

CHAPTER 1¹

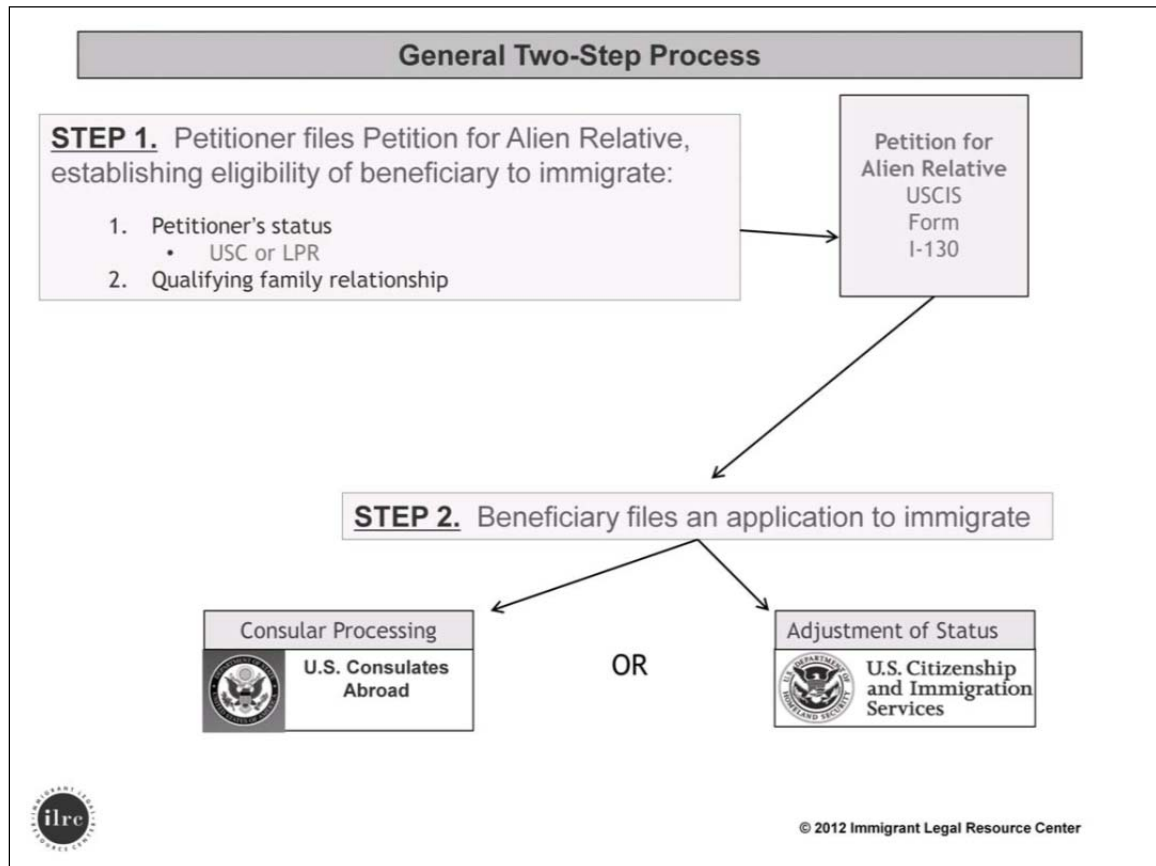
QUALIFYING FAMILY RELATIONSHIPS AND ELIGIBILITY FOR VISAS

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¹ If Comprehensive Immigration Reform (CIR) is passed and implemented by the Federal Government, much of the information in this chapter is expected to change approximately as of the end of 2014. Please stay up-to-date on the development of CIR.

§ 1.1 Overview of the Family Immigration Process: A Two-Step Process



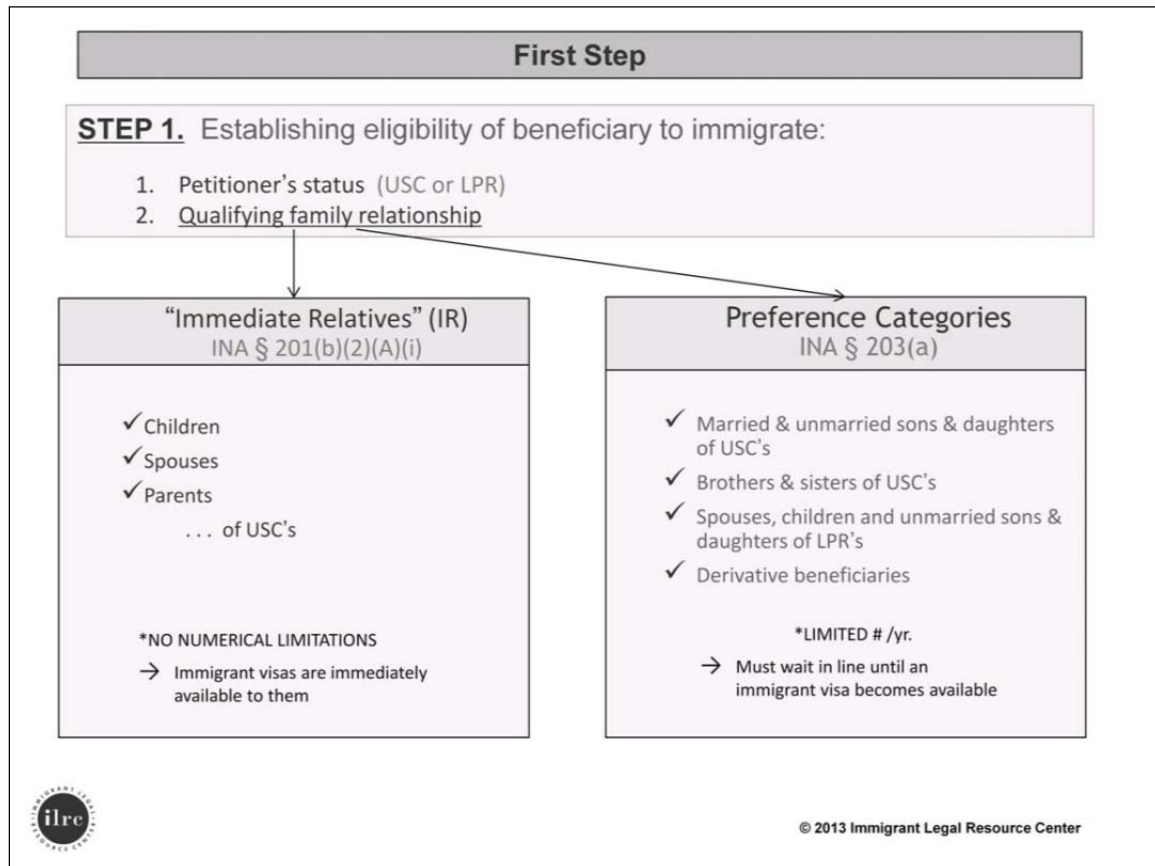
United States Citizens² and lawful permanent residents³ can help certain family members immigrate to the United States.⁴ This is a two-step process. The first step is the family visa petition, filed by the US citizen or lawful permanent resident petitioner. The second step is the application to become a permanent resident, filed by the foreign national relative. Each step involves different legal and factual issues.

² In this chapter, please note that a U.S. Citizen will also sometimes be referred to as a "USC."

³ 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."

⁴ 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.

A. Step One: The Petition



In order for a person to immigrate to the US through a US citizen (USC) or lawful permanent resident (LPR) relative, the USC or LPR relative first has to prove to the US government that their foreign national relative is eligible to immigrate to the US through a family relationship. In other words, the USC or LPR must *petition* the US government to allow the foreign national to apply for an immigration *benefit*. Therefore, the USC or LPR relative is called the “**petitioner**” and the foreign national relative is called the “**beneficiary**.”

The form that starts the immigration of a family member is filed by the USC or LPR relative and it is called the “Petition for Alien Relative,” **Form I-130**, often referred to as the B “**visa petition**.” Only a U.S citizen or permanent resident can file a visa petition on behalf of a family member.

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

1. The petitioner and the beneficiary have a qualifying **family relationship** (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, the US Citizenship and Immigration Services 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.⁵ 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 undertaken solely 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.

When the visa petition on Form I-130 is filed, the beneficiary is categorized according to the relationship that qualifies him or her for an immigrant visa. For example, relatives who fit the definition of a “child” or “spouse” of a lawful permanent resident fall under the category 2A. These categories are discussed in more detail in the sections that follow, but generally speaking, they each represent a queue or waiting list of foreign nationals on behalf of whom their US citizen or lawful permanent resident relatives have filed visa petitions. The reason for these waiting lists is that the number of people who can immigrate each year is limited by the law. Therefore, after the visa petition is approved, the foreign national relative must wait in the queue until an immigrant visa becomes available to them.

B. Step Two: Application to Immigrate

How soon the beneficiary can apply to immigrate depends on which queue or waiting list he or she is in. In other words, it depends on which category of relatives eligible for family visas he or she belongs to. For example, a person who qualifies as an “**immediate relative**” of a U.S. citizen can immigrate quickly.⁶ If this beneficiary is physically present in the U.S. and eligible for adjustment of status, he or she can apply for permanent resident status at the same time as the visa petition is filed or as soon as the visa petition is approved. This is because immediate relatives always have immigrant visas available to them.

However, because other relatives of U.S. citizens and lawful permanent residents have a limited number of visas available to them, they must wait for such availability, which can often take several years. These relatives are organized into groups referred to as a “preference categories” and they are categorized according to the relationship that qualifies them for an immigrant visa. Under this “**preference system**,” these beneficiaries may have to wait for several years, after the visa petition is approved, before they can actually immigrate.⁷

⁵ See Chapter 2 for a detailed discussion on submitting the petition.

⁶ See § 1.2.

⁷ See §§ 1.4-1.6.

The 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.

C. Adjustment of Status versus Consular Processing

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 who is inadmissible can still sometimes immigrate if CIS agrees to waive (forgive) the ground of inadmissibility.⁸ 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 after receiving the “green card” but before two years have passed, in order to have the *condition* on the permanent residency 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. 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.⁹

⁸ See Chapters 5 and 6.

⁹ INA § 201(b)(2)(A)(i).

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.

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.

“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.

A separate visa petition must be filed for each immediate relative; and immediate relatives cannot include “derivative beneficiaries” in their visa petitions. Therefore, for example, if the beneficiary spouse of a US citizen petitioner has a child, the US citizen petitioner must file a separate immediate relative visa petition on behalf of that child. This is one reason why it is important to understand the rules about which relative qualifies under which category, such as who is considered a child and who is considered a spouse.

NOTE: The two following sections defining “child” and “spouse” apply to any reference to “child” or “spouse” in the INA and the regulations, including the sections regarding preference categories as well as immediate relatives.

WHO IS A “CHILD”?

In all immigration work, remember that “**child**” is a term with a special legal meaning.¹⁰ 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.¹¹

¹⁰ INA § 101(b)(1).

¹¹ INA § 101(a)(39).

Example: A daughter who is 21 years old when her U.S. citizen parent's 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.¹²

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 LPR parent already filed a petition for that child. 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 Act¹³ 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 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 biological 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 additional requirements. Here is an overview of the other categories of "children":

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 18.¹⁴ If 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 between

¹² See *Matter of Aldecoatalora*, 18 I&N Dec. 430 (BIA 1983).

¹³ See INA 329A.

¹⁴ See INA § 101(b)(1)(B) and 8 CFR § 204.2(d)(2)(iv).

petitioner and beneficiary (step-parent and step-child or step-siblings) continues to exist as a matter of fact.¹⁵

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.¹⁶ 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.¹⁷ The two years residing together and two years legal custody requirements do *not* need to be fulfilled at the same time. In addition, the burden is placed on the parent to establish primary parental control during the two-year period of joint residence.¹⁸

There are two exceptions to these requirements.

First, if the same adoptive parents adopt a brother or sister of an adopted child, the parents must meet the same requirements for the second child, but adoption may take place while he or she was under the age of 18, rather than under 16 years. 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.

¹⁵ 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).

¹⁶ See *Matter of Guzman-Gomez*, 24 I&N Dec. 824 (BIA. 2009).

¹⁷ INA § 101(b)(1)(E), 8 CFR § 204.2(d)(2)(vii).

¹⁸ See *Matter of Marquez*, 20 I&N Dec. 160 (BIA 1990). This is particularly important if the adopted child is a relative of the adoptive parents. CIS will closely examine whether the biological parent has truly given up "parental control" to the adoptive parents, or whether the adoption is a "sham" for immigration purposes.

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.¹⁹ 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.²⁰ 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.²¹ 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.²²

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.²³ 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.”²⁴ The legacy INS sent instructions to the field on this change in the definition of “child” and “father.”²⁵ While advocates should use this language in visa work, the change does not appear to affect substantive law—with the possible exception of some impact 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 laws still use the terms “illegitimate” and “legitimate.”

¹⁹ INA § 101(b)(1)(F), 8 CFR § 1101(a)(1)(F).

²⁰ See 8 CFR § 204.3.

²¹ 22 CFR § 42.24.

²² The current list of Hague Convention member countries can be found on the U.S. Department of State’s website at: http://adoption.state.gov/hague_convention/countries.php.

²³ INA § 101(b)(1)(G).

²⁴ See INA §§ 101(b)(1)(A), 101(b)(1)(D), and 101(b)(2).

²⁵ See INS Cable HQ 204.21-P, 204.22-P reprinted in *Interpreter Releases*, January 2, 1996.

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, there are additional requirements.²⁶ The father must either prove a bona fide parental relationship with the child before the child reaches the age of 21, or prove the father has "legitimated" the child under the law of the child's or father's residence or domicile.

To prove a "bona fide parental relationship," the father must have shown "an actual concern for the child's support, instruction and general welfare."²⁷ 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.

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.²⁸ 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."²⁹ 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.

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

²⁶ INA §§ 101(b)(1)(C)-(D).

²⁷ 8 CFR § 204.2(d)(2)(iii); see also *Matter of Pineda*, Int. Dec. 3112 (BIA 1989).

²⁸ See, e.g., *Matter of Patrick*, 19 I&N Dec. 726, Int. Dec. 3076 (BIA 1988).

²⁹ See *Matter of Hines*, 24 I&N Dec. 544 (BIA 2008).

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 that petition or at a later date.

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, CIS follows the federal definition of “spouse.” Until recently, the federal Defense of Marriage Act (DOMA) had specified that a “spouse” could only be a person of the opposite sex. This prevented bi-national same-sex couples from filing immigrant visa petitions based on marriage. Thankfully, in June of 2013, the historic Supreme Court ruling in the case of *U.S. v. Windsor* struck down DOMA, declaring it unconstitutional; and the CIS has, therefore, begun approving visa petitions for same-sex spouses, announcing that it will use the same criteria as for heterosexual couples.³⁰ To this end, the CIS has stated that it will look to the law of the place where the marriage took place when determining whether it is valid for immigration law purposes. Therefore, couples who do not currently live in a state or country that recognizes same-sex marriage may obtain a lawful marriage in such a state or country so long as the laws of that place permit out-of-state residents to marry there.

Transgender 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. The petitioner in that case had undergone sex-reassignment surgery and had therefore been able to change her sex under the law of the State of North Carolina. The CIS had initially stated it would approve I-130 petitions only where the transgender spouse had undergone sex reassignment surgery and the surgery had resulted in a legal change of sex under the law of the place of marriage. Therefore, a heterosexual married couple including a transgender individual would not only need to prove the validity of the marriage for a marriage-based petition, the couple would also need to show that the marriage was a *heterosexual* one.³¹

After the 2013 U.S. Supreme Court decision in *U.S. v. Windsor*, which opened the way for same-sex couples to file marriage-based immigration petitions on behalf of the foreign spouse by striking down the Defense of Marriage Act, transgender individuals in heterosexual marriages should no longer be subjected to any special requirements or conditions in order to prove that their marriage is in fact a “heterosexual” marriage.

³⁰ *U.S. v. Windsor*, __U.S.__ (June 26, 2013); see also “Implementation of the Supreme Court Ruling on the Defense of Marriage Act” on the CIS website.

³¹ USCIS Policy Memorandum, “Adjudication of Immigration Benefits for Transgender Individuals; Addition of *Adjudicator’s Field Manual* (AFM) Subchapter 10.22 and Revisions to AFM Subchapter 21.3 (AFM Update AD2-02),” April 13, 2012.

Familiarity with the April 2012 USCIS Policy Memorandum regarding the adjudication of benefits for transgender individuals may still be helpful in matters concerning ways of documenting a change of gender identification for purposes of requesting the same be reflected on immigration documents. This memorandum clarifies that sex reassignment surgery is not necessary and it acknowledges a broader range of clinical treatments and other steps that can result in a legal change of gender under the various laws of the states. See **Appendix 1-B**.

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.³² Persons widowed before October 28, 2009 and who did not have a pending I-130 petition but otherwise met the above stated criteria could file a self-petition via Form I-360; however, such a petition *must have* been filed by October 28, 2011.³³

Note that the widow or widower will need to file a Form I-360 as a self-petitioner rather than filing Form I-130.³⁴

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.

§ 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, though there are quasi-immigrant visa requirements which the beneficiary must meet before the U.S. Consulate will issue the visa. A K-1 is in fact 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,

³² INA § 201(b)(2)(A)(i).

³³ P.L. 111-83, § 568(c)(2)(B).

³⁴ 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.

that they intend to marry, and that they are legally able to marry.³⁵ Under certain circumstances, the CIS will waive the requirement that the couple actually have met in person within the past two years.³⁶ For example, if the marriage is arranged, and arranged marriages are customary within that culture, then the CIS may waive the “having met in person” requirement, if the petitioner demonstrates that complying with the meeting requirement would cause extreme hardship or would “violate strict and long established customs of the beneficiary’s foreign culture or social practice.”³⁷ A request for a waiver 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, though financial hardship alone is usually insufficient.³⁸

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 then submits an I-130 petition, the fiancé(e) may then adjust using an approved I-130 instead of the fiancé petition.³⁹ The K-1 fiancé(e) cannot change status or adjust through a different visa petition filed by a different petitioner.

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. This means that they must be unmarried and they must have been admitted to the United States on their K-2 nonimmigrant visa while still under 21 years old.⁴⁰ See **Chapter 3**.

NOTE: A fiancé petition is very helpful in instances where the fiancé has a child under 21, but who is over the age of 18, as the fiancé petition will allow the child to immigrate. In comparison, if the couple marries after the child’s 18th birthday, and I-130 petitions are filed, the child could not immigrate since he or she would not qualify as a stepchild.

³⁵ See INA § 314(d).

³⁶ See 8 CFR § 214.2(k)(2).

³⁷ 8 CFR § 214.2(k)(2).

³⁸ *Matter of ___*, (AAO Jan. 2 2009)[unemployment insufficient because “financial constraints are a common concern for those filing the Form I-129F petition”].

³⁹ See Chapter 3 on adjustment of status.

⁴⁰ *Matter of Hieu Trung LE*, 25 I&N Dec. 541 (BIA 2011).

Two other laws affect U.S. citizen petitioners directly. The **International Marriage Broker Regulation Act (IMBRA)** provides that alien fiancé(e)s and spouses coming to the U.S. with K visas must be informed about other K petitions previously filed by the petitioner and when filing the I-129F, petitioners 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 request a waiver if he or she 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 such law impacting petitioners 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, listed in the statute, 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.⁴²

After the marriage, the immigrant 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.⁴³ 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 immigrant spouse **conditional resident** status for two years. The couple will subsequently have to apply to remove the condition during the 90 day window immediately before the date conditional residence expires, so that the immigrant spouse can remain in the United States.⁴⁴ K-2 children will also be granted conditional residence status.⁴⁵

If the U.S. citizen spouse dies before the K-1 visa holder adjusts his or her status, the immigrant 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. The adjustment application will be approved pursuant to INA 204(l) and the surviving spouse will be granted unconditional Lawful Permanent Resident status.⁴⁶

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

⁴¹ See INA § 214(d)(2)(A) & (B).

⁴² 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 www.uscis.gov/files/pressrelease/AdamWalshAct020807.pdf.

⁴³ See INA §§ 101(a)(15)(K), 214(d), and 8 CFR § 214.2(k).

⁴⁴ INA § 245(d).

⁴⁵ See Chapter 3.

⁴⁶ See USCIS Memo on INA § 204(l), cited above on note 34 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.

spouses and minor children of legal permanent residents⁴⁷ 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 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 Fiancé⁴⁸ 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.

PRACTICE TIP: Before filing a K-3 visa petition, check processing times for the I-129F K-3 category and compare to the processing times for immediate relative spouse I-130s. It has often been the case in the past that the K-3 does not in fact result in faster adjudication allowing the immigrant spouse of a U.S. citizen to travel to the U.S. more quickly than through an I-130 petition.

K-3 and K-4 visa holders cannot change status to another nonimmigrant status such as a student or temporary worker.⁴⁹

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

⁴⁷ The “V” Visa—see § 1.11 for more information.

⁴⁸ Even though Form I-129F is titled “Petition for Alien Fiancé,” it is also used for K-3 spouses.

⁴⁹ 8 CFR § 248.2(a)(2).

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.⁵⁰

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.

C. The "V" Non-Immigrant Visa for the Spouses and Children of Lawful Permanent Residents

On December 21, 2000, Congress enacted the Legal Immigration and Family Equity Act (LIFE). The LIFE Act somewhat ameliorated the family visa-backlog by creating a non-immigrant visa category for the spouses and minor children of legal permanent residents.⁵¹

Spouses and children (unmarried and under 21) of legal permanent residents *whose preference 2A I-130 family petitions were filed on or before December 21, 2000* and who had been waiting in the priority date backlog⁵² for three years or more were eligible to apply for a "V" visa. The "V" visa allowed these second preference beneficiaries to reside and work in the United States until their priority dates became current.⁵³ At this writing priority dates for all countries of chargeability under category 2A for spouses and minor children of legal permanent residents have passed the December 21, 2000 cutoff date. As a result, most, "V" visa holders have had immigrant visa availability for some time. If a "V" visa beneficiary has not yet attained permanent residency, it will be important to investigate whether or not the I-130 petition is still viable, or whether it has been "terminated" by the National Visa Center for lack of contact or action by the visa petition beneficiary. See **Chapter 4**.

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.

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.

⁵⁰ See 8 CFR § 214.2(k)(10).

⁵¹ See § 1.3 for information on the "K" visa.

⁵² See § 1.5, *infra*, to understand preference categories and "priority dates."

⁵³ INA § 101(a)(15)(V).

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. 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 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. 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**.

1. 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. The “V” visa is a non-immigrant visa. If a nonimmigrant is inadmissible, he or she can request a waiver of inadmissibility under INA § 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 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.

2. 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. 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. 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.

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.

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.

3. 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. In this situation, the aged-out derivative beneficiary can keep the same priority date if the same petitioner files the new petition.

For purposes of the 3- and 10-year bars, 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 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.

4. 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-D, Section 2**. For those spouses and children who do convert to immediate relatives, V status will expire when their authorized period of admission ends.

§ 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).

A. 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.⁵⁴

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.

B. 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.⁵⁵ 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. 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.

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?

⁵⁴ 22 CFR § 40.1(s).

⁵⁵ *Matter of Lin Lee*, 19 I&N Dec 435 (BIA 1987).

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.⁵⁶ 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:⁵⁷

Category	Beneficiaries Covered by This Category
First Preference (F1)	Unmarried sons and daughters, 21 years of age or older, of U.S. citizens.
Second A Preference (2A)	Spouse or child of a lawful permanent resident.
Second B Preference (2B)	Unmarried sons and daughters, 21 years of age or older, of lawful permanent residents. If an unmarried son or daughter of a lawful permanent resident marries, he or she loses eligibility to immigrate as the son or daughter of an LPR.
Third Preference (F3)	Married sons and daughters, of any age, of a U.S. citizen.
Fourth Preference (F4)	Brothers and sisters of U.S. citizens. The petitioner must be at least 21 years old. Both siblings must at some time have been the children of one common parent.

The date that the preference visa petition is filed with CIS 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.⁵⁸

A. Conversion of the Petition to a New Category

In instances where a child ages out (turns 21), 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

⁵⁶ 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).

⁵⁷ These categories are set forth at INA § 201(b)(1). Note that the preference categories were renumbered, in part, by the Immigration Act of 1990. Previously, 2A and 2B were collapsed into the same 2nd preference category, 3rd preference married sons and daughters were designated as 4th preference and siblings were designated as 5th preference. Employment preference categories, which are now completely separate from the family categories, filled in the other preference numbers (3rd and 6th).

⁵⁸ See §§ 1.7 and 1.8 below, which describe how the preference visa system works.

alive in a new category, and the beneficiary may retain his or her priority date in most circumstances.⁵⁹ The basic rule is: *If the new petitioner-beneficiary relationship will support a family petition, the beneficiary retains the petition and priority date.* Remember that “immediate relatives” (spouses, parents and minor unmarried children of U.S. citizens) are *not* subject to the preference system or priority dates *unless their family status changes.*

1st Preference to 3rd Preference (and Vice Versa): The single daughter or son of a U.S. citizen marries while waiting for his or her 1st preference priority date to become current. Because a U.S. citizen can petition for his or her 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.

- Unmarried son or daughter of a USC marries (a)
- Married son or daughter of a USC divorces (b)

Immediate Relative	Spouses, Unmarried Children, & Parents of USC
First (F1)	Unmarried Sons/Daughters of USC
Second (2A)	Spouses & Children of LPR
Second (2B)	Unmarried Sons/Daughters of LPR
Third (F3)	Married Sons/Daughters of USC
Fourth (F4)	Brothers & Sisters of USC's

⁵⁹ 8 CFR § 204.2(1)(i); see also § 1.8 below for a further explanation of priority dates.

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.⁶⁰

• Child of an LPR turns 21

Immediate Relative	Spouses, Unmarried Children, & Parents of USC
First (F1)	Unmarried Sons/Daughters of USC
Second (2A)	Spouses & Children of LPR
Second (2B)	Unmarried Sons/Daughters of LPR
Third (F3)	Married Sons/Daughters of USC
Fourth (F4)	Brothers & Sisters of USC's

Immediate Relative to 3rd Preference: The minor (under 21) 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 receipt by CIS of that petition.

• Unmarried child of a USC marries.

Immediate Relative	Spouses, Unmarried Children, & Parents of USC
First (F1)	Unmarried Sons/Daughters of USC
Second (2A)	Spouses & Children of LPR
Second (2B)	Unmarried Sons/Daughters of LPR
Third (F3)	Married Sons/Daughters of USC
Fourth (F4)	Brothers & Sisters of USC's


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

⁶⁰ See § 1.10 below.

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.

- LPR parent of unmarried son or daughter naturalizes.


Immediate Relative	Spouses, Unmarried Children, & Parents of USC
First (F1)	Unmarried Sons/Daughters of USC
Second (2A)	Spouses & Children of LPR
Second (2B)	Unmarried Sons/Daughters of LPR
Third (F3)	Married Sons/Daughters of USC
Fourth (F4)	Brothers & Sisters of USC's



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**.

- LPR parent of unmarried son or daughter naturalizes.

Immediate Relative	Spouses, Unmarried Children, & Parents of USC
First (F1)	Unmarried Sons/Daughters of USC
Second (2A)	Spouses & Children of LPR
Second (2B)	Unmarried Sons/Daughters of LPR
Third (F3)	Married Sons/Daughters of USC
Fourth (F4)	Brothers & Sisters of USC's



Note: Previously 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 visa petition beneficiary remains an immediate relative even after turning 21, unless he or she opts to convert to 1st preference.⁶¹

Changes in preference categories such as those described here, 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.⁶²

If, however, the newly created petitioner-beneficiary relationship will not support a family petition, the beneficiary loses the petition and the priority date.⁶³

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. This means the visa petition is automatically revoked and he or she loses her *priority* date. When and if her parent naturalizes, the newly naturalized parent can file a new petition and the wait begins again.

• The child or son/daughter of an LPR marries.

Immediate Relative	Spouses, Unmarried Children, & Parents of USC
First (F1)	Unmarried Sons/Daughters of USC
Second (2A)	Spouses & Children of LPR
Second (2B)	Unmarried Sons/Daughters of LPR
Third (F3)	Married Sons/Daughters of USC
Fourth (F4)	Brothers & Sisters of USC's

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 validity and the priority date, which would determine her place in each new waitlist.⁶⁴

⁶¹ *Id.*

⁶² See §§ 1.7 & 1.8 below.

⁶³ See § 1.12 below on automatic revocation of visa petitions.

⁶⁴ 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 then qualify to apply for a green card immediately, or he or she may already have become a U.S. citizen by derivation, depending on the facts.

PRACTICE TIP: If an LPR naturalizes after petitioning for his or her 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 his or her behalf, as well the appropriate immigration category.

Relative	Category
Carmen is an LPR who wants to petition for her husband.	2A
Joaquin would like to immigrate through his son, an LPR.	Cannot immigrate.
Martin, who is 35 and a USC, wants to petition for his brother.	F4
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 USC mother. He has delayed getting his birth certificate to you. Will his next birthday have any effect on the petition?	Yes, John can immigrate as an immediate relative child, so long as his mother files the visa petition before he turns 21. This way, his age will be “locked-in” under the CSPA, which would allow him to remain an immediate relative indefinitely.
Michelle is an LPR who wants to petition for her 25-year-old son Jacques, who is unmarried.	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 USC. What kind of petition could she file for Jacques now? What if he marries Renee?	Michelle could file a F1 petition for her unmarried son. If Jacques marries after Michelle naturalizes, the petition will convert to a F3 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.⁶⁵ 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**.

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 21.⁶⁶ Therefore, the elder son cannot immigrate as a derivative beneficiary, unless he is helped by the Child Status Protection Act (CSPA) (see § 1.10 below).

Derivative beneficiaries depend on the status of the principal beneficiary. The I-130 petition is not filed on behalf of the derivative, but rather on behalf of the principal beneficiary. This is often the only way for a derivative to immigrate through a family petition, because derivatives do not often qualify on their own as principal beneficiaries. For example, there is no category for “nephews or nieces” of US citizens, so they must immigrate as derivative children of the sibling of a US citizen, who is the principal beneficiary.

A major exception is where a principal beneficiary in the 2A category has a child who could also be the principal beneficiary in a separate 2A petition filed by the petitioner, as the petitioner’s own child, independent of the principal beneficiary parent. It is often a good idea for petitioners to file separate 2A petitions for their spouse and their children, especially where the

⁶⁵ INA § 203(d).

⁶⁶ See § 1.2, above.

petitioner is likely to naturalize in the near future.⁶⁷ 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 their family relationship to the principal beneficiary.

Example: Rafael’s mother filed just one I-130 visa petition, for third preference classification for Rafael. When Rafael immigrates, he, his wife and his younger son each must each submit a separate application for lawful permanent residence.⁶⁸ 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 at the border or port of entry to the United States or going through the process of adjustment of status and receiving final approval 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 immigrates (unless the Child Status Protection Act (CSPA) prevents that).⁶⁹ 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.⁷⁰

There are no derivative beneficiaries of **immediate relative** visa petitions.⁷¹ 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

⁶⁷ See the Practice Tip, below.

⁶⁸ Also called an application for an “immigrant visa.”

⁶⁹ See § 1.10 below.

⁷⁰ See § 1.8 below for an explanation of priority dates.

⁷¹ See § 1.2 above.

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.
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.⁷²

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.

§ 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.⁷³

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

⁷² See §§ 1.7 & 1.8 for a further explanation of how to evaluate a person's options in light of the various waitlists.

⁷³ See § 1.13 for a discussion of persons immigrating through the Diversity Program, or Employment Visas.

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 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.⁷⁴ With the right information, you can consult the State Department Visa Bulletin to see if your client is eligible to immigrate. For example, below is the visa bulletin for May 2013. As you can see, it lists the preference categories on the left-hand corner and then shows the priority dates that are current for each category. Note the four countries that are assigned their own queues of chargeability. Everyone else goes into the queue for all other chargeability areas. See more information below.

⁷⁴ The Visa Bulletin can be accessed through the State Department’s website at http://travel.state.gov/visa/bulletin/bulletin_1360.html.

Visa Bulletin For May 2013

Family-Sponsored	All Charge-ability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
F1	01APR06	01APR06	01APR06	08AUG93	01JUN99
F2A	01MAR11	01MAR11	01MAR11	01FEB11	01MAR11
F2B	15MAY05	15MAY05	15MAY05	01MAY93	08SEP02
F3	08AUG02	08AUG02	08AUG02	01APR93	22OCT92
F4	01MAY01	01MAY01	01MAY01	08SEP96	01OCT89

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 the beneficiary's "priority date" in the preference system.⁷⁵ 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 the petition was approved.⁷⁶ 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

⁷⁵ 22 CFR § 42.53(a).

⁷⁶ 8 CFR § 204.1(c).

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.⁷⁷ The approval notice will be issued once the petition is adjudicated, up to two to three years after filing in some cases, with the processing time dependent on the kind of petition. The priority date should be listed on the approval notice but separately from the date of approval.

1. “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. Still others may have had a petition filed on behalf of a parent or spouse prior to 1977 (registration), and though they themselves were born after 1977, they may still qualify to use the pre-1977 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.

Example: Berta’s grandmother, filed a petition for Berta’s mother in 1975, who was at that time married to Berta’s father. Berta was born in 1991, and her mother is presently an LPR. Berta’s mother is just now filing a petition for Berta, who is over 21. Berta can use the priority date established by her grandmother on behalf of her mother, from 1975, to immigrate now without waiting in the 2B preference line.

2. **Children who were 2A derivative beneficiaries (discussed in § 1.6) but now have turned 21 and are NOT protected by the CSPA age calculator** may nevertheless be able to use the priority date of their parent’s I-130, where the parent was the principal beneficiary, upon the filing of a new I-130 under preference category 2B, in which they—the children—are now the principal beneficiary.

⁷⁷ Occasionally CIS errs in assigning priority dates, or is slow in receipting a petition or application, and sometimes that makes a difference for the beneficiary or applicant. Also, sometimes whole petitions and applications have been lost or mistakenly shredded by CIS. Visa petitions (and everything else filed with CIS) should always be sent by certified or express mail or courier and proof maintained of delivery, along with a copy of what was filed.

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.

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" or "retain" the priority date of May 1, 2000—not the date of filing, June 1, 2011.⁷⁸

3. ***Supreme Court will consider whether CSPA allows conversion and/or retention of priority dates for derivatives in all preference categories***

The BIA in *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009), ruled that section 203(h)(3) of the INA allowed derivative beneficiaries of I-130 petitions filed under preference category F2A to *automatically* convert into the F2B category without having to file another visa petition. However, the BIA also clarified that the CSPA only allowed "conversion" (recapturing) of priority dates for F2B preference beneficiaries that had aged out of F2A eligibility as derivatives, in the scenario described in the paragraph above. In other words, individuals who were derivative beneficiaries in I-130 petitions filed under any other preference category may not recapture the priority date from those petitions upon the filing of a new petition where they are now the principal beneficiary. The Ninth Circuit disagreed in the case of *Cuellar de Osorio v. Mayorkas*, 695 F.3d 1003 (9th Cir. 2012), finding that the CSPA applied to *all* preference categories in which a derivative child "aged out," despite the fact that a different petitioner, the child's parent, would be required. *Cuellar de Osorio* involved derivative beneficiaries in the F3 and F4 preference categories. By the time the principal beneficiary (married son/daughter of U.S. citizen and sibling of U.S. citizen) were eligible to immigrate, a derivative child had "aged out." The principal beneficiary parent, subsequently filed a new visa petition for the child, but the government would not permit retention of the old priority date from the first petition to use with the second. This case was consolidated with a nationwide class action, *Costelo v. USCIS*, 695 F.3d 1003 (9th Cir. 2012), and the Supreme Court has granted certiorari in this case and is expected to hear oral arguments in 2014.⁷⁹ However, note that on November 21, 2013, the USCIS issued a memorandum stating that "[while *Cuellar de Osorio*] remains pending before the U.S. Supreme Court, *Matter of Wang* remains in effect and binding on USCIS ... [which] upon a final determination by the US Supreme Court ... will evaluate whether any modifications in USCIS policy are

⁷⁸ 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.

⁷⁹ Available at www.legalactioncenter.org/lac-docket-volume-iii-issue-3.

necessary.”⁸⁰ Furthermore, the USCIS stated in the same memo that it will reject as improperly filed any applications for adjustment of status filed on the basis of a priority date being current which was improperly recaptured under the policy articulated in the memo. Those applications that have already been accepted as properly filed will be held pending by USCIS until the Supreme Court decides *Cuellar de Osorio*. Therefore, until the Supreme Court issues such a decision, applicants should not rely on this case from the Ninth Circuit to seek to recapture a priority date for a former derivative beneficiary under any other preference category other than F2A.

For “recapturing” an earlier priority date, the visa petition must not have been revoked.⁸¹ 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.⁸²

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 or to the National Visa Center after the petition has been approved by CIS and forwarded.

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

⁸⁰ USCIS Policy Memorandum, *Guidance to USCIS Offices on Handling Certain Family-Based Automatic Conversion and Priority Date Retention Requests Pending a Supreme Court Ruling on Maryorkas v. Cuellar de Osorio*. November 21, 2013.

⁸¹ See § 1.12, below on revocation.

⁸² See 8 CFR § 204.2(h)(2).

country of chargeability of the parent he or she is immigrating with or following to join.⁸³ Finally, if a person is born in country where neither parent had citizenship or permanent residence, the person's country of chargeability can be the country of either of his parents' birth.

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 Visa Bulletin for Family Sponsored immigrants below.

Visa Bulletin For May 2013

Family-Sponsored	All Charge-ability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
F1	01APR06	01APR06	01APR06	08AUG93	01JUN99
F2A	01MAR11	01MAR11	01MAR11	01FEB11	01MAR11
F2B	15MAY05	15MAY05	15MAY05	01MAY93	08SEP02
F3	08AUG02	08AUG02	08AUG02	01APR93	22OCT92
F4	01MAY01	01MAY01	01MAY01	08SEP96	01OCT89

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 it 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, Mexico or the Philippines, he or she must consult that country's column of information.

⁸³ See INA § 202(b), and 22 CFR § 42.12.

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 Visa Bulletin above. Sarwan, who is single, was born in India in 1981. On October 5, 2004, his permanent resident mother filed a second preference visa petition for him. The petition was approved in 2012. The priority date for second preference 2B visa petitions from India on the chart is May 15, 2005. Sarwan's priority date, October 5, 2004, 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 May 1, 2001. 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. 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.⁸⁴

⁸⁴ 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.

§ 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 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.

§ 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.⁸⁵ They will remain immediate

⁸⁵ INA § 201(f)(1).

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 preference, so that when she immigrates her child will be able to immigrate with her as a derivative beneficiary.⁸⁶

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.⁸⁷

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.⁸⁸

⁸⁶ 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)].

⁸⁷ 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-C.

⁸⁸ INA § 201(f)(2).

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 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.⁸⁹

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

Married children benefit from the CSPA if they divorce while still under 21.⁹⁰ 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.

⁸⁹ 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)].

⁹⁰ INA § 201(f)(3).

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.

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.⁹¹

Following the formula outlined below, you must deduct the time the petition was pending from the beneficiary's actual age on the date a visa became available. The number you come up with is the CSPA age, or "calculated age."

The formula is as follows:

1. The first step is to calculate the time the petition was *pending*: the time between the **petition's filing date** and the **approval date**
 2. And the second step is to deduct the **time the petition was pending** (see the first step above) from the **beneficiary's actual age on the date the visa becomes available**.*
- * The *date the visa becomes available* is either:
- (a) the first day of the visa bulletin month on which the priority date becomes current or
 - (b) the petition approval date, *whichever occurs later*.⁹²

The age you get from this formula is the CSPA age; and if it is under 21, the beneficiary may continue to qualify as a "child" under the INA.

1. Caveat: The one-year requirement

The CSPA "calculated" age has an expiration date and is not valid indefinitely. In order to be protected by the CSPA age, *an individual must "seek to acquire" lawful permanent resident status within one year of the visa availability date (the date when the priority date became current)*. In other words, if a 2A beneficiary has already turned 21 and his or her priority date becomes current on October 1, 2013, you then calculate his or her CSPA age, and you see if it comes out to 18 years of age. However, this beneficiary does not have another three years of protection under the CSPA, as his CSPA age would suggest. Instead, he or she must comply with the one-year requirement and he or she must seek to acquire status as a lawful permanent resident before October 1, 2014.

⁹¹ INA § 203(h)(1)(A)-(B).

⁹² See Neufeld Memorandum above on note 87 and included here as Appendix 1-C.

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 or DS-260 to the 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. Although the derivative cannot actually precede the principal to the U.S. as an immigrant or adjust status first, the derivative can still take the steps necessary to comply with the “seek to acquire” residency requirement.

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.⁹³

Example: Pedro, who is an LPR, filed an I-130 for his son Samuel on October 8, 2008. It was approved exactly one year later, on October 8, 2009. It is now November 1, 2013, 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, 2014, 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, 2007. It was approved three years later, in August of 2010. Mark’s wife Wanda and minor daughter Diana were derivatives. It is now November 1, 2013, Diana is 22, and the priority date is current. Under the CSPA, if you deduct Diana’s age of 22

⁹³ See unpublished BIA decision *In re Kim*, A77 828 503 (BIA Dec. 20, 2004).

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, 2014*. If she fails to file before November 1, 2014, 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. Recapturing a Priority Date When the CSPA Fails to Protect a Derivative Beneficiary

Section 203(h)(3) of the Immigration and Nationality Act (INA) provides that if a derivative beneficiary is not protected by the CSPA (for example, because they failed to comply with the one-year requirement to "seek to acquire" status), the beneficiary's I-130 petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.

However, in the case of *Matter of Wang*, 25 I&N Dec 28 (BIA 2009), the Board of Immigration Appeals (BIA) agreed with the CIS' interpretation of the law, stating that the retention of a priority date is limited to when the **same petitioner** files a new I-130 for the **same beneficiary** in the **same preference category**. In other words, the retention of the priority date only applies to F-2A derivatives who were first included as derivative beneficiaries in an I-130 petition filed by their lawful permanent resident parent on behalf of their other parent, who was the principal beneficiary. When that derivative beneficiary child ages out, the petitioning LPR parent can file a new I-130 on his or her behalf; and the now adult son or daughter of an LPR may "recapture" or "retain" the priority date of the initial I-130.

The BIA held that this protection does not apply to derivatives in other preference categories, such as children of the sons and daughters of US citizens in the third preference category or children of the siblings of US citizens in the fourth preference category.

However, the Fifth and the Ninth Circuit Courts of Appeal disagreed with the BIA in the cases of *Khalid v. Holder*, 655 F.3d 363 (5th Cir. 2011) and *Cuellar de Osorio v. Mayorkas* (9th Cir. 2012). Those courts found that the protection found in the INA § 203(h)(3) applies to **all derivatives**, not just F-2As.

The CIS appealed the decision in *Cuellar de Osorio*, which was consolidated with a national class action regarding the same issue, requesting *certiorari* to the Supreme Court. The request for *certiorari*, or judicial review, was granted and oral arguments in the case are likely to be heard in 2014. Meanwhile, on November 21, 2013, the USCIS issued a memorandum stating that "[while *Cuellar de Osorio*] remains pending before the U.S. Supreme Court, *Matter of Wang* remains in effect and binding on USCIS ... [which] upon a final determination by the US

Supreme Court ... will evaluate whether any modifications in USCIS policy are necessary.”⁹⁴ Furthermore, the USCIS stated in the same memo that it will reject as improperly filed any applications for adjustment of status filed on the basis of a priority date being current which was improperly recaptured under the policy articulated in the memo. Those applications that have already been accepted as properly filed will be held pending by USCIS until the Supreme Court decides *Cuellar de Osorio*. Therefore, until the Supreme Court issues such a decision, applicants should not rely on this case from the Ninth Circuit to seek to recapture a priority date for a former derivative beneficiary under any other preference category other than F2A.

Therefore, it will be important to keep an eye on that litigation to know which derivatives will be protected by INA § 203(h)(3) in the future.

Example: In 1994, Abdoulaye, a U.S. citizen, filed an I-130 for his sister, Fanta, in which she included her child, Bintou, as a derivative beneficiary. However, Bintou aged out and was not otherwise protected by the CSPA. According to the cases of *Khalid* and *Cuellar de Osorio*, once Fanta becomes an LPR through Abdoulaye’s petition, she may then file an I-130 petition under preference category 2B on behalf of Bintou, who would be the principal beneficiary of that petition. Bintou could recapture or “retain” the priority date of the I-130 petition her uncle filed on behalf of her mother in 1994, since she was at that time a derivative of that original petition. However, until the U.S. Supreme Court issues a decision on the matter, the USCIS will not grant an adjustment of status application for Bintou based on this I-130 application filed by Fanta.

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.⁹⁵

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 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

⁹⁴ USCIS Policy Memorandum, *Guidance to USCIS Offices on Handling Certain Family-Based Automatic Conversion and Priority Date Retention Requests Pending a Supreme Court Ruling on Maryorkas v. Cuellar de Osorio*. November 21, 2013.

⁹⁵ CSPA § 6, amending and adding INA § 204(k); see Appendix 1-C.

I-485 application. The age of the child on the date of the parent's naturalization remains his or her age for CSPA purposes.⁹⁶

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 was included on her parents' asylum application at time of filing or added later, 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, if the child is living in the U.S. at the time of adjudication of the parent's asylum application, 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 when the child was included or added to her parent's application, as long as she was added before the application was adjudicated and was living in the U.S. at the time of adjudication. It also does not 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.⁹⁷
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

⁹⁶ See Memorandum from Joe Cuddihy, Director of International Affairs, USCIS, on Section 6 of the Child Status Protection Act (Mar. 23, 2004), found as a PDF file on-line. See Appendix 1-E.

⁹⁷ CSPA § 4 and 4; 8 CFR § 208.3(a).

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, 2002.⁹⁸ 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.⁹⁹ 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.¹⁰⁰

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.¹⁰¹ 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, 2001.¹⁰² For those who aged out before August 6, 2002, the policy is that the CSPA only applies if an application for adjustment of status or for an immigrant visa was

⁹⁸ 8 CFR § 208.21(c),(d).

⁹⁹ See *Matter of Avila-Perez*, 24 I&N Dec. 78 (BIA 2007).

¹⁰⁰ See Appendix 1-C.

¹⁰¹ *Padash v. INS*, 358 F. 3d 1161 (9th Cir. 2004).

¹⁰² See Appendix 1-C and Appendix 1-D.

submitted before aging 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 Protection for the Beneficiaries of a Family Petition when a Qualifying Relative 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.¹⁰³

A. Residence Requirement for Qualifying Beneficiaries¹⁰⁴

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 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.

B. Waivers of Inadmissibility¹⁰⁵

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

¹⁰³ 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.

¹⁰⁴ See USCIS Policy Memo in *supra* note 103 and included here as Appendix 1-A.

¹⁰⁵ *Id.*

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(1). The death of the qualifying relative will be deemed to be the equivalent of a finding of extreme hardship.

C. The Affidavit of Support¹⁰⁶

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.

D. Motion to Reopen and Humanitarian Reinstatement in Case of a Denial¹⁰⁷

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(1).¹⁰⁸ 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 said death and continues to do so.¹⁰⁹ Also, if a petition or application that should have been adjudicated in compliance with INA § 204(1) 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.

E. Widows and Widowers

Following from new INA § 203(1) 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.¹¹⁰ This is so even when the citizen and his or her alien spouse had only been

¹⁰⁶ *Id.*; see also § 5.7 below for detailed information on the Affidavit of Support.

¹⁰⁷ See USCIS Policy Memo in *supra* note 103, included here as Appendix 1-A.

¹⁰⁸ See AFM chapters 20.5(c)(8) and 10.21(c)(8) for complete guidance on this issue.

¹⁰⁹ See USCIS Policy Memo in *supra* note 103; 8 CFR § 205.1(a)(3)(iii)(C)(2); and AFM chapter 21.2(h)(1)(C).

¹¹⁰ See USCIS Policy Memo in *supra* note 103, included here as Appendix 1-A.

married for less than 2 years when the citizen died.¹¹¹ 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.¹¹² 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.¹¹³

§ 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.
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:

¹¹¹ 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.

¹¹² 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).

¹¹³ See USCIS Policy Memorandum, *supra* note 103.

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 the self-petition is filed within two years of the loss of status of the abuser.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 his or her journey to the United States.¹¹⁷

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

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)(B)(ii)(II)(aa)(CC)(aaa).

¹¹⁷ 8 CFR § 205.1(a)(3).

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 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

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. Also a 212(k) waiver may be effective in a case where the visa beneficiary has already entered the U.S. with the visa, and did not have knowledge of his own ineligibility at the time he was inspected and admitted.

¹¹⁹ *Sefton v. Sefton*, 45 Cal.2d 872 (1955).

¹²⁰ See West’s Ann.Civ.Code, §§ 84, 85, 86.

¹²¹ See *Matter of Samedy*, 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); *Nakamoto 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. 111 (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).

¹²⁴ See INS Adj. Field Manual 21.4.

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. 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.¹²⁶ In such cases, the CIS must give notice to the petitioner, and the petitioner must have the opportunity to 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.¹²⁷ 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.¹²⁸

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

¹²⁵ See *Matter of Wong*, 16 I&N Dec. 87 (BIA 1977); *Garcia v. INS*, 31 F.3d 441 (7th Cir. 1994).

¹²⁶ 8 CFR § 205.2.

¹²⁷ See INS Adj. Field Manual 20.3.

¹²⁸ 22 CFR § 42.43.

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.¹²⁹ Automatic revocation cannot be reviewed by the IJ or BIA.¹³⁰

C. 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).
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.¹³¹

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

¹²⁹ See INS Adj. Field Manual 20.3.

¹³⁰ *Matter of Zaidan*, 19 I&N Dec. 297 (BIA 1985); *Matter of Aurelio*, 19 I&N Dec. 458 (BIA 1987).

¹³¹ See § 1.10 above.

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).

D. 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 a new petition for the same petitioner, the petition can be given the earlier priority date.¹³²

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.

§ 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.¹³³ 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

¹³² See 8 CFR § 204.2(h).

¹³³ INA §§ 201(e), 203(c).

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.¹³⁴

Employment. Some people can immigrate through their employers. The Immigration Act of 1990 expanded this system.¹³⁵ Currently 140,000 employment visas are available each year, across five preference categories, with the vast majority going to professionals or college graduates.¹³⁶ Some visas are available for “skilled” workers, as well as “unskilled” workers; however, visas for unskilled workers are currently unavailable.

¹³⁴ 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*.

¹³⁵ See INA § 203(b).

¹³⁶ 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

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- Appendix 1-C** “Revised Guidance for the Child Status Protection Act (CSPA)” by Donald Neufeld, Acting Associate Director, Domestic Operations, April 30, 2008
- Appendix 1-D** USCIS Policy Memorandum “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
- Appendix 1-E** USCIS Interoffice Memorandum on “Section 6 of the Child Status Protection Act” by Joe Cuddihy, Director of International Affairs. March 23, 2004