CHAPTER 1

QUALIFYING FAMILY RELATIONSHIPS AND ELIGIBILITY FOR VISAS

This chapter includes:

§ 1.1 Visa Work: A Two Step Process

United States Citizens[1] and lawful permanent residents[2] can help certain family members immigrate to the United States.[3] This is a two-step process. The first step is the family visa petition. The second step is the application to become a permanent resident. Each step involves different legal and factual issues.

STEP ONE: THE PETITION

The form that starts the immigration of a family member is the **visa petition, Form I-130**. Its official name is the "Petition for Alien Relative." Only a U.S citizen or permanent resident can file a visa petition on behalf of a family member. The **petitioner** is the U.S. citizen

[1] In this chapter, please note that a U.S. Citizen will also sometimes be referred to as a "USC."
[2] Please note that a lawful permanent resident may also be referred to as a "LPR" or "permanent resident" or "legal resident" or "green card holder."
[3] Note that the term "immigrate" here refers to the process through which a person becomes a lawful permanent resident of the U.S., and applies whether the person is already physically in the U.S. or outside the U.S. See the distinction between "adjustment of status" and "consular processing" below.

or resident who files the visa petition; the **beneficiary** is the family member who is going to immigrate.

Two facts must be established in support of a visa petition:

1. The petitioner and the beneficiary have the **family relationship** required for the petition (for example, parent and child), and

2. The petitioner has the **immigration status** required for the petition—either U.S. citizenship or lawful permanent or conditional resident status.

If these elements are proved, CIS must approve the visa petition and step one will be completed.

Generally, the relatives prove their relationship by submitting official documents such as birth and marriage certificates.[4] But some cases may be more complex. A married couple, for example, not only must show that they are legally married but that the marriage is **bona fide** (legitimate) and not a fraud or sham established for immigration purposes. Some children may have to submit extra documents to show that they qualify as the **child** of the parent under the Immigration and Nationality Act (INA). These include stepchildren, adopted children, orphans, and children born out of wedlock. Also, an adopted child cannot petition for his biological birth parents or birth siblings.

Practice Tip: In general, family petitions are filed with the U.S. Citizenship and Immigration Services (USCIS) Chicago Lockbox with the PO Box part of the address depending on the petitioner's place of residence. You must check the most recent version of the Form I-130 instructions on the CIS website to determine the exact address.[5] If the visa petition is filed together with the adjustment application in a "one-step" adjustment of status, e.g., for an immediate relative (see **§ 1.2**, below) because the beneficiary is also eligible for adjustment of status, the visa petition and adjustment application are mailed together to:

U.S. Citizenship and Immigration Services
PO Box 805887
Chicago, IL 60680-4120

Or if using a non-postal-service courier, such as Federal Express or UPS, mail to:

U.S. Citizenship and Immigration Services
Attn: FBAS
131 South Dearborn, 3rd Floor
Chicago, IL 60603-5517

[4] See Chapter 2 for a detailed discussion on submitting the petition.
[5] See www.uscis.gov.

Mail the petition by certified mail with return receipt for delivery. As always, you and/or the petitioner should keep a copy of everything filed with CIS. See the CIS website for information on filing and processing of family petitions and other submissions to CIS.[6]

Note Regarding Petitioners with Criminal Convictions Involving Minors: Legislation may prohibit certain petitioners from successfully filing visa petitions for any family member if the petitioner was convicted of a "specified offense against a minor," unless CIS determines that the petitioner poses no risk to the beneficiary. The "minor" must have been under 18 and the convictions specified are broadly defined, involving primarily sexual or related offenses.[7]

STEP TWO: APPLICATION TO IMMIGRATE

Once the visa petition is approved, the relative can—sooner or later—proceed to step two and apply to immigrate. This end goal is referred to as: **becoming a lawful permanent resident**, **obtaining an immigrant visa**, or **obtaining a green card**. These terms are often used interchangeably, and basically they all mean the same thing: the person becomes a lawful permanent resident of the United States and gains the right to live and work in the United States permanently.

How soon the person can apply to immigrate depends on what kind of visa petition was filed. A person who qualifies as an **immediate relative** of a U.S. citizen can immigrate quickly.[8] He or she can apply for permanent resident status as soon as the visa petition is approved and all the paperwork is taken care of, which can take many months, or at the same time as the visa petition is filed, if he or she is eligible for adjustment of status in the U.S.

Other relatives of U.S. citizens and residents can immigrate if they qualify for a visa under the **preference system**. The number of people who can immigrate each year under the preference system is limited. For this reason, preference system immigrants may have to wait for several years, after the visa petition is approved, before they can actually immigrate.[9]

People can immigrate in one of two ways: by applying for an **immigrant visa** through **consular processing** in another country at a U.S. consulate, or by applying for **adjustment of status** to permanent residency at a CIS office in the United States.

When applying to immigrate, the applicant must prove that he or she is **admissible** as an immigrant. An applicant is admissible if no **ground of inadmissibility applies**. But an applicant

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[6] See Chapter 2 for more information on Adjustment of Status.
[7] See Aytes memo, "Guidance for Adjudication of Family-Based Petitions and I-129F Petition for Alien Fiancé(e) Under the Adam Walsh Child Protection and Safety Act of 2006," of February 8, 2007, which can be found at http://www.uscis.gov/files/pressrelease/AdamWalshAct020807.pdf.
[8] See § 1.2.
[9] See §§ 1.4-1.6.

who is inadmissible can still sometimes immigrate if CIS agrees to waive (forgive) the ground of inadmissibility.[10] Otherwise, the inadmissible applicant cannot immigrate.

Thus, three facts must be established at step two:

1. That the applicant is not inadmissible, or if he or she falls into a category of inadmissibility, that he or she can obtain a waiver of the inadmissibility ground;

2. That the visa petition is still valid (the petitioner-beneficiary relationship still exists and the petitioner still has the required immigration status); and

3. That the applicant is eligible to immigrate now, without having to wait (i.e., a visa is available).

Special rules apply to married couples. Some people who immigrate through their marriage must go through a third step to immigrate. Under the Immigration Marriage Fraud Amendments, many applicants through marriage obtain **conditional permanent residency** at the time they immigrate. The married couple must submit an additional petition to CIS before two years have passed to have the conditional status removed. See **Chapter 3** for a detailed discussion on conditional permanent residency.

§ 1.2 The Immediate Relative Category: Definition of "Child" and "Spouse"

Certain people can immigrate as the **immediate relative** of a U.S. citizen. Immediate relatives can immigrate very quickly. As soon as the visa petition is approved, the person may begin the application to immigrate because visas are always available for immediate relatives of U.S. citizens. Visa availability never delays immigration for immediate relatives, but the application process itself may take several months, depending on how busy the CIS or consulate is. A separate visa petition must be filed for each immediate relative. A person qualifies as an immediate relative if he or she is the:

1) Spouse of a U.S. citizen

2) "Child" of a U.S. citizen, or

3) Parent of a U.S. citizen, if the citizen is at least 21 years of age.[11]

Example: Alfredo is married to a U.S. citizen. Laura has a U.S. citizen son who is 30 years old. Kwan is 12 and his father is a U.S. citizen. All of these people may immigrate as immediate relatives.

[10] See Chapters 5 and 6.
[11] INA § 201(b)(2)(A)(i).

"One-step" Adjustment Applications: Immediate relatives that qualify for adjustment under INA § 245(a) or 245(i) can often submit the I-130 visa petition along with the adjustment application. See **Chapter 3** for a discussion of adjustment of status.

WHO IS A "CHILD"?

In all visa work, remember that "**child**" is a term with special legal meaning.[12] Learn to associate the word "child" with the technical legal definition. To be a child the person must meet two important criteria.

A. The Person Must Be Unmarried and under 21 Years of Age

A person who is divorced or widowed at the time of petitioning is considered unmarried.[13]

> **Example:** A daughter who is 21 years old when the petition is filed is not a "child" under the INA and cannot be petitioned for as an immediate relative. (She may, however, be able to immigrate as a "daughter" through a preference petition. See **§ 1.4** below). A married 19-year-old daughter is not a "child." But a 19-year-old divorced daughter is a "child" under the Act.

However, note that if the CIS or the immigration court find that the divorce was sought purely for purposes of obtaining an immigration benefit, they may deem the petition and corresponding application fraudulent and may thus deny them.[14]

Note: The Child Status Protection Act (CSPA), effective August 6, 2002, allows children of U.S. citizens who turn 21 while a parent's visa petition is pending to immigrate as if they were still children, even though they no longer meet the definition of a "child" under the Act because they are over 21 years of age when the I-130 petition is finally approved. For example, in the case of a naturalizing lawful permanent resident (LPR) petitioner, the age of the child locks in on the date of the parent's naturalization. If the child is under 21 on that date, the petition will convert into an immediate relative petition and remain as such until the child immigrates. The CSPA rules are complicated, especially for the children of lawful permanent residents. See **§ 1.10** for a detailed explanation of the CSPA. In addition, the National Defense Authorization Act[15] allows some children to maintain immediate relative status after turning 21 if they are children of deceased U.S. citizen or permanent resident members of the armed forces who died "as a result of an injury or disease incurred in or aggravated by combat." The child must have been under 21 and

[12] INA § 101(b)(1).
[13] INA § 101(a)(39).
[14] See *Matter of Aldecoatalora*, 18 I&N Dec. 430 (BIA 1983).
[15] See INA 329A.

unmarried at the time the parent died and must self-petition within two years of the parent's death.

B. The Person Must Have a Child-Parent Relationship that CIS Recognizes

Obviously natural-born children who were born in wedlock are considered children under the immigration laws. But other children, such as stepchildren, adopted children, adopted orphans, and children born out of wedlock, may also qualify. These other children must meet specific requirements. Here is an overview of these other categories:

Stepchildren. A common situation involves stepchildren. This rule is simple. A stepchild is a child for immigration purposes if the marriage that creates the stepparent-stepchild relationship took place before the child turns 18.[16] However, where the marriage creating the stepchild relationship has been terminated by death, divorce or legal separation, the Board of Immigration Appeals (BIA) has ruled that the petitioner must prove that the step familial relationship continues to exist as a matter of fact.[17]

> **Example:** Gina, a lawful permanent resident, marries Juan. Juan has a 10-year-old daughter, Soledad. Can Gina petition Soledad as her child?
>
> Yes. Since Juan and Gina married before Soledad reached the age of 18, Soledad is Gina's child for immigration purposes. Soledad became Gina's stepchild as of the date of Gina and Juan's marriage.

Note: A stepchild born outside the United States cannot derive U.S. citizenship by virtue of his or her relationship to a nonadoptive stepparent.[18] Therefore, if Gina in the example above were a U.S. Citizen, she would still need to file an I-130 petition on behalf of Soledad, who could then become a lawful permanent resident.

Adopted Children Generally. Children who are adopted while under the age of 16 and have been residing with and in the legal custody of the adoptive parents for at least two years may qualify as children under the Act.[19] There are two exceptions to these requirements.

First, if the same adoptive parents adopt a brother or sister of an adopted child, the second child must meet the same requirements but can be considered an adopted child if the adoption took place while he or she was under the age of 18. The burden is placed on the parent to establish primary parental control during the two-year period of joint residence.[20]

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[16] See INA § 101(b)(1)(B) and 8 CFR § 204.2(d)(2)(iv).
[17] See *Matter of Breier*, 8 Immig. Rptr. B1-57 (BIA 1997); *Matter of Mowrer*, 17 I&N Dec. 613 (BIA 1981); *Matter of Mourillon*, 18 I&N Dec. 122 (BIA 1981)(step-siblings).
[18] See *Matter of Guzman-Gomez*, 24 I&N Dec. 824 (BIA. 2009).
[19] INA § 101(b)(1)(E), 8 CFR § 204.2(d)(2)(vii).
[20] See *Matter of Marquez*, 20 I&N Dec. 160 (BIA 1990).

Second, the Violence Against Women Act of 2005, § 805(d) removed the two-year custody and residency requirements for abused adopted children by allowing adopted children to obtain permanent residency even if they have not been in the legal custody of, and have not resided with, the adoptive parent for at least two years, if the child has been battered or subject to extreme cruelty by the adoptive parent or by a family member of the adoptive parent.

Adopted Orphans. Orphans either adopted abroad or coming to the United States to be adopted who are under the age of 16 may qualify as children under the INA.[21] One of the adopting parents must be a U.S. citizen. "Orphan" under the INA has a different meaning from common usage and does not necessarily require that the child's birth parents be deceased. In order for a child to meet the definition of "orphan," the child must be residing outside the United States when the petition is filed. In addition, the adopting parent must obtain a valid home study before adopting and must also meet many other requirements.[22] If the same adoptive parents adopt a brother or sister of an orphan, the second child must meet the same requirements but can be considered an orphan if the orphan petition is filed while he or she is under the age of 18.

Children Adopted Abroad/Hague Adoptions. On April 1, 2008, the Hague Adoption Convention went into effect. This is an agreement between the United States and many other countries governing international adoptions. The Hague Convention changed the rules under which U.S. citizens can adopt children from the other countries that are signatories to the Convention. Special rules apply to children that are habitual residents of Hague Convention countries.[23] U.S. citizens who wish to adopt a child from one of these countries must be careful to comply with the rules of the Convention or their adoption will not be recognized by CIS.[24]

A child adopted from a Hague Convention country by a U.S. citizen that is a habitual U.S. resident qualifies for a visa as an immediate relative.[25] If a child is adopted from a non-Convention country, this adoption is classified as an "Orphan Adoption" and different rules apply (see "Adopted Orphans" above). Note: if your client is adopting a child from a Convention country, the client must make sure that he or she is in compliance with the Hague Convention as well as adoptions laws of the country in which the adopted child resides.

Children Born Out of Wedlock. The immigration laws historically have referred to certain children as "illegitimate" if their parents were not married at the time of the children's birth. Partly in response to criticisms that this language was insensitive, Congress changed the INA's definition of "child" by replacing the words "illegitimate child" with "child born out of wedlock" and "legitimate child" with "child born in wedlock."[26] The legacy INS sent instructions to the field on this change in the definition of "child" and "father."[27] While advocates should use

[21] INA § 101(b)(1)(F), 8 CFR § 1101(a)(1)(F).
[22] See 8 CFR § 204.3.
[23] 22 CFR § 42.24.
[24] The current list of Hague Convention member countries can be found on the U.S. Department of State's website at: http://www.adoption.state.gov/hague/overview/countries.html.
[25] INA § 101(b)(1)(G).
[26] See INA §§ 101(b)(1)(A), 101(b)(1)(D), and 101(b)(2).
[27] See INS Cable HQ 204.21-P, 204.22-P reprinted in *Interpreter Releases*, January 2, 1996.

this language in visa work, the change does not appear to affect substantive law—with the possible exception of some effect on the definition of an orphan. Whether a child who was born out of wedlock is later "legitimated" remains relevant under the law. Note that citizenship and naturalization law still uses the terms "illegitimate" and "legitimate."

If a child's parents are not married at the time of birth, he or she is considered a "child born out of wedlock." Such a child can immigrate through his or her mother without any problems. But if the child tries to immigrate through the father, the family must meet certain conditions.[28] They must prove that the father has a bona fide parental relationship with the child before the child reaches the age of 21. To do this the father must have shown "an actual concern for the child's support, instruction and general welfare."[29] The family also must prove that the father is the natural father.

> **Example:** Geraldo has a daughter Eliza. He and Eliza's mother never married. Geraldo lived and worked in the United States for years, but he always sent money to Eliza's mother for her upbringing in Mexico. He visited her every year when he returned to Mexico, and they sometimes wrote letters to each other. Everyone in the village knows that Geraldo is Eliza's father. Geraldo's mother in Mexico is a devoted grandmother to Eliza and often cares for her.
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> Geraldo has become a permanent resident and wants to petition for Eliza, who is 16. To prove that they have had a bona fide relationship he will submit copies of money order receipts, copies of letters, and affidavits of friends, neighbors and others to show all of the emotional and financial support he provided to Eliza as her father. (If instead of waiting in Mexico, Eliza had come to the United States illegally to stay with her father, they would submit documents about Geraldo and Eliza's relationship in the United States as well.) To prove that he is Eliza's natural father, Geraldo will submit her birth certificate listing him as father, or some other proof.

In other cases, the family may prove that the child has been "legitimated" under the law or that the child should not have been considered illegitimate in the first place, because the laws of the particular country where he or she was born do not distinguish between children born in or out of wedlock.[30] Note, however, that some countries have passed laws to eliminate discrimination against children born out of wedlock but still require a marriage of the parents for the child to be considered legally "legitimated."[31] If relying on a foreign country's "legitimation" laws, it is critically important to research the current law of that country or consult with an expert in that country's laws.

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[28] INA §§ 101(b)(1)(C)-(D).
[29] 8 CFR § 204.2(d)(2)(iii); see also *Matter of Pineda*, Int. Dec. 3112 (BIA 1989).
[30] See, e.g., *Matter of Patrick*, 19 I&N Dec. 726, Int. Dec. 3076 (BIA 1988).
[31] See *Matter of Hines*, 24 I&N Dec. 544 (BIA 2008).

Practice Tip: Always ask clients specifically to disclose to you all children they may have inside or outside of marriage. Some people are not aware that children born out of wedlock are also "children" for immigration purposes, or sometimes the existence of these children may be a sensitive issue, and so the parents fail to list them on their immigration petitions and applications. They should be told that if they fail to include any such children on petitions filed with CIS, it will be more difficult later to help these children immigrate through them.

WHO IS A "SPOUSE"?

People who are legally married and have a bona fide marriage relationship are spouses under the Act. See **Chapter 2**, **§ 2.13** below.

Same-Sex Spouses. The INA does not define the word "spouse" in terms of the sex of the parties. However, because immigration law is federal law, it will follow the federal definition of "spouse" provided by the Defense of Marriage Act (DOMA), which specifies under § 3(a) that a "spouse" is only a person who is a husband or a wife, through a legal union of marriage, to a person of the opposite sex.[32] Therefore, despite the Department of Justice's decision, announced in February of 2011, not to continue to defend DOMA in some federal litigation due to its conclusions that § 3(a) is unconstitutional, the CIS has stated as of the date of this publication that it will continue to deny I-130 petitions filed on behalf of same-sex spouses, even when the couple is legally married under the law of a state or foreign country.

However, there may be situations where it is advisable for a bi-national same-sex couple to get married if possible and perhaps even file an I-130 petition, such as in the case where the foreign spouse may be in removal proceedings. In June 2011 ICE released a memorandum describing the agency's enforcement priorities which stated that family relationships and marriage to a U.S. citizen or lawful permanent resident were to be considered as factors in determining low priority cases for removal. Following that memorandum, DHS clarified in August 2011 that this included gay and lesbian families.

Because this is an area of law that is currently under development and may change, practitioners are advised to stay updated with the state of federal litigation involving DOMA and with DHS's position regarding the enforcement of the same. Additionally, passage of the Uniting American Families Act (UAFA) would amend the INA to allow U.S. citizens to sponsor same-sex partners.

Transsexual Spouses. In the case of *Matter of Lovo-Lara*, the BIA held that a marriage is valid for immigration purposes so long as it is considered a valid heterosexual marriage between two people of the opposite sex according to the law of the state where the marriage was celebrated.[33] However, the petitioner in that case had undergone sex-reassignment surgery and

[32] DOMA § 3(a), 110 Stat. at 2419 (codified at 1 USC § 7 (2000).
[33] See *Matter of Lovo-Lara*, 23 I&N Dec. 746 (BIA 2005).

had therefore been able to change her sex under the law of the State of North Carolina. Therefore, the CIS has interpreted the BIA's decision to mean that it should approve I-130 petitions only where the following requirements are fulfilled:

1. One of the claimed spouses has undergone sex reassignment surgery;
2. Under the law of the place of marriage, the surgery resulted in a legal change of sex; and
3. The marriage is, therefore, recognized as a valid heterosexual marriage.[34]

Therefore, although advocates are working to change these additional restrictions, CIS has stated that it will not approve an I-130 petition based on a marriage where one of the spouses is a post-operative transsexual person and the marriage was conducted in either Florida, Illinois, Kansas, Ohio, Tennessee or Texas, because the laws of these States do not recognize sex-reassignment surgery as changing a person's legal sex for purposes of marriage.

Widow and Widower Spouses: The Immigration Act of 1990 added a new definition of "spouse" to allow widows and widowers who had been married to a U.S. citizen for at least two years to remain immediate relatives. However, as of October 28, 2009, the INA has been amended to eliminate the two-year requirement. Therefore, the widow or widower of a U.S. citizen, who was not legally separated from the U.S. citizen at the time of his or her death, will continue to be considered an immediate relative for two years after the U.S. citizen's death, or until the time he or she remarries, whichever comes first.[35] Therefore, persons widowed before October 28, 2009 and who did not have a pending I-130 petition but otherwise meet the above stated criteria may file a self-petition via Form I-360, however, such a petition *must* be filed by October 28, 2011.[36]

Note that the widow or widower will need to file a Form I-360 as a self-petitioner rather than filing Form I-130.[37]

> **Example:** Jacqueline married a U.S. citizen in June of 2008. Her husband died on February 1, 2010. Jacqueline may immigrate as an immediate relative until January 31, 2012, or until she remarries, whichever comes first. The fact that she was only married to her U.S. citizen husband for less than 2 years is no longer a barrier.

[34] USCIS Interoffice Memorandum, "Adjudication of Petitions and Applications Filed by or on Behalf of Transsexual Individuals," January 14, 2009.
[35] INA § 201(b)(2)(A)(i).
[36] P.L 111-83, § 568(c)(2)(B).
[37] See P.L. 111-83§ 568(c)(2)(B) and INA § 204(a)(1)(A)(iii); see also USCIS Policy Memorandum, "Approval of Petitions and Applications after the Death of the Qualifying Relative under New Section 204(l) of the Immigration and Nationality Act." December 16, 2010 ("USCIS Memo on INA § 204(l)") included in this manual as Appendix 1-A. See § 1.12 below for information regarding beneficiaries who become widows or widowers after the I-130 petition had already been filed.

§ 1.3 K Visas for Fiancé(e)s, Spouses and Children of U.S. Citizens

A. Fiancé(e)s Petition (the K-1 Visa)

This "K-1" petition allows a U.S. citizen (but not a lawful permanent resident) to petition for a fiancé(e) to enter the United States in order to marry the U.S. citizen petitioner. This is not an immediate relative visa petition. In fact, it is a non-immigrant visa petition (Form I-129F) that allows the fiancé(e) to enter the United States for a limited time and purpose: to marry the U.S. citizen within 90 days of arrival. To qualify for this visa, the couple must show that they have met at least once in person within the past two years, that they intend to marry, and that they are legally able to marry.[38] Under certain circumstances, the CIS will waive the requirement that the couple actually have met in person within the past two years.[39] For example, if it is an arranged marriage, customary within that culture, then the CIS may waive the requirement that the couple have met within the past two years. A petitioner can receive an exception if he or she can demonstrate that complying with the meeting requirement would have constituted extreme hardship. This will be examined on a case-by-case basis, taking into account the totality of the petitioner's circumstances. Generally circumstances that are not within the power of the petitioner to control and are likely to last for a considerable duration are considered persuasive.

If the couple does not get married within 90 days, the fiancé(e) may be required to leave the United States, and if the fiancé(e) does not leave the United States, she or he will be removed. The only exception is if the couple gets married after the 90 days and the same petitioner submits a new I-130 petition, the fiancé(e) may then adjust using the I-130 instead of the fiancé petition.[40]

For a U.S. citizen to file a K-1 visa petition for a fiancé(e), an I-129F must be filed at the USCIS Service Center with jurisdiction over the petitioner's residence in the United States. If the petitioner and fiancé(e) live outside of the United States, the I-129F must be submitted to the USCIS Service Center with jurisdiction over the petitioner's last place of residence in the United States.

The K-1 fiancé(e)'s unmarried children under the age of 21 can be included in the petition and enter the U.S. with the fiancé(e) parent. Children of K-1 fiancé(e)s are designated as "K-2" visa holders. Generally, K-2 visa holders can adjust status and become permanent residents as long as they still qualify for the K-2 visa (meaning that they must be unmarried and under 21 at the time the adjustment application is filed), but note that this is developing law and some immigration judges have been known to grant LPR status to K-2 derivatives over 21 years of age. See **Chapter 3**.

Note: In instances, where the fiancé has a child under 21, but who is over the age of18, the fiancé petition allows the child to immigrate. Whereas, if the couple marries after the child's 18th birthday, the child could not immigrate since he or she would not qualify as a stepchild.

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[38] See INA § 314(d).
[39] See 8 CFR § 214.2(k)(2).
[40] See Chapter 3 on adjustment of status.

Two other laws affect U.S. citizen petitioners directly. The International Marriage Broker Regulation (IMBRA) provides that alien fiancé(e)s and spouses coming to the U.S. with K visas must be provided any information regarding the petitioner's past criminal activity and other K petitions previously filed by the petitioner. When filing the I-129F, petitioners now must provide information regarding certain criminal convictions, which will be shared with the beneficiary prior to the issuance of a K visa. The petitioner for a K-1 fiancé(e) visa must also request a waiver if the petitioner has filed two or more K-1 visa petitions at any time in the past or had a prior K-1 petition approved within the last two years.[41]

The second new law is the Adam Walsh Child Protection and Safety Act, which prohibits a U.S. citizen petitioner from filing K nonimmigrant visa petitions for fiancé(e)s, spouses or minor children if the petitioner was convicted of a "specified offense" against a minor, which is listed in the statute, unless CIS determines that the petitioner poses no risk to the beneficiary.

After the marriage, the alien spouse must apply for adjustment of status to permanent residency at a CIS office in the United States. The couple does not need to file an I-130, however.[42] If the marriage is less than 2 years old at the time of the adjustment interview, as is usually the case with people who enter on fiancé visas, the CIS will grant the alien spouse **conditional resident** status for two years. The couple will have to apply to remove the conditional status within 90 days of the date conditional residence expires, so that the alien spouse can remain in the United States.[43] K-2 children will also be granted conditional residence status.[44]

If the U.S. citizen spouse dies before the K-1 visa holder adjusts his or her status, the alien spouse may file the adjustment application just as they would have done if the U.S. citizen petitioner had not died. It is, therefore, not necessary for such a K-1 visa holder to file Form I-360 as a self-petitioning widow or widower. This alien spouse's adjustment application will be approved pursuant to INA 204(l) and the alien will be granted Lawful Permanent Resident status instead of conditional status.[45]

B. Petitions for Spouses and Children of U.S. Citizens (the K-3 and K-4 Visas)

On December 21, 2000, the Legal Immigration and Family Equity Act (LIFE) became law. Among other provisions, LIFE created two new non-immigrant visa categories, one for the spouses and minor children of legal permanent residents[46] and one for spouses and minor children of U.S. citizens residing abroad. Spouses and minor children (unmarried and under 21) of U.S. citizens are able to request the "K-3 [spouse] and K-4 [minor children of the spouse]" visa in

[41] See INA § 214(d)(2)(A) & (B).
[42] See INA §§ 101(a)(15)(K), 214(d), and 8 CFR § 214.2(k).
[43] INA § 245(d).
[44] See Chapter 3.
[45] See USCIS Memo on INA § 204(l), cited above on note 38 and included as Appendix 1-A. INA § 204(l) concerns the surviving beneficiaries of qualifying relatives on certain petitions and applications and was added by § 586(d)(1), DHS Appropriations Act, 2010, Act of October 28, 2009.
[46] The "V" Visa—see § 1.11 for more information.

much the same way that K-1 fiancé(e) petitions are currently processed, using the same type of petition (I-129F).

> **Example:** Vijay, who is a U.S. citizen, recently traveled to India to get married. He just returned to the United States to file immigration papers for his new bride. While waiting for an I-130 approval notice and the usual consular processing, he can file a "K" visa petition for his new wife who will then be allowed to travel to the United States where they will be able to file for her green card.

In order to obtain a K-3 visa, the U.S. citizen spouse must have submitted an I-130 Relative Petition for the K-3 spouse (but not for her children) and received the Notice of Action (Form I-797) from the CIS indicating that the Service has received the petition. The U.S. citizen spouse can then file a Form I-129(F) Petition for Alien Fiancé[47] and all supporting documents with the Service Center where the underlying I-130 petition is already pending. Use the address on the most recent receipt or transfer notice. However, for petitions filed from abroad, contact the U.S. embassy or consulate nearest your residence for current filing instructions.

In addition to allowing spouses of U.S. citizens to enter the United States to apply for adjustment of status, Congress created a K-4 visa to allow the under 21 and unmarried children of K-3 eligible applicants to enter the United States as well.

> **Example:** Vijay's new wife has a twelve-year-old daughter. Vijay can request a K-4 visa to bring his wife's daughter (i.e., Vijay's new stepdaughter) into the United States.

K-3 and K-4 visa holders cannot change status to another nonimmigrant status such as a student or temporary worker.[48]

Additionally, neither a K-3 nor a K-4 can adjust status except through an I-130 filed by the USC who was the petitioner for the K-3 visa on form I-129F. Termination of K-3/K-4 occurs 30 days after the denial or revocation of the I-130 or the adjustment of status. A K-3 visa also terminates upon the K-3's divorce from the USC. A K-4's visa terminates upon termination of the K3 visa, or the K-4's marriage.[49]

In the case that the U.S. citizen petitioner dies before the K-3 or K-4 has adjusted their status, the I-130 petition filed for the K-3 spouse is automatically converted into an I-360 self-petition. The K-4 becomes a derivative beneficiary on the I-360 who will be "following-to-join" the K-3 spouse.

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[47] Even though Form I-129F is titled "Petition for Alien Fiancé," it is also used for K-3 spouses.
[48] 8 CFR § 248.2(a)(2).
[49] See 8 CFR § 214.2(k)(10).

§ 1.4 Petitions under the Preference System: Definition of Siblings and Sons and Daughters

Family members who do not qualify as an immediate relative or fiancé(e) may be able to immigrate another way, through the **preference system**. Unlike an immediate relative, the beneficiary of a preference petition may have to wait for some period of time between approval of the visa petition and immigrating. The waiting period is discussed in **§§ 1.8–1.9**.

Before discussing preference petitions, we must define two new categories of family members: "sons and daughters" and "siblings" (brothers and sisters).

WHO IS A SON OR DAUGHTER?

A son or daughter is a person who once qualified as a child, but now may be over 21 or married.[50]

> **Example:** Gina and Juan marry when Soledad is ten years old. Soledad qualifies as a child under the stepchild rule discussed above. Years later, when Soledad is thirty, she wants to immigrate through Gina. She is not a child because she is over 21. Can she qualify as Gina's "daughter"?
>
> Did Soledad ever qualify as Gina's "child"? Yes. Since Soledad once qualified as Gina's child, she now can qualify as her daughter.

WHO IS A SIBLING (Brother or Sister)?

Siblings are persons who were once "children" with at least one parent in common either by adoption or by blood relation.[51] However, an adopted child cannot file a visa petition for his or her biological siblings or parents if the adoption is one that meets the definition of "adopted child" under the immigration laws. After such an adoption, the biological siblings or parents can immigrate through the adopted child only if no immigration benefit was received due to the adoption, the adoption has been legally terminated, and the original parent-child relationship has been lawfully reestablished.

> **Example:** Suppose that when Soledad was age 30, Gina left Juan and had another child, Fidel, with another man. Years pass. Now Fidel is 30 years old and Soledad is 60. Are Fidel and Soledad siblings under the INA?
>
> Yes, because both Soledad and Fidel once were children with the same mother, Gina. It does not matter that they were not children at the same time, or that Soledad was a stepchild, and Fidel a child born out of wedlock. At one time, they both qualified as Gina's "children" under the INA.

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[50] 22 CFR § 40.1(s).
[51] *Matter of Lin Lee*, 19 I&N Dec 435 (BIA 1987).

Example: An American couple adopts Lim, born in China. They petition for her as their child and she immigrates, later becoming a naturalized U.S. citizen. When Lim grows up, she travels to China and meets her birth parents and biological siblings. Lim wants to petition for her natural sister. Can she?

No. Although Lim and her sister have the same biological parents, Lim's adoption canceled her ability to file visa petitions for her birth parents and her biological siblings.[52] If Lim had not immigrated through her adopted parents but had immigrated another way, and her adoption was ultimately terminated, she might have been able to petition for her natural parents and siblings.

§ 1.5 The Preference Categories

People who immigrate through a preference visa petition will fall into one of four categories. The preference categories are:[53]

FIRST PREFERENCE: The beneficiary is the unmarried son or daughter, 21 years of age or older, of a U.S. citizen. A first preference beneficiary is a U.S. citizen's "child" who has grown up and is unmarried.

SECOND (2A) PREFERENCE: The beneficiary is the spouse or child of a lawful permanent resident.

SECOND (2B) PREFERENCE: The beneficiary is the unmarried son or daughter, 21 years of age or older, of a lawful permanent resident. If an unmarried son or daughter of a lawful permanent resident marries, he or she loses eligibility to immigrate through that parent.

THIRD PREFERENCE: The beneficiary is the married son or daughter, of any age, of a U.S. citizen.[54] A third preference beneficiary is a U.S. citizen's "child" or son or daughter who is now married.

FOURTH PREFERENCE: The beneficiary is the brother or sister of a U.S. citizen. The petitioner must be at least 21 years old. Both siblings must at some time have been the children of one common parent.[55]

Also see the chart in **Appendix 1-B**, "Who Can Immigrate through a Family Visa Petition?"

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[52] See INA § 101(b)(1)(E); *Matter of Xiu Hong Li*, 21 I&N 13 (1995); *Matter of Li*, 20 I&N Dec. 700 (BIA 1993); *Matter of Kong*, 17 I&N Dec. 151 (1979).
[53] These categories are set forth at INA § 201(b)(1).
[54] Before the Immigration Act of 1990, this was referred to as Fourth Preference.) A third preference beneficiary is a U.S. citizen's "child" or son or daughter who is now married.
[55] Before the Immigration Act of 1990, this was referred to as Fifth Preference.)

The date that the preference visa petition is filed is called the priority date. Because the preference visa categories are subject to a quota system, there is a limited number of visas available each year for each of these categories. Because of these limitations, there are often more people who file petitions than there are visas available, resulting in long waiting periods for prospective immigrants. The priority date determines when the prospective immigrant can immigrate. Its function is equivalent to a number on a waitlist. Earlier priority dates are further up on the waitlist for an immigrant visa or green card.[56]

Conversion of the Petition to a New Category

In instances where a child ages out, there is a change in the beneficiary's marital status, or there is a change in the petitioner's immigration status, the petition may stay alive in a new category, and the beneficiary may retain her/his priority date in most circumstances.[57] The basic rule is: *If the new petitioner-beneficiary relationship will support a family petition, the beneficiary retains the petition and priority date.*

1st Preference to 3rd Preference (and vice versa): The single daughter or son of a U.S. citizen marries while waiting for her/his 1st preference priority date to become current. Because a U.S. citizen can petition for her/his married daughter or son in the 3rd preference, the 1st preference petition converts to a 3rd preference petition. If the beneficiary then divorces during the long wait for a current date, he or she again converts—this time back to the 1st preference.

Preference 2a to 2b: The child of an LPR (2a preference) reaches the age of 21 while she awaits a current priority date. Her petition converts to 2b preference and she retains the priority date. There are some exceptions to this rule under the Child Status Protection Act.[58]

Immediate relative to 3rd Preference: The child of a U.S. citizen (an immediate relative) marries (thus becoming a 3rd preference beneficiary). He or she retains the original petition and the priority date is set by the date of that petition.

Preference 2B to First Preference: The petitioner naturalizes so that the beneficiary is the son or daughter of a U.S. citizen. A beneficiary could move from 2B to First Preference and then to Third Preference upon getting married. Also see discussion under **§ 1.10** below regarding a situation where, under the CSPA, a beneficiary might opt to retain his or her 2B classification.

Preference 2A to Immediate Relative: The petitioner naturalizes so that 2A spouses and unmarried children under 21 become immediate relatives. This allows them to escape the preference quotas and potentially process immediately their applications for green cards. In addition, for certain beneficiaries, it may allow them to adjust status—an option they may not have had as 2A beneficiaries. See discussion of adjustment of status in **Chapter 3**.

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[56] See §§ 1.7 and 1.8 below, which describe how the preference visa system works.
[57] 8 CFR § 204.2(1)(i); see also § 1.8 below for a further explanation of priority dates.
[58] See § 1.10 below.

Note: It used to be that an immediate relative child who turned 21 would automatically convert to 1st preference. However, under the Child Status Protection Act (CSPA), effective August 6, 2002, the beneficiary remains an immediate relative even after turning 21, unless he or she prefers to convert to 1st preference.[59]

Changes in preference categories such as those described here, therefore, imply a switch from one waitlist to another. With that switch comes a corresponding change in waiting times, such that going from one preference category to another may mean a longer or shorter waiting time to apply for an immigrant visa.[60]

If, however, the newly created petitioner-beneficiary relationship will not support a family petition, the beneficiary loses the petition and the priority date.[61]

Child or Daughter/Son of a lawful permanent resident (Preference 2A or 2B) Marries: If the child or daughter/son of an LPR marries, he or she has nowhere to go in the preference system because there is no visa category for *married* sons and daughters of lawful permanent residents. Therefore he or she loses her petition *and* priority date. When and if her parent naturalizes, the newly naturalized parent can file a new petition and the wait begins again.

Note: If the parent *naturalized first*, before the child or daughter/son married, then the parent's naturalization would first determine the change in category—from preference 2B to 1st preference in the case of an unmarried son/daughter. The subsequent marriage of the son/daughter would then change the petition to a new category—from 1st preference to 3rd preference. Throughout all the changes, the beneficiary would retain the petition and the priority date, which would determine her place in each new waitlist.[62]

Practice Tip: If an LPR naturalizes after petitioning for her/his single child or daughter or son who marries after the petition is filed, compare the date the parent naturalizes with the date of the marriage. If the naturalization date comes first, the petition is alive. If the child or daughter/son married first, the petition and priority date are lost.

> **Example:** See the chart below for examples as to whether the specified relative can have a family visa petition filed on her/his behalf, as well the appropriate immigration category. See also **Appendix 1-B**.

[59] *Id.*
[60] See §§ 1.7 & 1.8 below.
[61] See § 1.12 below on automatic revocation of visa petitions.
[62] Note that if the son/daughter of the naturalized USC parent in this example qualifies as a "child" he or she may have either become an immediate relative when his or her parent naturalized, and may therefore qualify to apply for a green card immediately, or he or she may qualify for derivative citizenship, depending on the facts.

Relative	Category
Carmen is a lawful permanent resident who wants to petition for her husband.	Second preference, 2A.
Joaquin would like to immigrate through his son, a lawful permanent resident.	Cannot immigrate.
Martin, who is 35 and a U.S. citizen, wants to petition for his brother.	Fourth preference.
Martin also wants to petition for his uncle and cousins.	Cannot immigrate.
John, who is single and 20 years old, would like to immigrate through his mother, a U.S. citizen. He has delayed getting his birth certificate to you. Will his next birthday have any effect on the petition?	Yes, John can immigrate. Once he turns 21, however, he will have to immigrate as a first preference, unless his mother filed the I-130 before he turned 21 and "locked in" his age under the CSPA, which would allow him to remain an immediate relative indefinitely.
Michelle is a lawful permanent resident who wants to petition for her 25-year-old son Jacques, who is unmarried.	Second preference 2B.
Jacques hopes someday to marry his girlfriend, Renee. Would that affect the visa petition Michelle wants to file?	If Jacques marries, he cannot immigrate through his LPR mother. A permanent resident cannot petition for a married son or daughter.
Michelle becomes a U.S. citizen. What kind of petition could she file for Jacques now? What if he marries Renee?	Michelle could file a first preference petition for her unmarried son. If Jacques marries after Michelle naturalizes, the petition will convert to a third preference petition for her married son. Renee could be a derivative beneficiary of the petition.
Zoila is a lawful permanent resident who wants to petition for her married daughter. Zoila is about to apply for U.S. citizenship. Will Zoila's becoming a U.S. citizen help her daughter immigrate?	Yes, once she becomes a U.S. citizen she will be able to immigrate her married daughter as a third preference. Now as an LPR, however she cannot petition for her married daughter.
Sofia is a U.S. citizen who is 18 years old. Her mother would like to immigrate.	Sofia cannot petition for her mother until she turns 21.

§ 1.6 Derivative Beneficiaries

People who immigrate under the preference system have an important right: their spouses and children can immigrate along with them, on the same petition, so the family will not be split up.[63] The **principal beneficiary** is the person immigrating under the preference system. The spouse and children who immigrate with him or her are the **derivative beneficiaries**.

[63] INA § 203(d).

There is a very easy way to see if someone can immigrate as a derivative beneficiary. Simply ask two questions:

1. Will the principal beneficiary immigrate through a preference visa petition?
2. Does that person have a spouse or child?

If the answer to both questions is yes, the spouse and/or child qualify as derivative beneficiaries.

> **Example:** Ramona, a U.S. citizen, files a visa petition on behalf of Rafael, her son. Rafael is married and has 18 and 25 year old sons. When the time comes for Rafael to apply for lawful permanent resident status, who can apply along with him?
>
> First ask: Will Rafael (the principal beneficiary) immigrate on a preference visa petition? Yes, he will immigrate as a third preference immigrant because he is the married son of a U.S. citizen.
>
> Then ask: Does Rafael have a wife or children? Yes, Rafael has a wife and an 18-year-old child. They can immigrate as derivatives. His 25-year-old son is not a "child" under the INA because he is over 21.[64] Therefore, he cannot immigrate as a derivative beneficiary.

Separate I-130 visa petitions may only be filed for derivative beneficiaries in the 2A classification, where children are also eligible for 2A classification, independent of the principal beneficiary parent. Therefore, it may be a good idea for petitioners to file separate 2A petitions for their spouse and their children, especially where the petitioner is likely to naturalize in the near future.[65] Each family member must file his or her own separate application for an immigrant visa or adjustment of status at the second and final step in the immigration process. They also must prove the family relation to the principal beneficiary.

> **Example:** Rafael's mother filed just an I-130 visa petition, for Rafael for third preference classification. When Rafael immigrates, he, his wife and his younger son each must submit an application for lawful permanent residence. Plus, his wife must submit a marriage certificate and his son a birth certificate to prove that they are Rafael's relatives—just as they would do if Rafael had filed a separate visa petition for each of them.

If a 2A derivative beneficiary (child) turns 21 before immigrating (meaning, before completing consular processing and being inspected and admitted to the United States or going through the process of adjustment of status to become a permanent resident), the person might "age-out" and no longer qualify as a derivative beneficiary at the time his or her parent

[64] See § 1.2, above.
[65] See the Practice Tip, below.

immigrates (unless the Child Status Protection Act (CSPA) prevents that).[66] If the CSPA does not prevent the person from aging out, the petitioner should file a separate I-130 on behalf of that son or daughter, under preference category 2B. The beneficiary in the 2B classification will retain the priority date of the principal beneficiary parent from the 2A petition (referred to as **recapturing a priority date**) to avoid being placed at the end of the waiting list.[67]

There are no derivative beneficiaries of **immediate relative** visa petitions.[68] Anyone who immigrates as an immediate relative must qualify in his or her own right and the petitioner must file separate visa petitions for each person.

> **Example:** Steve is a U.S. citizen who files an immediate relative petition for his wife, Marie. Marie's six-year-old daughter Lisa cannot immigrate as a derivative beneficiary of the petition. Steve must file a separate immediate relative visa petition for Lisa as his stepchild.

Practice Tip: Submitting a separate family petition, even if the relative would qualify for derivative status, may be advisable. If the principal beneficiary spouse dies before the visa process is completed, the petitioner must file new petitions for his or her deceased spouse's children. Recapturing the original beneficiary's priority date may be problematic. The same is true if the principal beneficiary divorces the petitioner. An LPR, especially one who is planning to naturalize, should submit separate family petitions for a spouse and children. Once the petitioner has naturalized, a beneficiary spouse becomes an immediate relative, and any children who were derivatives of the spouse's application are no longer eligible as derivatives.

> **Example:** Examples of when the following family members can immigrate as principal and derivative beneficiaries based on the two-step analysis.

1. *Roberto is the brother of a U.S. citizen. He has a wife and 6-year-old son.*

   a. Will Roberto immigrate through a preference visa petition?
   Yes. Roberto is a fourth preference because he is the brother of a U.S. citizen.

   b. Does Roberto have a spouse or child?
   Yes. His wife and 6 year old son qualify as spouse and child, so they can be derivative beneficiaries.

[66] See § 1.10 below.
[67] See § 1.8 below for an explanation of priority dates.
[68] See § 1.2 above.

2. *Marta is the daughter of a U.S. citizen. She has a husband, a married 19 year old son, and an unmarried 21 year old son.*

   a. Will Marta immigrate through a preference visa petition?
   Yes. Marta is a third preference relative.

   b. Does she have a spouse or child (as defined in the INA)?
   Only Marta's husband can qualify as a derivative beneficiary, unless the CSPA helps the 21 year old unmarried son.

3. *Li is the wife of a lawful permanent resident. She has a 3 year old daughter from a previous marriage. [Note: Is there another way Li's daughter could immigrate?]*

   a. Will Li immigrate through a preference petition?
   Yes. Li is a second preference relative.

   b. Does she have a child who can immigrate with her?
   Yes. Li has a child who qualifies as a derivative beneficiary. Her child could also immigrate through a separate petition as her husband's "stepchild."

4. *Susanna is the unmarried 20-year-old daughter of a U.S. citizen. She has a baby girl.*

   a. Will Susanna immigrate through a preference petition?
   NO. Susanna is an immediate relative, and therefore will immigrate through an immediate relative petition.

   b. Can her child immigrate with her?
   No. Her child cannot be a derivative beneficiary because Susanna is not a preference petition beneficiary. If Susanna waits to immigrate until she is over 21, her petition will convert to first preference, and her child could then immigrate with her as her derivative. However, converting to the first preference category would also mean that an immigrant visa would no longer be immediately available for Susanna, and she may have to wait several years on the first preference waitlist in order to apply for permanent residence. Therefore, an alternative option could be for Susanna to immigrate now as an immediate relative of her USC parent and once she becomes an LPR, she can file an I-130 petition for her child under the 2nd preference category, 2A.[69]

[69] See §§ 1.7 & 1.8 for a further explanation of how to evaluate a person's options in light of the various waitlists.

5. *Soheyla has just become a US citizen. She wants to petition for her parents, but her mother is concerned about leaving Soheyla's 16 year old twin sisters behind.*

   Soheyla can petition for her parents as immediate relatives, but there are no derivatives of immediate relatives so that the twins cannot immigrate with Soheyla's parents. Soheyla can file fourth preference petitions for her twin sisters, but the wait to immigrate would be very long. However, once the parents have immigrated as immediate relatives, they can file I-130 petitions for their 16 year old daughters under the 2A preference category. Sometimes, one parent immigrates first so that the second parent can stay in the home country with the minor children.

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§ 1.7 How the Preference System Works

Probably the first question a visa client will ask you is when he or she will be able to immigrate. As discussed above, immigration through a family petition is a two-step process. The first step is submitting a visa petition and the second step is applying for the immigrant visa and permanent resident status. Once the petition is approved, an immediate relative beneficiary may go to step two and apply for immigration. A preference petition beneficiary, however, must wait until a visa is available under the preference system before going on to step two. Understanding how the preference system works will help you analyze visa cases.

The Preference System. When we discuss family visas in the preference system, we are talking about people who immigrate through the first, second, third, and fourth preference categories.[70]

CIS can approve an unlimited number of preference visa *petitions* each year. But not everyone with an approved petition will be able to immigrate.

Only a certain number of people who are born in each country can immigrate to the United States each year under the family preference system. Each time someone immigrates to the United States under the preference system, one visa is **charged to** (subtracted from) the numbers of visas set aside for the country where the person was born. If more people per year want to immigrate than there are visas, that country develops a waiting list or "visa backlog."

As far as theory goes, that is about all you need to know. *The more people who want to immigrate from a country each year over its visa allotment, the longer the waiting list for that country will be.* For that reason, someone from France or Uruguay may be able to immigrate much faster than someone with a similar visa petition from Mexico or the Philippines.

Example: Only 30,130 people can immigrate to the United States from any one country each year. Each year many thousands more people from Mexico apply to immigrate to

[70] See § 1.13 for a discussion of persons immigrating through the Diversity Program, or Employment Visas.

the United States. For this reason, Mexican nationals face a wait of several years to immigrate through the preference system.

Each year, a far smaller number of people apply to immigrate to the United States from France. For that reason, many applicants from France have a relatively short wait.

Changes in the System under the Immigration Act of 1990. The Immigration Act of 1990 set up a complicated system for how many visas go to each preference category.

One of the most important changes in the Act was to allow extra visas for the second preference category, and especially for the spouses and "children" (unmarried and under 21) of permanent residents, category 2A. In the past, this category has had a wait of 10 to 12 years for some countries. Under the current system, the backlog is now approximately 5 to 7 years even for countries with the biggest preference backlog, such as Mexico and the Philippines. However, for unmarried sons and daughters of permanent residents, who are also in the second preference, category 2B, the backlog as of this writing, is approximately 7 to 19 years.

§ 1.8 Using the State Department Visa Bulletin to Make an Estimate of When Your Client Can Immigrate

Each month the U.S. State Department issues a Visa Bulletin.[71] With the right information, you can consult the State Department Visa Bulletin to see if your client is eligible to immigrate. When a backlog exists, predicting exactly when the client will be able to immigrate is impossible. But the Bulletin may be used to make a *very rough estimate* of when the client might be able to immigrate in the future. To do this you need to know the following information about the intending immigrant:

1. The priority date of the visa petition
2. The country of chargeability
3. The preference category
4. How fast the preference category has been advancing in the last 2-3 years.

A. Priority Date

The date that the I-130 visa petition is *filed* with the CIS becomes, upon approval of the I-130, the beneficiary's "priority date" in the preference system.[72] That date establishes the person's place in line to wait for a visa and to determine when the person can immigrate. The priority date is the date that the CIS received the petition and accepted the fee, not the date that

[71] The Visa Bulletin can be accessed through the State Department's website at http://travel.state.gov/visa/bulletin/bulletin_1360.html.
[72] 22 CFR § 42.53(a).

the petition was approved.[73] This is only fair, because in some cases the petition might not be approved for several months or even years after filing it.

> **Example:** Ana filed a petition for her sister Elsa on May 2, 2002. The petition was approved on July 9, 2002. Elsa's priority date is May 2, 2002.

Practice Tip: Shortly after (usually a few weeks) the petitioner files the I-130 at the CIS Regional Service Center, he or she should receive a receipt notice on Form I-797. It is possible, however, that CIS will reject the filing for an error and return the packet with a notice that describes the error. Once the filing is accepted by CIS, the receipt notice issued will indicate when CIS received the petition. This is the priority date. The approval notice will be issued once the petition is adjudicated, up to two to three years after filing in some cases, with the time dependent on the kind of petition. The priority date should be listed on the approval notice but separately from the date of approval.

"Recapturing" Old Priority Dates

In a limited number of situations, immigrants can take advantage of earlier priority dates:

1. ***Western Hemisphere nationals who established a priority date prior to January 1, 1977*** may use that date in any other visa petitions. Before 1977, people who had U.S. citizen children could register and obtain a priority date. Some of these people may carry so-called "*Silva* letters" as beneficiaries of the lawsuit, *Silva v. Bell*, 605 F.2d 978 (7th Cir. 1979). Other people may have had a parent or spouse immigrate before 1977 and, as a result, may qualify for an earlier priority date. Old Western Hemisphere priority dates show up increasingly rarely. When they do, however, the pre-1977 priority date can be used in any family preference category.

   > **Example:** Eduardo had a U.S. citizen child and registered with a U.S. consulate on June 1, 1976. He never immigrated. Now his brother is a U.S. citizen and has filed a 4th preference for him. Eduardo can use his old priority date of June 1, 1976.

2. ***Children who were 2A derivative beneficiaries (discussed in § 1.6) but now have turned 21*** may be able to use the priority date of their parent, the former principal beneficiary.

   > **Example:** Gina is an LPR who files an I-130 petition for her husband under the 2A preference category. Since their child, Soledad, is a minor, Juan and Gina believe that she will be able to immigrate as a derivative with her father before her 21st birthday; hence they do not want to spend the money to submit a separate I-130 for her. Juan's priority date is May 1, 2000.

[73] 8 CFR § 204.1(c).

> However, visas advance slowly and in the year 2006 Soledad turns 21 before she can complete consular processing and immigrate. On June 1, 2011, Gina submits a new I-130 for Soledad. Fortunately, because Soledad was a derivative beneficiary of a 2A petition filed by Gina, she can retain the filing date of the petition for the principal beneficiary (her father). So, she can "recapture" the priority date of May 1, 2000—not the date of filing, June 1, 2011.[74]

For "recapturing" an earlier priority date, the visa petition must not have been revoked.[75] If the petition has not been revoked, the CIS deems the approval of the new petition to be a reaffirmation of the initial petition and reinstates the priority date from the original.[76]

Practice Tip: To request the acquisition of an old priority date, send a letter requesting the earlier date with an explanation of the reason you believe the beneficiary is entitled to that date. You can send the request as a cover letter with the I-130 or, if necessary, later while the petition is pending.

B. Country of Chargeability

Sometimes a question comes up about the country to which the person's visa will be charged. This can make a tremendous difference, since the visa backlog from one country may be a few months, while the wait may be several years from another.

As a general rule, the person's place of birth is the country or territory to which a visa will be charged. This is true even if the person has become a citizen of another country.

> **Example:** Enrique was born in Mexico but has acquired citizenship in Guatemala. His country of chargeability is Mexico.

In some situations, an exception may apply and immigrant applicants can "cross-charge" to a different country. Spouses who are immigrating together, but were born in different countries can pick the most beneficial country of chargeability. Similarly, a 2A spouse whose lawful permanent resident spouse was born in a different country may use the lawful permanent resident spouse's country of chargeability, if more favorable. And, children can cross-charge to a country of chargeability of the parent he or she is immigrating with or following to join.[77] Finally, if a person is born in country where neither of his or her parents had citizenship or permanent residence, the person's country of chargeability can be the country of either of his parents' birth

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[74] See 8 CFR § 205.1(a)(3)(ii)(E). Note that Soledad might still qualify as a "child" under the Child Status Protection Act (CSPA). See § 1.10 below, which describes how the CSPA works.
[75] See § 1.12, below on revocation.
[76] See 8 CFR § 204.2(h)(2).
[77] See INA § 202(b), and 22 CFR § 42.12.

C. Preference Category

This is the category of the visa petition, for example second preference 2A for the immigrating spouse of a lawful permanent resident.

HOW TO READ THE VISA BULLETIN: Look at the copy of a State Department Visa Bulletin in **Appendix 1-C**. First, notice the date at the top. This shows the month to which this visa bulletin is pertinent. The State Department issues a new visa bulletin each month and most of the information in the bulletin changes from month to month. So checking the new visa bulletin each month is important.

Along the left side of the bulletin chart are all the categories of preference visas. Across the top is a list of countries called the "areas of chargeability." The first category says "All Chargeability Areas except Those Listed." Known as the "worldwide" category, it includes all countries not separately listed. For example, Argentina does not have a separate listing in the bulletin. Therefore, a person from Argentina should use the numbers listed in the "All Chargeability" column. The countries that fall into this category usually have the smallest backlogs and thus the shortest waiting periods.

If the person is from a country that has its own separate listing, such as China, India, the Dominican Republic, Mexico or the Philippines, he or she must consult that country's column of information.

If you draw a line from the relevant preference category and across from country of chargeability you will find a date. That is the priority date of persons from that country, and in that preference category, for whom immigrant visas are available now. The rule to reading the Bulletin is:

> If your client's priority date falls *before the date listed*, a visa is now available and she can immediately apply for lawful permanent resident status. If your client's priority date falls *on or after the date listed*, no visa is available to her that month and she must wait longer.
>
> **Example:** Look at the July 2011, Visa Bulletin on **Appendix 1-C**. Pretend today is December 15, 2010. Sarwan, who is single, was born in India in 1981. On March 6, 2003, his permanent resident mother filed a second preference visa petition for him. The petition was approved in 2006. The priority date for second preference 2B visa petitions from India on the chart is July 1, 2003. Sarwan's priority date, March 6, 2003, is before the priority date listed in the Visa Bulletin. Therefore, Sarwan is eligible to immigrate now.
>
> Louise was born in Haiti. On February 22, 2003, her U.S. citizen sister filed a visa petition for her. The priority date for fourth preference petitions worldwide is March 8, 2000. Louise is not eligible to immigrate now, because her priority date falls after the date in the Visa Bulletin.

Sometimes, categories show the letters "C" or "U" instead of a date. The letter "C" means that the category is current and there is no waiting for a visa, no matter when the petitioner filed the petition. The letter "U" means that the category is unavailable. All the visas in that category and country have been used up for the current year. Some visas may become available at the end of the year or the beginning of the next year's accounting in October (CIS operates on a fiscal year basis, beginning every October 1st). Until then, the person cannot immigrate no matter when his or her visa petition was filed.

TO ORDER THE STATE DEPARTMENT VISA BULLETIN: You can receive the monthly State Department Visa Bulletin. There is no charge. To be placed on the Department of State's E-mail subscription list for the Visa Bulletin, send an e-mail to the following address: listserv@calist.state.gov and in the message body type: Subscribe Visa-Bulletin First name/Last name (example: Subscribe Visa-Bulletin Sally Doe). To be removed from the Department of State's e-mail subscription list for the Visa Bulletin, send an e-mail message to the following address: listserv@calist.state.gov and in the message body type: Signoff Visa-Bulletin.[78]

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§ 1.9 Advising Your Client about When a Visa May Become Available

Predicting exactly when a visa will become available for a person waiting to immigrate under the preference system is impossible. The priority dates in the Visa Bulletin do not advance consistently because the number of people who apply in a particular preference category can vary from month to month, the number of people who are on the waiting list who still want to immigrate is unknown, and the number of derivative beneficiaries is unpredictable. The dates in one category may even jump ahead three months over one month of "real time" or they may stand still or even go backwards.

Review past Visa Bulletins and read the comments in the State Department mailing to get an idea of where a preference category may be moving. However, no one can guarantee exactly what will happen. You must explain this uncertainty to clients. With experience, rough estimates can be made, but changing worldwide visa demands or changes in the law can create drastic changes.

You can only make rough estimates as to when a client will be able to immigrate when there is a backlog. This is because no one knows exactly how many people are on the waiting

[78] The Visa Bulletin can also be accessed through the State Department's website at http://travel.state.gov/visa/bulletin/bulletin_1360.html. Additionally, a recorded message with visa cut-off dates can be heard at: (202) 663-1541. The recording is normally updated by the middle of each month with information on cut-off dates for the following month.

list. Some may have died, changed preference categories, or changed their minds. Some may have had children, adding to the number of derivative beneficiaries ahead of you.

Practice Tip: Your client may have more than one family member who can file a petition for her/him. In general, when the wait between the time of filing and the time the priority date becomes current is long, consider advising your client to ask more than one family member (and perhaps all who can) to file a petition. Long waits coupled with life's uncertainty can result in loss of the ability to immigrate after many years of waiting because of, e.g., death or divorce. Filing two or more petitions is a relatively inexpensive insurance policy against future loss of a petition and priority date. In addition, if the petitions are in different categories, the beneficiary can also hedge his or her bets about which category will advance more quickly.

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§ 1.10 Child Status Protection Act (CSPA)

The Child Status Protection Act (CSPA) went into effect on August 6, 2002. It was created to help with the problem of children "aging out" of their eligibility to immigrate when they turn 21. This section describes how CSPA works.

A. Children of U.S. Citizens

Children of U.S. citizens benefit the most from CSPA. If their parents file I-130 visa petitions for them before they turn 21, they will never age out.[79] They will remain immediate relatives, even though they are no longer children as defined in the INA. Before the CSPA was enacted, their petitions would have converted automatically into 1st preference petitions when they turned 21. By remaining immediate relatives, these beneficiaries will be able to immigrate more quickly, because they do not have to wait for a priority date to become current. While these beneficiaries must remain unmarried, there is no time limitation regarding when they must actually apply for adjustment or an immigrant visa.

Such a beneficiary might prefer to convert to 1st preference if he or she has a child of her own. This is because an immediate relative petition does not include derivative beneficiaries, meaning that if the parent immigrates as an immediate relative, her child cannot immigrate with her. Instead, the child would have to wait until the parent becomes a lawful permanent resident and then can petition for her. This could take years. However, all preference petitions can have derivative beneficiaries, so if the parent immigrates, through her own U.S. citizen parent, as a 1st preference immigrant, her child can immigrate with her.

Fortunately, the CSPA allows the immediate relative beneficiary to opt out of remaining an immediate relative upon turning 21. Therefore, if the beneficiary wants, she can convert to 1st

[79] INA § 201(f)(1).

preference, so that when she immigrates her child will be able to immigrate with her as a derivative beneficiary.[80]

The BIA has held that the CSPA also allows former immediate relatives who aged out before the CSPA became effective on August 6, 2002 to file an application for an immigrant visa or adjustment of status, if they have not already done so**,** no matter how long ago the visa petition was filed and approved.[81]

> **Example:** Paula, a U.S. citizen, filed an I-130 for her daughter Isabel on June 7, 1997. The petition was approved on December 2, 1997. Isabel did not file for adjustment of status and then turned 21 on January 5, 1998. The petition was at that time converted to first preference. The BIA has recognized that visa petition beneficiaries such as Isabel can qualify for CSPA. So, Isabel filed an adjustment of status application on August 1, 2008, though she is now 30 years old. Isabel is considered an immediate relative and is allowed to adjust her status now.

B. Children of LPR Parents who Naturalize while the Petition Is Pending

If an LPR parent petitions for a child, and then naturalizes before that child turns 21, the child becomes an immediate relative. Under the CSPA, the child will remain an immediate relative even if he or she turns 21 before he or she can immigrate.[82]

Sometimes an LPR petitioner will file only one I-130 for his or her spouse and assume that their children will immigrate in derivative status. Keep in mind that when these parents naturalize, they will need to file a separate I-130 petition for each child, since the children will lose their derivative status. What happens to those children when they turn 21?

Under the CSPA, we believe that derivative children under 21 at the time the lawful permanent resident parent naturalizes should be considered immediate relatives, even if the parent did not file new petitions for them until after they turned 21; the relevant petition should be the original petition filed by the LPR parent for the spouse, with the children included as derivatives. However, the CSPA is not totally clear on what happens to children in this situation. To be on the safe side, you should make sure that once the lawful permanent resident parent naturalizes, the new petitions for the children are filed before they turn 21. That way, they will be sure to retain their status as immediate relatives after they turn 21.

Like other children of U.S. citizens, if the petitioner's child has a child of his or her own, he or she might not want to remain an immediate relative after turning 21, because he or she

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[80] See item 30 in the U.S. Department of State's revised cable of January 3, 2003, "The Child Status Protection Act: ALDAC 2," which can be found at: http://travel.state.gov/visa/laws/telegrams/telegrams_1369.html [also posted on AILA InfoNet at Doc. No. 03020550 (Feb. 3, 2003)].

[81] See *In re Avila-Perez*, 24 I&N Dec. 78 (BIA 2007); see also Neufeld memorandum, "Revised Guidance for the Child Status Protection Act (CSPA), issued April 30, 2008 and included as Appendix 1-D.

[82] INA § 201(f)(2).

would not be able to bring the child in as a derivative beneficiary. Again, CSPA allows the beneficiary to opt out of classification as an immediate relative if he or she wants to.[83]

C. Married Children of U.S. Citizens (Third Preference Category)

Married children benefit from the CSPA if they divorce while still under 21.[84] They become immediate relatives, instead of just converting to 1st preference (unmarried son/daughter of a U.S. citizen). If they are over 21 when they divorce, then they convert to 1st preference.

It is not clear under the CSPA whether married children who are under 21 years old and are the children of U.S. citizens are eligible to opt out of converting to immediate relatives if they divorce. Obviously, if they have dependent children, they may prefer to move into the first preference category upon turning 21 so that their children can derive status and immigrate with them.

D. Children of LPRs and of Derivative Beneficiaries

Before CSPA, the children of LPRs who turned 21 would convert from the 2A to the 2B preference category. Derivative beneficiaries, such as the children of 4th preference (brother/sister of USC) beneficiaries, would age out and lose their ability to immigrate altogether before CSPA.

The CSPA changes this, but it is much less generous, and much more complicated, for the children of lawful permanent residents and other derivative beneficiaries than it is for the children of U.S. citizens. There is a formula you have to follow:

1. First you have to calculate the time the petition was *pending*. The CSPA itself does not define what "pending" means, but the CIS and the State Department have decided that it means the time between the petition's filing date and the approval date

2. Second, you have to deduct the time the petition was pending from the beneficiary's actual age *on the date the visa becomes available*. The date the visa becomes available is either (a) the date the priority date (for the original preference category) becomes current or (b) the petition approval date, *whichever occurs later*.[85]

In other words you have to look at the biological age of the derivative beneficiary at the time the visa becomes available. If the beneficiary is over 21, he or she still might qualify, depending on how long the I-130 was pending.[86]

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[83] See item 30 of the U.S. Department of State's revised cable of January 3, 2003, "The Child Status Protection Act: ALDAC 2," found at: http://travel.state.gov/visa/laws/telegrams/telegrams_1369.html [also posted on AILA InfoNet at Doc. No. 03020550 (Feb. 3, 2003)].
[84] INA § 201(f)(3).
[85] See Neufeld Memorandum above on note 81 and included here as Appendix 1-D.
[86] INA § 203(h)(1)(A)-(B).

If you deduct the time the petition was pending from the beneficiary's actual age and come up with a number that is less than 21, the person can remain a 2A beneficiary ***as long as he or she "has sought to acquire" lawful permanent resident status within one year of the priority date becoming current***.

For those who are going to adjust their status, the clearest and safest way to comply with the "sought to acquire" provision is to file the I-485 adjustment application within one year of the date the visa becomes available. For those who are going to immigrate through consular processing, this means that the beneficiary should either submit a completed form DS-230 to NVC (see **Chapter 4**), or, for derivative beneficiaries of a principal beneficiary who has immigrated, submit a form I-824 to the Service Center that processed the I-130 within one year of the date the visa becomes available (see **Chapter 2**).

Practice Tip: If a person is a derivative beneficiary, the important date to take action and seek to acquire residency is within one year from when the visa became available. Remember that the date the visa becomes available is defined as either the date the priority date (for the principal beneficiary and original visa category) becomes current or the date the visa petition is approved, whichever is later The derivative beneficiary should therefore NOT wait to take action to apply to immigrate until after the principal parent beneficiary immigrates, which may occur more than one year after the priority date becomes current. If the beneficiary is then over 21 and has not "sought to acquire" residency within the one year time period, it will be then likely be too late to do so.

If the beneficiary did not file the I-485 or consular processing documents within one year, it is possible that other actions may be sufficient to meet the "has sought to acquire" residency requirement, such as seeking legal counsel.[87]

> **Example:** Pedro, who is an LPR, filed an I-130 for his son Samuel on October 8, 1998. It was approved exactly one year later, on October 8, 1999. It is now November 1, 2003, the priority date is now current, and Samuel is now 21. Samuel is in the United States and intends to apply for adjustment of status (see **Chapter 3**). Since the CIS took one year to approve the petition, you can deduct one year from his current age. For purposes of immigrating, therefore, he is only 20, and he can still immigrate as a 2A beneficiary, even though he is really over 21. However, if he doesn't file his adjustment application before November 1, 2004, he will lose the right to immigrate in the 2A preference category, and will automatically become a 2B beneficiary. Since the priority date for 2B is not current, he'll have to wait longer to immigrate.

The same rule applies to derivative beneficiaries in other preference categories.

> **Example:** Jane, a U.S. citizen, filed a third preference petition for her married son Mark on August 1, 1999. It was approved three years later, in August of 2002. Mark's wife

[87] See unpublished BIA decision *In re Kim*, A77 828 503 (BIA Dec. 20, 2004).

Wanda and minor daughter Diana were derivatives. It is now November 1, 2005, Diana is 22, and the priority date is current. Under the CSPA, if you deduct Diana's age of 22 from the 3 years that the petition was pending, the number you get is 19. Therefore, Diana can remain included in Mark's petition ***as long as she files for adjustment or consular processing before November 1, 2006.*** If she fails to file before November 1, 2006, Diana will lose her derivative status, and the only way she will be able to immigrate is through a separate petition filed by her father or mother after they have immigrated.

E. New Processing Procedure

The CIS adopted a new procedure for the processing of I-130s. It may be advantageous for beneficiaries who would otherwise age out in spite of CSPA. Instead of processing I-130s prior to the availability of a visa, CIS will process them as the visa numbers become available. As a result the amount of time the petition is pending is longer. This amount of time is then subtracted from the actual age of the applicant at the time the visa number is available. As a result, an applicant who would otherwise have aged out may be able to retain 2A status or derivative status.

Example: Julio, a lawful permanent resident, filed a petition for his daughter, Luisa in December of 1998. If the petition were approved one year later, one year would be subtracted from Luisa's age at the time the visa number is available. However, if it takes 3 years for her priority date to become current, and Luisa was 19 at the time the petition was filed, she would be 22 at the time the visa number becomes available. Since her petition was only pending for 1 year, she could deduct one year from her actual age, and would be considered 21 for the purposes of CSPA. Thus, she would age out.

However, under the new procedure, Luisa's petition will be pending so long as there is not a visa number available, in this example, 3 years. Now the 3 years the petition was pending will be subtracted from Luisa's current age of 22 so that her age under CSPA is 19, thus allowing her to still qualify for a 2A visa.

F. Relief for Filipinos/Opt Out Provisions under CSPA

For complicated reasons, the first preference category is now backlogged much further than the second preference 2B category for beneficiaries from the Philippines. Therefore, when their parents naturalized, and these sons and daughters over 21 moved from 2B to first preference, they actually extended the time they needed to wait for their visa to become current. The CSPA allows beneficiaries in this situation to elect whether they want to automatically convert to the first preference or opt out and stay in the 2B category.[88]

The CIS advises that persons seeking to opt out file a request in writing with the CIS Office that has jurisdiction over the beneficiary's residence. This request must be submitted by

[88] CSPA § 6, amending and adding INA § 204(k); see Appendix 1-D.

the beneficiary him or herself, not the petitioner. The Officer in Charge of the CIS Office will provide written notification of a decision to both the beneficiary and the Department of State's visa issuance unit. Once the beneficiary's request is approved, the beneficiary's eligibility for family-based immigration will be determined as if the beneficiary's parent never naturalized. If the beneficiary is filing an adjustment of status application, this request can be submitted with the I-485 application. The age of the child on the date of the parent's naturalization remains his or her age for CSPA purposes.[89]

Of course, if the children were under 21 at the time the parent naturalized, then they would become immediate relatives upon their parents' naturalization and would be able to immigrate immediately. Though this part of the CSPA was designed to remedy a dilemma faced by people from the Philippines, in reality it is not limited to nationals of the Philippines.

G. Children of Asylees and Refugees

The spouse and unmarried children of refugees and asylees may enter the United States as derivatives. Before, if the child turned 21 before the parent was granted asylum or refugee status, the child could not be a derivative beneficiary of the parent. In certain situations, the CSPA allows such children to be derivative beneficiaries. There are several groups of children whose status could be affected by the CSPA. These groups are:

1. ***Unmarried Child in the United States and Under 21 when the Parent's Asylum Application Is Filed, and Included in That Application:*** If an unmarried child who is living in the U.S. was included on her parents' asylum application, and that application was filed at any time, but no decision on the application was final until on or after the CSPA effective date of August 6, 2002, the child will be able to derive asylee status and later adjust her status to that of a lawful permanent resident, even if she later turns 21. It doesn't matter whether she turns 21 before or after the approval of the asylum application, or before or after she applies for adjustment of status.

2. ***Unmarried Child in the United States and under 21 when the Parent's Asylum Application Is Filed, but NOT Included in That Application:*** If an unmarried child who is living in the United States was not included on her parents' asylum application, the principal must file an asylee relative petition (Form I-730) within 2 years of the date the asylum application is granted in order for the child to derive asylum status from the parent. For those asylum applications filed on or after August 6, 2002, these children will be able to derive asylee status and later adjust status to that of a lawful permanent resident so long as the asylum application was filed before the child turned 21, and the I-730 is filed within 2 years of the asylum grant.[90]

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[89] See Memorandum from Joe Cuddihy, Director of International Affairs, USCIS, on Section 6 of the Child Status Protection Act (Mar. 23, 2004), found at: http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2004/cspa_sec6_32304.pdf. See Appendix 1-F.

[90] CSPA § 4 and 4; 8 CFR § 208.3(a).

3. ***Unmarried Child outside the United States*:** If an unmarried child is not living in the U.S., and a parent files an asylum application on or after August 6, 2002, the child will be able to derive asylee status and later adjust her status to that of a lawful permanent resident so long as the asylum application was filed before the child turned 21 and the parent filed or files the I-730 within two years of obtaining asylum status.

4. ***Asylum Applications Filed before August 6, 2002:*** Still somewhat unresolved is what happens in the situation when the asylum application of the parents of an unmarried child was approved before August 6, 2002. Under these circumstances, we believe the child should still be able qualify for derivative asylee benefits so long as the parent filed the I-730 and it was pending on August 6, 2002.[91] Although under these circumstances it should not matter whether the child turned 21 before or after August 6, 2002, it is unclear whether the I-730 had to have been filed before the child turned 21 for the child to remain eligible for derivative asylee benefits and adjustment of status.

H. Effective Date of CSPA

The CSPA was signed into law on August 6, 2002. Therefore it applies to ALL petitions filed on or after that date. It also applies to certain petitions that were filed before August 6, 2002 but that were approved on or after that date, including petitions that were denied before August 6, 2002 if an appeal or motion to reopen was granted after that date. In addition, those beneficiaries who had approved visa petitions but no adjustment of status application "pending" on August 6, 2002 who later filed applications for adjustment were initially denied or discouraged from applying. The BIA has clarified that such beneficiaries are actually protected by the CSPA, finding that the CSPA does not require that an adjustment application be pending on the date of enactment if a visa petition was already approved.[92] Those beneficiaries who otherwise qualified for CSPA may now file motions to reopen or reconsider their denied adjustment applications without fee, or make their initial application now, in certain cases.[93]

However, current policy is that the CSPA does not apply to petitions approved before August 6, 2002 if there has been a final determination on the immigrant visa application or adjustment of status application before that date. According to the CIS, a final determination for purposes of an adjustment of status application means approval or denial by the CIS or EOIR. However, the Ninth Circuit has ruled that there is no final determination if an appeal is pending in federal court.[94] At this time, CIS is only applying this rule in the Ninth Circuit.

If there has been no final determination of the immigrant visa or adjustment of status application as of August 6, 2002, the CSPA will apply to petitions approved before August 6, 2002 if the dependent aged out on or after August 6, 2002 and the visa became available on or after August 7, 2001.[95] For those who aged out before August 6, 2002, the policy is that the

[91] 8 CFR § 208.21(c),(d).
[92] See *Matter of Avila-Perez*, 24 I&N Dec. 78 (BIA 2007).
[93] See Appendix 1-D.
[94] *Padash v. INS*, 358 F. 3d 1161 (9th Cir. 2004).
[95] See Appendix 1-D and Appendix 1-E.

CSPA only applies if an application for adjustment of status or for an immigrant visa was submitted before ageing out. There is some dispute about whether this CIS/DOS interpretation is correct, but at this writing this is how the CSPA is being implemented.

§ 1.11 The "V" Non-immigrant Visa

As you may have noticed from studying the priority date system, spouses and children of lawful permanent residents often wait many years to immigrate without a right to work or reside in the United States. On December 21, 2000, Congress enacted the Legal Immigration and Family Equity Act (LIFE). The LIFE Act somewhat ameliorated the family visa-backlog problem by creating two non-immigrant visa categories: one for the spouses and minor children of legal permanent residents (The "V" Visa); and the other for the spouses and minor children of U.S. citizens (the "K" Visa).[96]

Spouses and children (unmarried and under 21) of legal permanent residents whose family petitions were filed on or before December 21, 2000 and who have been waiting in the backlog for three years or more will be given permission to reside and work in the United States until their visa petitions become current (thereby becoming eligible to file for adjustment—see **Chapter 3** for information on adjustment).[97]

> **Example:** Carmelo filed for his wife Josefina in November 1999. In November 2002, Josefina was allowed to apply for a "V" visa thereby granting her permission to reside and work in the United States.

In order to qualify, the beneficiary has to be eligible for the "V" visa when he or she reaches the three-year mark, not just as of December 21, 2000.[98]

> **Example:** Carmelo filed for his daughter in November 2000. Carmelo's daughter was 20 years old at the time. In November 2003, she will have been waiting for three years for her visa petition to become current, however by that date she will be over 21. Therefore, she will no longer be eligible to receive the "V" visa.

Important Note: Originally, CIS said that children in V visa status would lose eligibility for the V visa once they turned 21. The Ninth Circuit held, however, that a child who initially qualified for a "V" visa remains eligible for "V" status once she turns 21.[99] Although CIS was only legally required to follow this case in the 9th Circuit, it made the decision to follow it all over the country. Therefore, thanks to this case, people who turn 21 while in V visa status are eligible to remain in

[96] See § 1.3 for information on the "K" visa.
[97] INA § 101(a)(15)(V).
[98] INA § 101(a)(15)(V); 8 CFR § 214.15(c).
[99] *Akhtar v. Burzynski*, 383 F. 3d 1193 (9th Cir. 2004).

that status until they are able to immigrate. They still must be under 21 when they apply for the V visa the first time.

Individuals who are eligible to request a "V" visa can do so either at the consulate in the country they reside, or if living in the United States (legally or not) from the CIS.[100] If processing at the consulate the applicant should request the V visa at the same consulate that would have jurisdiction over the applicant's immigrant visa. If living in the U.S. without status, the applicant should *not* travel abroad for processing, as that could trigger grounds of inadmissibility affecting later eligibility to adjust status to permanent residency. See **Chapter 5**.

Eligible individuals residing in the United States regardless of status need to submit the following documents:[101]

- Form I-539 Application to Change Nonimmigrant Status plus filing fee and Form I-539 Supplement A;
- Form I-765 Work Authorization Application plus filing fee;
- Form I-693 Medical Examination, without the vaccination supplement;
- Fingerprint Fee if between 14 and 79 years of age; and
- Proof that the I-130 petition has been pending for at least 3 years.

An approval notice is not required to establish that the I-130 was submitted. Other evidence, such as a receipt notice, is acceptable. The petitioner may also be asked to submit a nonbinding affidavit of support (Form I-134), which no longer requires a notarized signature, but has been changed so as to reflect that signing the I-134 "is under penalty of perjury under U.S. law." The documents must be sent to the following address:

U.S. Citizenship and Immigration Services
PO Box 7216
Chicago, IL 60680-7216

Eligible individuals residing outside the United States are to be notified by their respective Consular Office as to how to proceed with a "V" visa request. You can find a link to individual consular posts by going to the State Department's web site.[102]

A. Inadmissibility and the "V" Visa

By statute, the three- and ten-year bars do not apply to "V" visa applicants, however, all other grounds of inadmissibility do apply.[103] The "V" visa is a non-immigrant visa. If a nonimmigrant is inadmissible, he or she can request a waiver of inadmissibility under INA §

[100] INA § 214(q).
[101] 8 CFR § 214.15(f)(1).
[102] To find a specific U.S. Consulate's or Embassy's website, go to http://www.usembassy.gov/.
[103] INA § 214(q)(2).

212(d). Thus, "V" visa applicants should be able to receive waivers pursuant to § 212(d). The nonimmigrant inadmissibility waiver can waive any ground of inadmissibility in the discretion of the CIS upon recommendation of the State Department. Therefore, although this issue is not yet settled, we encourage advocates to argue that the CIS should grant a § 212(d) waiver of a ground of inadmissibility for individuals seeking nonimmigrant visas even though a waiver of that same ground of inadmissibility would not be available for individuals seeking immigrant visas.

> **Example:** Chin is subject to the permanent bar[104] because he lived in the United States without permission from May 1998 to July 2000, then left, then returned to the U.S. in December 2000 by crossing the border illegally. He is not eligible for a waiver of the permanent bar as an intending immigrant. However, as a nonimmigrant "V" visa applicant the CIS can grant him a general waiver. Note that when Chin applies for his immigrant visa the CIS will deny his application because he is inadmissible as an immigrant under the permanent bar.

B. Extending the V Status or V Visa

The CBP may grant persons a two-year stay if they are entering the United States with a "V" visa issued by the consulate.[105] The authorized stay is designated on form I-94, the white card that is stapled into a person's passport upon admission to the U.S. However, CBP may authorize less than 2 years when the person's passport is valid for a shorter period. If your client was given less than two years for no apparently legitimate reason, he or she may be able to have the local Deferred Inspections section of CBP (usually still housed within the CIS District Office, even though not a part of CIS) remedy this.

Persons who enter the United States with the "V" visa or who are issued the "V" visa status from the CIS will need to extend their stay before their current stay expires.[106] If they are still in status, they can file the Form I-539, in addition to Supplement A to Form I-539, with the filing fee, up to 120 days before the expiration of their status. Send the Form I-539, Supplement A and filing fee to CIS, PO Box 7216, Chicago, IL 60680-7216. In Part 2, Question 1, check box (a) asking for an extension of stay of their current status. They should be able to include derivatives and other co-applicant family members on the Supplement A form thus avoiding additional filing fees. They do not need to submit the fingerprint service fee or the medical examination, Form I-693. Include an I-765 and filing fee if seeking renewed work authorization.

A V nonimmigrant who has filed an application for adjustment of status (Form I-485) is still eligible for an extension of V nonimmigrant status as long as the adjustment application remains pending.[107]

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[104] INA § 212(a)(9)(C). See Chapter 5 on Grounds of Inadmissibility.
[105] 8 CFR § 214.15(g).
[106] 8 CFR § 214.15(g)(3).
[107] 8 CFR § 214.15(g)(4)(iii).

If the V status is expiring and an immigrant visa number is available the V nonimmigrant is allowed one 6-month extension to file for the adjustment.[108]

If the client already has let the authorized stay on the I-94 expire, he or she will still be filing the Form I-539, but will not be asking for an extension. Instead, they will be filing for a new application for the V status, and will be checking box (b) in Part 2, Question 1. They will write in "V status" on the line asking for the new status they are requesting. They will need to submit the medical exam results and fingerprint service fee. The agency will not extend the V visa or V status if the applicant has applied after the I-94 has expired.

C. Age-Outs

In January 2005, the CIS reversed its prior policy of not renewing visas for children who entered with V-2 visas (children of LPRs with separate I-130s filed on their behalf) or V-3 visas (derivatives) once they turned 21. Therefore, all children granted a V-2 or V-3 visa can continue to receive extensions of status as long as their application is not terminated under 8 CFR 214.15(j) and regardless of their age. Children who had previously had a V-2 or V-3 status and whose renewals were denied based on turning 21 can file a new application for an extension and it will be granted starting from the date that the previous status expired.

If a child who is a derivative beneficiary of a second preference spouse turns 21, a separate petition is required.[109] In this situation, the aged-out derivative beneficiary can keep the same priority date if the same petitioner files the new petition.[110]

For purposes of the 3- and 10-year bars,[111] children do not begin gaining unlawful presence until they turn 18, nor is unlawful presence relevant for periods prior to April 1, 1997. Children who enter the United States for the first time with the V visa, therefore, do not begin to gain unlawful presence until their I-94 expires or they turn 18, whichever is later, for purposes of the 3- and 10-year bars. However, they will begin to accrue unlawful presence after their I-94 expires for purposes of the "permanent bar" in INA § 212(a)(9)(C), which does not exempt children (see **Chapter 5**).

V Visa holders who file a timely application for an extension do not accrue unlawful presence until a decision is made on the application. If they are approved for another two years, then they never acquire unlawful presence; if they are denied, unlawful presence begins on the date of the denial.

Those who file new applications for V visa status after the expiration of their original V visa status accrue unlawful presence until the new application is granted. spouses and children between the ages of 18 and 21 who were illegally here when they filed for V status in the United

[108] 8 CFR § 214.15(g)(4)(ii).
[109] See 8 CFR § 204.2(a)(4).
[110] This retention of the priority date, however, does not apply to aged-out derivative beneficiaries in the other preference categories.
[111] See INA § 212(a)(9)(B).

States may have already acquired enough unlawful presence to trigger the bars to admission. Unlawful presence accrued either before or after the V status still counts toward the bars. If they have been unlawfully present in the U.S. for a continuous period of more than 180 days, then they trigger the three-year bar when they leave the United States. If they have been in the U.S. continuously for one year or more, then they trigger the 10-year bar when they leave the U.S. Please see **Chapter 5** for more information on this topic.

One way to avoid gaining unlawful presence is to ensure that the person does not leave the United States before obtaining permanent residence, including leaving the U.S. to apply for a V visa abroad, which is unnecessary. See **Chapter 3** on Adjustment of Status. There is a waiver of the 3- and 10- year bars available to those who have U.S. citizen or lawful permanent resident spouses or parents.[112]

D. Termination of V Status

If the petitioner becomes a U.S. citizen while the beneficiary is in V status then the spouse and children, including derivative children, will no longer qualify for a V visa, if they then become immediate relatives. However, if the V-2 or V-3 child turned 21 before the parent petitioner naturalized and does not otherwise qualify as an immediate relative under the CSPA, then the child (now a "son or daughter") can stay in V status until an immigrant visa becomes available and he or she is then able to apply for adjustment of status. Any V-2 or V-3 son or daughter who was denied an extension solely because of the naturalization of the petitioner may now again request an extension through a request letter or motion to reopen without sending a fee to the National Benefits Center. See **Appendix 1-E**, **Section 2**.[113] For those spouses and children who do convert to immediate relatives, V status will expire when their authorized period of admission ends.

§ 1.12 When Is a Visa Petition Terminated or No Longer Valid?

A. Automatic Revocation of a Visa Petition

Pursuant to 8 CFR § 205.1(a)(1)-(3), approval of a visa petition for the relative of a U.S. citizen or of a permanent resident alien is automatically revoked retroactive to the original approval date if:

1. The State Department terminates the beneficiary's registration for a visa because the alien failed to apply for an immigrant visa within one year after being notified that a visa was available and the beneficiary failed to prove to the Service, within two years of the notice, that the failure to apply was due to circumstances beyond the alien's control.

[112] See Chapter 5, § 5.11.
[113] Clarification of Aging Out Provisions as They Affect Preference Relatives and Immediate Family Members Under The Child Status Protection Act Section 6 And Form I-539 Adjudications for V Status by Michael Aytes, CIS Associate Director, Domestic Operations, dated June 14, 2006.

2. If the filing fee and any other charges are not paid within 14 days after notifying the petitioner or beneficiary that the original check was returned as not payable.

3. If the petitioner files a formal notice of withdrawal with any Service officer who is authorized to approve such petitions;

   If any of the following events happen before the beneficiary enters the U.S. after consular processing or, if in the U.S., before the final adjudication of the adjustment of status:

4. For the beneficiary of a spousal petition, if the requisite marriage terminates by divorce or annulment;[114]

5. Upon the marriage of a person granted second-preference status as the unmarried son or daughter of a lawful resident alien.[115]

   Example: Juan, an LPR, petitions her daughter, Patricia (2B). Patricia gets married. Because LPRs cannot immigrate married sons or daughters, the petition is terminated.

6. If a petitioner legally terminates his status as a lawful permanent resident, except when such termination occurs through the petitioner's naturalization.

   Example: Carlos, a lawful permanent resident, petitions his wife Lorena (2A preference.) Carlos is convicted and deported for an aggravated felony. The petition for Lorena is terminated.

   Example: Carlos, a lawful permanent resident, petitions his wife Lorena (2A preference.) Carlos becomes a U.S. citizen. The petition is not terminated because Lorena becomes an immediate relative.

***Exception*:** A self-petitioning abused spouse or child does *not* lose eligibility if the lawful permanent resident abuser loses permanent resident status due to an incident of domestic violence and after the self-petition has been filed.[116]

For adjustment of status, the petition is automatically revoked when the circumstance that triggers revocation occurs before a final decision is made on the application. In consular processing cases, the petition is revoked if the circumstance occurs before the beneficiary or self-petitioner commences her/his journey to the United States.[117]

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[114] Note that if the beneficiary is or was the victim of "battery or extreme cruelty" at the hands of the petitioner, he or she may file a VAWA self-petition on Form I-360 per INA § 204(a)(1)(A)(iii) and recapture the priority date from the I-130 previously filed by the petitioner.
[115] See 8 CFR § 205.1(a)(3)(i)(I) and INS Adj. Filed Manual 21.4.
[116] INA § 204(a)(1)(A)(iii).
[117] 8 CFR § 205.1(a)(3).

> **Example:** Carolina, an LPR, petitioned a number of years ago for her unmarried son, Austin, who lives in Mexico, (preference category 2B). Austin goes to his consular appointment and his application is approved. After getting his visa but before going to the United States, he gets married to his girlfriend, Barbara. Austin's visa application is revoked because he no longer qualifies as a 2B beneficiary because he is no longer is the *unmarried* son of an LPR.[118]

Effect of an Annulment: Depending on the reasons for annulment and on the pertinent state law, an annulment may "relate back" to the date of marriage as if the marriage had never happened.[119] The courts apply this principle for immigration purposes where it promotes justice and the intended outcome of the law.[120] For example, in the case of a marriage between a USC or LPR and an alien, a retroactively applied annulment of the marriage forming the basis of the immigrant petition may lead to the revocation of the petition and the denial of any subsequent application for adjustment or for an immigrant visa.[121] The main factor considered by the courts is whether the retroactive application of the annulment would serve the interest of justice. Therefore, where there is no evidence that a marriage was entered into for the purposes of applying for an immigration benefit, an annulment may not be applied retroactively.[122] Similarly, the annulment of a prior marriage may or may not be applied retroactively for purposes of validating the current marriage that is the basis for an immigrant petition, depending on whether or not the courts find that the annulment was sought for the purposes of gaining an immigration benefit.[123]

> **Example:** Karthik, a USC, files an I-130 for his wife, Sureikha. After Sureikha enters the U.S. and becomes an LPR, she and Karthik obtain an annulment. The annulment may or may not be given retroactive effect, causing the revocation of Sureikha's LPR status, depending on whether or not it is determined that the marriage was entered into for immigration purposes.

The case is similar for the beneficiary of a second preference visa petition. The son or daughter of an LPR must be unmarried at the time the LPR parent files the immigrant petition and until the

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[118] But see *Corniel-Rodriguez v. INS*, 532 F.2d 301 (2d Cir. 1976), holding that the visa petition was not revoked where the beneficiary was not given either oral or written notice that marriage would invalidate her second preference petition; see also Effect of an Annulment below.
[119] *Sefton v. Sefton*, 45 Cal.2d 872 (1955).
[120] See West's Ann.Civ.Code, §§ 84, 85, 86.
[121] See *Matter of Samedi*, 14 I&N Dec. 625 (BIA 1974); *Matter of V--*, 6 I&N Dec. 153 (BIA 1954); *McCreath v. Holder*, 573 F.3d 38 (1st Cir. 2009); *Nakamato v. Ashcroft*, 363 F.3d 874 (9th Cir. 2004).
[122] See *Matter of T--*, 8 I&N Dec. 493 (BIA 1959).
[123] See *Matter of Magana*, 171 I&N Dec. 11 1 (BIA 1979) (court refused to give retroactive effect to a prior marriage, finding that beneficiary misrepresented his marital history for purposes of obtaining an immigrant visa); see also, *Matter of Astorga*, 17 I&N Dec. 1 (BIA 1979) (B upheld retroactive application of annulment of previous marriage, finding that beneficiary did not obtain immigration benefit through fraud or misrepresentation).

beneficiary becomes a lawful permanent resident.[124] Such a visa petition may, therefore, be revoked if the beneficiary son or daughter married after the LPR filed the visa petition, even if the marriage was later annulled. Whether or not the annulment is given retroactive effect may depend on whether or not it is found to have been sought in order to grant an immigration benefit to the beneficiary. An annulment will, therefore, not be given retroactive effect in order to cure an otherwise invalid application for LPR status.[125]

> **Example:** Aminata, an LPR, files an I-130 petition for her unmarried daughter, Binta. Binta subsequently marries, while she waits for her priority date to become current. When an immigrant visa becomes available for her, she goes to her consular interview and enters the U.S. Once in the US, she obtains an annulment of her marriage. Her visa petition may be revoked and she may be placed in removal proceedings.

There is no provision for appeal of an automatic revocation of a visa petition, and no requirement that CIS give notice of revocation or take any other action to effect the revocation of a petition that is automatically revoked.

B. Elimination of Revocation when the Petitioner Dies

As of October 28, 2009 the INA has been amended to add § 204(l) relating to the adjudication of immediate relative or family-based immigrant visa petitions, and all related applications, upon the death of the qualifying relative, that is, the petitioner or the principal beneficiary. According to the new law, both the principal and the derivative beneficiaries of a pending or approved I-130 visa petition (whether in the immediate relative category or one of the preference categories) are protected should the petitioner or the principal applicant die before the final adjustment of status application is adjudicated under certain conditions. The death of an I-130 petitioner does not revoke the underlying petition and neither does the death of the principal applicant revoke the derivative beneficiary's application if certain conditions are met.[126]

Residence Requirement for Qualifying Beneficiaries[127]

In order to qualify for this protection, the beneficiary of a pending or approved I-130 petition must have resided in the U.S. when the qualifying relative died and must continue to reside in the US on the date the decision on the pending petition or application is made. This does not mean that the beneficiary must have been physically present in the US when the qualifying relative died, but simply that the beneficiary's actual residence was in the U.S. Additionally, if any one of the beneficiaries of a petition meets this residence requirement, then

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[124] See INS Adj. Field Manual 21.4.
[125] See *Matter of Wong*, 16 I&N Dec. 87 (BIA 1977); *Garcia v. INS*, 31 F.3d 441 (7th Cir. 1994).
[126] See INA 204(l); see also, USCIS Policy Memorandum, "Approval of Petitions and Applications after the Death of the Qualifying Relative under New Section 204(l) of the Immigration and Nationality Act." December 16, 2010 included in this manual as Appendix 1-A.
[127] See USCIS Policy Memo in *supra* note 126 and included here as Appendix 1-A.

all the beneficiaries meet it as well. It is not necessary for each beneficiary to meet the residence requirement on their own. Therefore, if it is the principal beneficiary who has died, the petitioner may continue to seek approval of the petition so long as at least one derivative beneficiary meets the residence requirements. However, note that this does not give derivative beneficiaries any right to the petition. The petitioner continues to retain his or her right to withdraw the petition at any time.

If an alien has obtained an adjudication of a petition under this new provision of the INA but does not qualify for adjustment of status, he or she may leave the U.S. to undergo consular processing.

Waivers of Inadmissibility[128]

This protection extends not only to the underlying I-130 visa petition but to the adjustment of status and any other related application based on that I-30 petition, such as one for a waiver of inadmissibility. Therefore, CIS has the discretion to approve an inadmissibility waiver application, or any other form of relief from inadmissibility, regardless of whether or not the qualifying relationship necessary to qualify for the waiver application has ended as a result of the relative's death. Additionally, it is not required that the waiver application was pending when the qualifying relative died. The waiver application can be filed after the petitioner's death as long as the surviving beneficiary qualifies under INA § 204(l). The death of the qualifying relative will be deeded to be the equivalent of a finding of extreme hardship.

The Affidavit of Support[129]

The death of the qualifying relative does not relieve the alien beneficiary of the requirement to have a sponsor file the Affidavit of Support on Form I-864. Therefore, if the sponsor on the Affidavit of Support dies, another individual who qualifies as a "substitute sponsor" must submit a Form I-864 under INA § 213A.

Motion to Reopen and Humanitarian Reinstatement in Case of a Denial[130]

This new rule applies to any petition or application adjudicated on or after October 28, 2009, even if it was filed before that date. For petitions or applications that were denied before that date due to the death of either the petitioner or the principal beneficiary, the surviving beneficiary may file an untimely motion to reopen with the proper filing fee and request that the pending petition or application be adjudicated according to INA § 204(l).[131] Additionally, the CIS has found that it would be appropriate to reinstate the approval of an immediate-relative or family-based petition that was automatically revoked upon the death of the petitioner or the principal beneficiary before October 28, 2009, if the beneficiary was residing in the U.S. upon

[128] *Id.*
[129] *Id.*; see also § 5.7 below for detailed information on the Affidavit of Support.
[130] See USCIS Policy Memo in *supra* note 126, included here as Appendix 1-A.
[131] See AFM chapters 20.5(c)(8) and 10.21(c)(8) for complete guidance on this issue.

said death and continues to do so.[132] Also, if a petition or application that should have been adjudicated in compliance with INA§ 204(l) was denied on or after October 28, 2009, CIS must reopen the case on its own motion for a new decision.

If the beneficiary does not meet the residence requirement of the new INA rules, the CIS continues to have authority to reinstate the petition.

Widows and Widowers

Following from new INA § 203(l) described above, as of October 28, 2009, the death of a petitioning spouse is no longer cause for revocation of a family-based immigrant visa petition. Instead, if the U.S. citizen petitioning spouse dies while the visa petition is pending, Form I-130 is automatically converted to a widow(er)'s Form I-360, and the widow or widower becomes a self-petitioner.[133] This is so even when the citizen and his or her alien spouse had only been married for less than 2 years when the citizen died.[134] Furthermore, in that case, the alien will be granted lawful permanent residence and not conditional residence. Therefore, he or she will not be required to file an I-751 Petition to Remove the Conditions on Residence. However, if the widow or widower remarries before becoming an LPR, he or she loses eligibility for adjustment based on the pending or approved I-360.

Note Regarding Previously Approved I-130's : Prior to enactment of this new provision in the INA, some courts were allowing widows and widowers of U.S. citizens to immigrate based upon an I-130 petition already filed by the deceased spouse, even though the petitioner died before the couple was married for two years.[135] In light of the new law, CIS will honor those approvals and the subsequent adjustment applications and will not seek to rescind a grant of adjustment based on the death of the U.S. citizen petitioning spouse.[136]

D. Revocation upon Notice

In addition to automatic revocation, CIS may revoke the approval of an immediate relative or family-sponsored visa petition on grounds other than those specified above.[137] In such cases, the CIS must give notice to the petitioner, and the petitioner must have the opportunity to

[132] See USCIS Policy Memo in *supra* note 126; 8 CFR § 205.1(a)(3)(iii)(C)(2); and AFM chapter 21.2(h)(1)(C).
[133] See USCIS Policy Memo in *supra* note 126, included here as Appendix 1-A.
[134] See § 1.3 below for more information on what happens to widows and widowers with K-1 or K-3 visas, and to their dependents.
[135] See *Lockhart v. Napolitano*, 561 F.3d 611 (6th Cir. 2009); see also *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006); *Neang Chea Taing v. Napolitano*, 567 F.3d 19 (1st Cir. 2009) (agreeing with the result reached by the Ninth and Sixth Circuits); *Hootkins v. Napolitano* (Apr. 20, 2009), summarized in 86 *Interpreter Releases* 1177, 1184 (Apr. 27, 2009).
[136] See USCIS Policy Memorandum, *supra* note 126.
[137] 8 CFR § 205.2.

oppose the proposed revocation. If CIS decides to revoke the petition approval, the agency must explain the reasons for the revocation.

The action to revoke the petition may be initiated by the consular office due to information acquired during their review of the petition or during an interview with the beneficiary. In that case the consular office returns the petition to CIS with a memo explaining the reasons why they believe the petition should be revoked.[138] The consular officer may suspend action in a petition case and return the petition, with a report of the facts, for reconsideration by CIS if the officer knows or has reason to believe that approval of the petition was obtained by fraud, misrepresentation, or other unlawful means, or that the beneficiary is not entitled, for some other reason, to the status approved.[139]

CIS may find that the petition is not revocable for the reasons stated by the consular office. If that occurs, CIS returns the petition to the consular office with an explanation of the decision not to revoke the petition.

If CIS agrees with the consular officer that there is a basis to revoke the petition, the petitioner must be notified by CIS of intent to revoke the petition. The intent letter should fully explain the reasons for the revocation and give the petitioner a reasonable period of time (usually 30 days) to submit evidence in opposition to the revocation. Additional time may be granted if the petitioner needs it to obtain documentation from abroad or other meritorious reasons. If the petitioner responds with satisfying evidence that the approval should not be revoked and CIS agrees, the petitioner is advised of the decision to reaffirm the petition by a letter. The petition is then returned to the consular office with copies of the letter of intent to revoke, the petitioner's response, and the letter of reaffirmation. If the petitioner does not overcome the basis for the revocation, or fails to respond timely, CIS prepares a decision of revocation on Form I-292.

A petitioner may appeal the revocation to the CIS' Administrative Appeals Unit (AAU), and the authorized period for filing the appeal is only 15 days regardless of the type of petition.[140] Automatic revocation cannot be reviewed by the IJ or BIA.[141]

E. Circumstances that Do Not Lead to Revocation

Certain changes of circumstances may result in the petition moving to a different category rather than revocation of the petition.

1. If a child beneficiary seeking immediate relative status turns 21, and has opted out of remaining an immediate relative, he or she will become a family-sponsored first preference immigrant (unmarried son or daughter of a U.S. citizen).

[138] See INS Adj. Field Manual 20.3.
[139] 22 CFR § 42.43.
[140] See INS Adj. Field Manual 20.3.
[141] *Matter of Zaidan* 19 I&N Dec. 297 (BIA 1985); *Matter of Aurelio* 19 I&N Dec. 458 (BIA 1987).

2. If a child beneficiary seeking immediate relative status marries, the petition automatically converts to a third preference petition (married son or daughter of a U.S. citizen).

   Example: Maria, a U.S. citizen petitions for her son Jaime who is 19 and single (thus, an immediate relative). Before he immigrates, Jaime gets married. His petition is not terminated because he can move to third preference status as the married son of U.S. citizen.

3. If a married son or daughter of a U.S. citizen who is under 21 divorces, the visa petition converts back to that of an immediate relative.

4. If a married son or daughter over 21 divorces, the visa petition converts automatically to a first preference petition.

5. If a person granted 2A preference status as the child of a lawful permanent resident turns 21 years old, and is not able to remain in 2A status under the CSPA the visa petition becomes a 2B petition.[142]

   Example: Juana, an LPR, petitions her daughter Patricia who is 20 and therefore eligible for 2A preference status (child of lawful permanent resident). The petition is only pending one month before it is approved. Patricia is 22 by the time the priority date becomes current. Since she can only deduct one month from her biological age under the CSPA, she is unable to remain a 2A beneficiary, and her petition automatically becomes a 2B preference petition (unmarried daughter of an LPR).

F. Revoked Petitions and Recapturing of Priority Date

If a visa petition is revoked, a new petition filed by the same petitioner for the same beneficiary will NOT acquire the old priority date. However, if the petition is not revoked and the petitioner files new petition for the same petitioner, the petition can be given the earlier priority date.[143]

Example: Santana petitions his wife Clotilde. When the priority date becomes current, Santana is not able to immigrate his wife because they do not meet the affidavit of support requirements. The consulate denies Clotilde a visa. Santana is promoted the next month and now makes enough money to meet the affidavit of support requirements. He wants to try to immigrate Clotilde again. Santana can recapture the priority date from the first petition because he is the same petitioner of the same beneficiary under the same category and the original petition was not revoked. However, if Clotilde had waited several years to submit additional evidence and had been told that her application had been terminated, the visa petition would have been revoked. A new petition filed by Santana would be given a new priority date.

[142] See § 1.10 above.
[143] See 8 CFR § 204.2(h).

§ 1.13 Diversity Immigrants, Employment Visas, and Children in Juvenile Court Proceedings

Under the Immigration Act of 1990, visas were set aside for new categories of immigrants, and the system for immigrating through employment was changed and expanded. This section briefly summarizes these types of visas, but a complete explanation is beyond the scope of this manual.

Diversity and Diversity Transition Visas. Congress decided to give extra visas through these programs to people from certain countries that have had low rates of immigration in the recent past. These are called "adversely affected" countries. Countries with high immigration in recent years, for example Mexico and the Philippines, do not qualify for these extra visas.

Fifty-five thousand (55,000) "diversity" visas per year are available to people from "adversely affected" countries.[144] The applicant must have a high school education or its equivalent, or have two years of work experience in an occupation that requires at least two years of training or experience. Spouses and children may immigrate as derivatives in the diversity program. The application period for these diversity visas occur once a year, for a one-month period; with only one application per person submitted. Diversity visa winners, however, are subject to the grounds of inadmissibility, including the 3-year and 10-year bars.

Children who are under the jurisdiction of juvenile court and eligible for long term foster care may apply for adjustment of status as "special immigrants." This means that the children can become permanent residents without having a U.S. citizen or permanent resident parent and without having to wait for a priority date. A court must also rule that returning the child to his or her country of origin would not be in the child's best interest.[145]

Employment. Some people can immigrate through their employers. The Immigration Act of 1990 expanded this system.[146] Currently 140,000 employment visas are available each year, across five preference categories, with the vast majority going to professionals or college graduates.[147] Some visas are available for "skilled" workers, as well as "unskilled" workers; however, visas for unskilled workers are currently unavailable.

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[144] INA §§ 201(e), 203(c).
[145] INA §§ 101(a)(27)(J), 203(b)(4); see also the ILRC manual "Special Immigrant Juvenile Status and Other Immigration Options for Children and Youth."
[146] See INA § 203(b).
[147] See the U.S. Department of State Visa Bulletin at http://travel.state.gov/visa/bulletin/bulletin_1360.html.

CHAPTER 1

QUALIFYING FAMILY RELATIONSHIPS AND ELIGIBILITY FOR VISAS

INDEX OF APPENDICES