

## Legal Sidebar

# Firearms Eligibility for Foreign Nationals in the United States

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The recent terrorist attacks in Paris, France and San Bernardino, California, have prompted [increased attention](#) upon the categories of persons barred from acquiring firearms. [The Gun Control Act of 1968 \(GCA\), as amended](#), generally prohibits certain categories of persons from acquiring firearms or ammunition, including some categories of foreign nationals (i.e., aliens). The GCA [provides that](#) aliens in the United States unlawfully are generally barred from purchasing a firearm, as are most aliens admitted into the United States pursuant to temporary, “nonimmigrant” visas (subject to limited exceptions). Aliens who violate these prohibitions, along with persons who sell or transfer firearms to them, may face [criminal penalties](#).

Foreign nationals who do not fall under these two restrictions—including lawful permanent residents (commonly referred to as immigrants), refugees, and other lawfully present aliens who did not enter the United States pursuant to a visa, such as many foreign travelers visiting the United States under the terms of the [Visa Waiver Program](#)—are not prohibited from acquiring a firearm solely on account of their immigration status. Nonetheless, other provisions in the GCA, such as residency requirements that must be satisfied for a firearms sale to be lawful, may impede some foreign nationals from acquiring firearms.

### **Aliens Admitted to the United States Pursuant to a Nonimmigrant Visa**

In general, aliens seeking to come to the United States on a temporary basis (e.g., for tourism, as temporary workers, or as students) must first obtain a [nonimmigrant visa](#) authorizing their admission. However, by immigration [statute](#) and [regulation](#), some foreign travelers seeking to enter the United States under a nonimmigrant classification are exempted from visa requirements. For example, [foreign nationals from Canada or Bermuda](#) generally do not need a visa if they seek to briefly travel to the United States for business or tourism. Similarly, under the [Visa Waiver Program](#), foreign nationals from [37 participating countries and Taiwan](#) are generally permitted to visit the United States for business or pleasure for up to 90 days without first obtaining a visa.

In 1998, Congress amended the GCA to extend its criminal prohibitions to “[aliens admitted to the United States under a nonimmigrant visa](#),” except for certain foreign government officials and law enforcement agents, persons admitted into the United States for hunting or sporting purposes, and aliens who possess hunting licenses or permits lawfully issued in the United States. Aliens with nonimmigrant visas may also petition for a waiver of the application of GCA restrictions. In 2002, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), the Department of Justice component primarily responsible for enforcing the GCA, announced a [final interim rule](#) interpreting the 1998 amendment to the GCA. ATF interpreted the new restriction as broadly covering any alien “in a nonimmigrant classification,” regardless of whether the alien had been admitted pursuant to a nonimmigrant visa. However, in 2011, the DOJ’s Office of Legal Counsel (OLC), issued both informal and formal opinions in response to an inquiry by ATF as to the permissibility of its interim rule. The OLC [concluded](#) that the plain text of the GCA “is clear: the provision applies only to nonimmigrant aliens who must have visas to be admitted, not to all aliens with nonimmigrant status.” The OLC [disagreed](#) with ATF’s characterization of the legislative history of the amendments as clearly supporting a broader interpretation, and also [postulated several reasons](#) why Congress might have opted to distinguish between nonimmigrants admitted pursuant to a visa and those admitted without. For example, OLC suggested that Congress

might have believed the categories of nonimmigrants likely to be admitted without visas posed a lesser security risk than those admitted pursuant to nonimmigrant visas. In response to the OLC opinion, ATF issued a [final rule](#) in 2012 that interpreted the 1998 amendment to the GCA as not applying to nonimmigrants who had been admitted into the United States without a visa. There are, however, [legislative proposals](#) that have been introduced in the 114<sup>th</sup> Congress that would amend the GCA to explicitly make it a criminal offense for aliens admitted under the Visa Waiver Program to purchase a firearm.

As the law currently stands, though, while nonimmigrants admitted to the United States without a visa are not expressly subject to criminal liability under the GCA if they attempt to purchase a firearm, other criminal restrictions may be applicable. Neither federal firearms licensees (FFLs) nor private individuals can sell or transfer firearms to persons that they know, or have reason to know, reside in a different state, with limited exceptions. Additionally, private persons are not permitted to purchase firearms outside of their states of residence, with limited exceptions. [ATF regulations](#) define an individual's state of residence as the state in which she "is present ... with the intention of making a home." Because nonimmigrants admitted into the United States without a visa are generally in the United States for very limited periods (no more than 90 days in the case of travelers under the Visa Waiver Program), and for specific purposes such as tourism, it would seem difficult for such aliens to satisfy the GCA's residency requirements.

### **Unlawfully Present Aliens**

The GCA also makes it a criminal offense for an alien who is "illegally or unlawfully in the United States" to acquire or possess a firearm (this provision, [added in 1986](#), was essentially a recodification of a criminal prohibition that had been in effect since the [Safe Streets Act of 1968](#)). [Regulations promulgated](#) by ATF construe this criminal prohibition as generally being applicable to aliens who have entered the United States without inspection or who have overstayed their authorized term of admittance into the country. The [regulations](#) also construe the prohibition as not applying to aliens who, while not having been conferred legal immigration status, have been permitted by immigration authorities to physically enter or remain in the United States as an [exercise of parole authority](#).

There have been several legal challenges to the application of this prohibition to aliens who have committed immigration violations making them removable from the country, but who may be eligible for temporary or permanent relief from removal. The [U.S. Court of Appeals for the Fifth Circuit](#) has held that the GCA's application to unlawfully present aliens does not apply to aliens who have been granted [Temporary Protected Status \(TPS\)](#), a temporary form of relief from removal that may be granted to aliens who cannot be safely returned to their home countries, notwithstanding whether the alien was unlawfully present in the United States at the time TPS was granted. On the other hand, federal courts have upheld application of the GCA to aliens who (1) [have committed an immigration status violation but have not yet been ordered removed from the country](#); (2) removable aliens who have petitioned but not yet been granted certain forms of relief from removal, such as [asylum](#) or [TPS](#) (including in situations where the alien had been granted temporary work authorization pending the outcome of his petition); or (3) had [applied, but not yet been granted, adjustment to a legal immigration status on account of marriage to a U.S. citizen](#).

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