

## **9 FAM 42.33 NOTES**

*(CT:VISA-1555; 09-30-2010)*  
*(Office of Origin: CA/VO/L/R)*

### **9 FAM 42.33 N1 BACKGROUND**

*(CT:VISA-1478; 08-26-2010)*

- a. Section 131 of the Immigration Act of 1990 (Public Law 101-649) amended INA 203 (8 U.S.C. 1153) to provide for a new class of immigrants known as "diversity immigrants" (DV immigrants). The amendment established an annual numerical limitation of 55,000 DV immigrants effective for fiscal year 1995 and thereafter. Aliens who are natives of countries determined by the Attorney General through application of a mathematical formula specified in INA 203(c)(1)(A) (8 U.S.C. 1153(c)(1)(A)) to be "low admission" countries may compete for immigration under this limitation. INA 203(c)(1) (8 U.S.C. 1153(c)(1)) requires a separate registration of all competing aliens for each fiscal year.
- b. INA 203(c)(1)(A) (8 U.S.C. 1153(c)(1)(A)) requires the Attorney General to determine the actual number of immigrant admissions from each foreign country for the previous five year period. The formula identifies both high and low admission regions and high and low admission foreign states. A greater share of the available visa numbers goes to low admission regions. High admission states are excluded from the program.
- c. In November 1997, Congress passed Public Law 105-100, the Nicaraguan Adjustment and Central American Relief Act (NACARA). With NACARA, Congress stipulated that beginning with the 1999 Diversity Immigrant Visa Program (DV-99), and as long as necessary, up to 5,000 of the 55,000 annually-allocated diversity visas (DV) can be made available for use under the NACARA program.

### **9 FAM 42.33 N2 REQUIREMENTS FOR DIVERSITY IMMIGRANT PROGRAM**

*(CT:VISA-1478; 08-26-2010)*

To qualify under INA 203(c) (8 U.S.C. 1153(c)) as a diversity immigrant, the

following requirements must be met:

- (1) The alien must be a native of, or chargeable to, a diversity country (see 9 FAM 42.33 N4); and
- (2) The alien must have at least a high school education or equivalent (see 9 FAM 42.33 N7); or
- (3) The alien must have, within five years of the date of application for a diversity immigrant visa under INA 203(c) (8 U.S.C. 1153(c)), at least two years of work experience in an occupation, which requires at least two years of training or experience. (See 9 FAM 42.33 N8.)

## **9 FAM 42.33 N3 DIVERSITY COUNTRIES**

### **9 FAM 42.33 N3.1 Formula**

*(CT:VISA-910; 10-23-2007)*

- a. The Attorney General is required to determine total admissions of preference and immediate relative (IR) immigrants over the most recent five-year period for which statistics are available, worldwide total, by region, and by individual foreign state. Using these figures, the Attorney General is to identify both high admission regions and high admission foreign states. A high admissions region is a region whose admission total is greater than one-sixth of the worldwide total. A foreign state whose admissions total is greater than 50,000 is a high admission foreign state.
- b. Using available estimates, the Attorney General must then determine the population of each of the six regions (excluding the population of any high admission foreign state) and use those totals to determine the apportionment of the 55,000 worldwide DV limitations. Quotas for the six regions will be established. Natives of these regions compete for that portion of the total established for that region. Any unused portion of a regional quota is distributed proportionally among the other regions. High admission states are excluded entirely from the apportionment. No one country's nationals may receive more than 7% of the available visas in any one year.

### **9 FAM 42.33 N3.2 Qualifying Countries**

*(CT:VISA-910; 10-23-2007)*

INA 203(c) (8 U.S.C. 1153(c)) provides that the number of visas made available to natives of high admission countries is zero. Department regulations, therefore, prohibit natives of such countries from competition

for diversity visas (DV). Department of Homeland Security (DHS) will determine annually the list of ineligible countries. The list is subject to change annually.

## **9 FAM 42.33 N4 NATIVE**

### **9 FAM 42.33 N4.1 Regulatory Definition**

*(CT:VISA-1478; 08-26-2010)*

"Native" ordinarily means both someone born within a particular country, regardless of the individual's current country of residence or nationality. "Native" can also mean someone entitled to be "charged" to a particular country under the provisions of INA 202(b) (8 U.S.C. 1152(b)).

### **9 FAM 42.33 N4.2 Chargeability**

*(CT:VISA-1555; 09-30-2010)*

As stated in the regulatory definition, the normal rules of chargeability apply to INA 203(c) (8 U.S.C. 1153(c)) immigrants. Many applicants may seek beneficial treatment from the rules of cross chargeability, as in the following examples:

- (1) A spouse or child born in a country, which is not among those for which DV visas are available, may use the principal registrant's chargeability when they are accompanying or following-to-join;
- (2) A child born in a non-qualifying country in which neither parent was born nor resident at the time of the child's birth, may claim the birthplace of either parent;
- (3) A *principal registrant* born in a country, which is not among those for which DV visas are available, and the spouse who was born in a qualifying country, may be issued DV visas, provided the relationship was established prior to submitting the entry. In such instances, however, both applicants are considered principal applicants for the purpose of cross-chargeability and must be issued visas and apply for admission to the United States simultaneously.

### **9 FAM 42.33 N4.3 Errors in Choice of Country of Chargeability**

*(CT:VISA-1478; 08-26-2010)*

If the entrant chooses the wrong country of chargeability at the time of the initial entry, the error will generally be disqualifying. However, if a DV

applicant chooses a country of chargeability during DV registration that is within the same geographic region (one of the six) as the correct country of chargeability, and you determine that the applicant gained no benefit from his or her error, you may continue processing the application.

## **9 FAM 42.33 N5 PETITIONS/APPLICATIONS**

### **9 FAM 42.33 N5.1 Required Information**

*(CT:VISA-1478; 08-26-2010)*

Each year, the Department of State will publish rules for the next fiscal year's DV program in the Federal Register. Rules for a DV program in any fiscal year stipulate what information must be included on the DV electronic entry form, such as name, photo requirement, etc., as well as other requirements for the program and the DV lottery registration Web site. The Consular Affairs Web site on Visa Travel remains the best source of information on entry and eligibility requirements as well as on qualifying countries. Entries lacking the required information or photos will be rejected by the registration Web site or disqualified at a later date during processing by the Kentucky Consular Center (KCC).

### **9 FAM 42.33 N5.2 Petition/Application Validity**

#### **9 FAM 42.33 N5.2-1 General**

*(CT:VISA-1478; 08-26-2010)*

Under INA 204(a)(1)(I)(ii)(II) (8 U.S.C. 1154(a)(1)(I)(ii)(II)), persons registered as DV immigrants are entitled to apply for visa issuance only during the fiscal year for which the application was submitted. The petition is valid until midnight of the last day of the fiscal year for which the petition was submitted. There is no carry-over of benefit into another year for persons who do not receive a visa during the fiscal year for which they registered. Following-to-join derivative visas must be issued during the same fiscal year as that of the principal beneficiary.

#### **9 FAM 42.33 N5.2-2 In Death of Principal Beneficiary and/or Applicant**

*(TL:VISA-374; 03-20-2002)*

The death of the principal beneficiary and/or applicant shall result in the automatic revocation of the application. Thereafter, derivative beneficiaries are no longer entitled to the DV classification.

## **9 FAM 42.33 N6 REGISTRATION**

*(CT:VISA-745; 06-09-2005)*

Diversity Visa (DV) entries are processed at the Kentucky Consular Center (KCC).

### **9 FAM 42.33 N6.1 Registration Dates**

*(CT:VISA-910; 10-23-2007)*

We will establish a period for the submission of DV entries of at least 30 days each fiscal year in which the lottery will be conducted. To ensure wide dissemination of the information both abroad and in the United States, we will provide timely notice of the program's rules and the exact dates of the registration period through publication in the Federal Register and by other methods.

### **9 FAM 42.33 N6.2 Number of Entries**

*(CT:VISA-745; 06-09-2005)*

- a. Only one entry by or for each person is allowed during each registration period. Submission of more than one entry disqualifies the applicant from registration. Applicants may be disqualified at any time if more than one entry is discovered. Applicants may prepare and submit their own entries, or have someone submit the entry for them.
- b. Husband and wife, if otherwise qualified, may each submit one application. If either is registered, the other is entitled to derivative status.

### **9 FAM 42.33 N6.3 Form of Submission**

*(CT:VISA-910; 10-23-2007)*

Entries must be submitted electronically during the specified registration period at the Department's designated Web site.

### **9 FAM 42.33 N6.4 Registration Process**

*(CT:VISA-1555; 09-30-2010)*

- a. Entries received during the designated registration period for the DV program will be separated into one of six geographic regions. At the end of the registration period, a computer will randomly select numbers. Within each region, the first entry randomly selected will be the first case registered, the second *entry* selected the second registration, etc. All entries successfully received during the registration period will have an

equal chance of selection within the respective region.

- b. When a case is selected for additional processing, the KCC will send the applicant a notification letter with instructions on how to make a formal visa application. (See 9 FAM 42.33 PN3.3.)

## **9 FAM 42.33 N6.5 Principal Registrants Under Age 18**

*(CT:VISA-745; 06-09-2005)*

Although there is **no** minimum age for submission of an application for registration, the requirement for a high school education or work experience will effectively disqualify most persons under age 18.

## **9 FAM 42.33 N6.6 Derivative Status**

*(CT:VISA-1555; 09-30-2010)*

- a. Applicants must include on their initial entry their spouse and all natural children, as well as legally-adopted children and stepchildren, who are unmarried and under the age of 21 as of the date of the initial entry.
- b. *By regulation, applicants are not required to include spouses and children who are already U.S. citizens or Legal Permanent Residents (LPRs) on the registration. Applicants are nevertheless instructed to include all such family members in their registration, to ensure that all family members may qualify for visas in the event they do not have LPR or U.S. citizen status. However, a failure to include on the registration spouses and children who are in fact U.S. citizens or Legal Permanent Residents (LPRs) cannot be used as grounds for denial.*
- c. You must deny the applications of registrants who list on their Form DS-230, Application for Immigrant Visa and Alien Registration, or their Form DS-260, Online Application for Immigrant Visa and Alien Registration, a spouse or child who was not included in their initial entry, unless such spouse or child was acquired subsequent to submission of qualifying DV entry. The spouse of a principal alien, if acquired after registration, and prior to the principal alien's admission, or the child of a principal alien, if the child was born after registration or is the issue of a marriage which took place after registration and prior to the principal alien's admission to the United States, although not named on an application, is entitled to derivative DV status.
- d. If post believes a case merits issuance despite apparent failure to comply with this instruction, post can submit the case for an advisory opinion (AO) to the Advisory Opinions Division (CA/VO/L/A).

## **9 FAM 42.33 N7 "HIGH SCHOOL EDUCATION OR EQUIVALENT"**

*(CT:VISA-745; 06-09-2005)*

The consular office shall adjudicate the applicant's qualifications under this requirement. In order to register for the DV program, the alien need not prove that this requirement is met. The applicant must, however, meet this requirement at the time of visa application.

### **9 FAM 42.33 N7.1 Definitions**

*(CT:VISA-910; 10-23-2007)*

The Department's interpretation of the term "high school education or its equivalent" means successful completion of a:

- (1) Twelve-year course of elementary and secondary study in the United States; or
- (2) Formal course of elementary and secondary education comparable to completion of 12 years elementary or secondary education in the United States. Because a United States high school education is sufficient in itself to qualify a student to apply for college admission, in order for a foreign education to be equivalent to a United States education, it should be sufficient to allow a student to apply for college admission without further education. Vocational degrees that are not considered a basis for further academic study will not be considered equivalent to United States high school education.

### **9 FAM 42.33 N7.2 Education Requirements**

*(CT:VISA-910; 10-23-2007)*

We interpret the phrase "high school education or its equivalent" to apply only to formal courses of study. Equivalency certificates (such as the G.E.D.) are not acceptable. To qualify, an alien must have completed a 12-year course of elementary and secondary education in the United States or a comparable course of study in another country. Evidence might consist of a certificate of completion equivalent to a United States diploma, school transcripts, or other evidence issued by the person or organization responsible for maintaining such records, which specify the completed course of study.

### **9 FAM 42.33 N7.3 Education Evaluation**

*(CT:VISA-1555; 09-30-2010)*

- a. Each post needs to determine what course of study is equivalent to a high school education or its equivalent in the host country. Previously, posts were provided with a guidebook that provided information on high school equivalency country by country. That guidebook ("Foreign Education Credentials Required") is no longer in print and *is* not available in updated format. You should not rely on it for your evaluation of high school credentials. You should make use of the resources found in your Public Diplomacy (PD) section to determine comparable courses of study in the host country that would meet the definition of a high school education or its equivalent. Contacts in the host country's Ministry of Education may also be of help. If you have questions about certificates and diplomas, you should consult with your public diplomacy section, including EducationUSA advisors and locally engaged staff, as they are valuable resources in evaluating local education systems. PD personnel advise prospective students and evaluate their educational backgrounds and have experience with and knowledge of local schools. To determine the authenticity of any particular document, you will need to work with your Fraud Prevention staff to develop expertise in making that determination. Interviewing officers may wish to consult with other posts when in doubt about the authenticity of educational certificates from countries outside their consular district.
- b. A DV refusal must be based on evidence that the alien did not in fact obtain the required degree and not on your assessment of the alien's knowledge level. You may not administer an exam, either oral or written, to test an applicant's basic knowledge in order to determine whether they have the equivalent of a U.S. high school education. You may not refuse a DV applicant solely on the basis of your analysis of the applicant's basic knowledge. Doubts about the applicant's claimed educational level raised by your interview, however, may lead you to investigate the authenticity of the educational credentials claimed by the DV applicant.

## **9 FAM 42.33 N8 "WORK EXPERIENCE"**

### **9 FAM 42.33 N8.1 No Labor Certification**

*(CT:VISA-910; 10-23-2007)*

The labor certification requirement of INA 212(a)(5) (8 U.S.C. 1182(a)(5)) does not apply to applicants applying as DV immigrants. Applicants, however, who do not meet the education requirement, must meet the work experience requirement of two years of experience in an occupation which requires at least two years training or experience within the five-year period immediately prior to application.



## **9 FAM 42.33 N8.2 Work Experience Evaluation**

*(CT:VISA-910; 10-23-2007)*

If an applicant does not have the equivalent of a high school education, you will evaluate work experience. You must use the Department of Labor's O\*Net OnLine database to determine qualifying work experience. (See 9 FAM 42.33 PN5.1 - PN5.2.) All applicants qualifying for a DV on the basis of their work experience must, within the past 5 years, have two years of experience in an occupation that is classified in a Specific Vocational Preparation (SVP) range of 7.0 or higher.

## **9 FAM 42.33 N9 INELIGIBILITY GROUNDS**

*(CT:VISA-1090; 10-23-2008)*

Applicants who establish that they qualify for DV immigrant visa classification are subject to all grounds of ineligibility specified in the Immigration and Nationality Act other than INA 212(a)(5) (8 U.S.C. 1182(a)(5)). (In other words, any applicant who qualifies for DV immigrant classification is exempt from the labor certification requirements.) There are no special provisions for a waiver of any ground of visa ineligibility other than those ordinarily provided in the INA.

### **9 FAM 42.33 N9.1 Labor Certification Refusals**

*(CT:VISA-1478; 08-26-2010)*

Any applicant for a DV visa who fails to establish that they possess the requisite qualifications, including a valid entry for participation in the DV program, would be ineligible under INA 212(a)(5)(A)(i) (8 U.S.C. 1182(a)(5)(A)(i)). It is not appropriate to refuse a DV applicant under INA 212(a)(5)(A)(i) (8 U.S.C. 1182(a)(5)(A)(i)) when a fraud investigation is needed before determining whether an applicant is qualified for a DV (e.g., if you suspect that the DV applicant does not possess the requisite education or work experience or if you suspect that the DV derivative applicant does not possess the requisite relationship to the DV principal applicant). In those cases, you must refuse the application under INA 221(g) pending the outcome of a fraud investigation.

### **9 FAM 42.33 N9.2 INA 221(g) Refusals**

*(CT:VISA-1090; 10-23-2008)*

- a. Interviewing officers should verbally impress on the applicants at the time of refusal, the importance of returning to the embassy quickly, preferably within the same month, with the necessary information to overcome the

refusal. Officers should advise applicants that failure to return within the month may mean that visa numbers will no longer be available for them and they may miss their opportunity to obtain a visa.

- b. Posts should prepare a stamp to be stamped on the Form OF-194, The Foreign Service of the United States of America Refusal Worksheet, refusal letters of DV applicants refused under 221(g), with the following message:

ATTENTION: UNDER NO CIRCUMSTANCES CAN A VISA BE ISSUED OR AN ADJUSTMENT OF STATUS OCCUR IN YOUR CASE AFTER SEPTEMBER 30, \_\_\_\_.

VERY IMPORTANT: BECAUSE OF THE LIMITED NUMBER OF VISAS THAT MAY BE ISSUED UNDER THIS PROGRAM, VISAS MAY CEASE TO BE AVAILABLE EVEN BEFORE THIS DATE. THIS IS ESPECIALLY TRUE THE CLOSER TO SEPTEMBER 30 AN APPLICATION OR RE-APPLICATION IS MADE.

- c. Cases that are in 221(g) refusal status at the end of the fiscal year may be left in that status. You do not need to enter an additional refusal (such as (5)(A)(i)) to close the case.

## **9 FAM 42.33 N9.3 Public Charge**

*(CT:VISA-1090; 10-23-2008)*

While many categories of immigrants must submit the legally binding Form I-864, Affidavit of Support Under Section 213A of the Act, the DV category is not one of them. You can consult 9 FAM 40.41 for standards of processing public charge issues in immigrant visa (IV) cases that do not involve the I-864, Affidavit of Support Under Section 213A of the Act.

## **9 FAM 42.33 N9.4 Waivers**

*(CT:VISA-1090; 10-23-2008)*

Unlike applicants eligible for immigrant visas (IV) under other programs involving random selection, no special provisions have been made for a waiver of any ineligibility grounds for applicants entitled to DV registration. The regular ineligibility waiver provisions of the INA, including 212(e), all apply.

## **9 FAM 42.33 N10 FEE**

*(CT:VISA-745; 06-09-2005)*

There is no fee for submitting the initial entry for registration in the DV program. However, those applicants who are selected and apply for DV

visas will be required to pay an IV application processing fee and a DV lottery surcharge. (See 9 FAM 42.33 N10.1.)

## **9 FAM 42.33 N10.1 Collection of Fee**

*(CT:VISA-910; 10-23-2007)*

Section 636 of Public Law 104-208, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, authorized the Department to collect a fee for the processing of DV immigrant visas. This fee is in addition to the standard IV processing fees, and the amount is specified in the Schedule of Fees for Consular Services. Posts shall collect the processing fee at the time of the applicant's formal interview.

## **9 FAM 42.33 N10.2 Processing Cases to Conclusion**

*(CT:VISA-910; 10-23-2007)*

We can appreciate posts' efforts to prescreen applications allowing unqualified applicants to withdraw their applications to avoid paying the required fees. Nevertheless, it is important to process such cases to conclusion and not to simply allow the candidate to withdraw the application. Instances have arisen where DV winners who were advised not to make an application at a post abroad have then entered the United States and requested adjustment of status processing at the Department of Homeland Security (DHS).

## **9 FAM 42.33 N11 NUMERICAL CONTROL**

*(CT:VISA-1555; 09-30-2010)*

Centralized control of the DV numerical limitation *will* be with the Department. (See 9 FAM 42.51.)