)(F). Upon completion of the numbering of all envelopes, all numbers assigned for each region shall be separately rank-ordered at random by a computer using standard computer software for this purpose. The Department shall then select in the rank orders determined by the computer program a quantity of envelopes for each region estimated to be sufficient to ensure, to the extent possible, usage of all immigrant visas authorized under INA 203(c) for the fiscal year in question.

(d) Approval of petitions. Envelopes selected pursuant to paragraph (c) of this section shall be opened and reviewed. Petitions which are legible and contain the information specified in paragraph (b) of this section shall be approved for further consideration.

(e) Validity of approved petitions. A petition approved pursuant to paragraph (d) of this section shall be valid for a period not to exceed Midnight of the last day of the fiscal year for which the petition was submitted.

(f) Order of consideration. Further consideration for visa issuance of aliens whose petitions have been approved pursuant to paragraph (d) of this section shall be in the regional rank orders established pursuant to paragraph (c) of this section.

(g) Further processing. The Department shall inform applicants whose petitions have been approved pursuant to paragraph (d) of this section of the steps necessary to meet the requirements of INA 222(b) in order to apply formally for an immigrant visa.

(h) Maintenance of information concerning petitioners who are visa recipients. (1) The Department shall compile and maintain the following information concerning petitioners to whom immigrant visas are issued under INA 203(c):

(i) age;

(ii) country of birth;

(iii) marital status;

(iv) sex;

(v) level of education; and

(vi) occupation and level of occupational qualification.

(2) Names of visa recipients shall not be maintained in connection

with this information and the information shall be compiled and maintained in such form that the identity of visa recipients cannot be determined therefrom.

4. Section 42.51(b) is revised to read as follows:

Sec. 42.51 Department control of numerical limitations.

* * * * *

(b) Allocation of numbers. Within the foregoing limitations, the Department shall allocate immigrant visa numbers for use in connection with the issuance of immigrant visas and adjustments based on the chronological order of the priority dates of visa applicants classified under INA 203 (a) and (b) reported by consular officers pursuant to Sec. 42.55(b) and of applicants for adjustment of status as reported by officers of the INS, taking into account the requirements of INA 202(e) in such allocations. In the case of applicants under INA 203(c), visa numbers shall be allocated within the limitation for each specified geographical region in the random order determined in accordance with sec. 42.33(c) of this Part.

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5. Section 42.54(a)(2) is revised to read as follows:

Sec. 42.54 Order of consideration.

(a) * * *

(2) Beginning with fiscal year 1995, in the random order established by the Secretary of State for each region for the fiscal year for applicants entitled to status under INA 203(c).

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Dated: March 25, 1994.

David L. Hobbs,

Acting Assistant Secretary for Consular Affairs.

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