

CHAPTER 1

FAMILY-BASED IMMIGRATION: IMMEDIATE RELATIVES AND THE PREFERENCE SYSTEM

Overview of Family-Sponsored Immigration

Historically, family reunification has been the principal policy underlying U.S. immigration law. Family-based immigration allows for close relatives of U.S. citizens and lawful permanent residents (LPRs) to immigrate to the United States. A legal immigrant is a foreign-born individual who has been admitted to reside in the United States as an LPR.¹ Proof of LPR status is the I-551, Permanent Resident Card, commonly referred to as a “green card.” These family members immigrate either as (1) immediate relatives of U.S. citizens or (2) through the family preference system.

Immediate Relatives

Immediate relatives include the following: (1) spouses of U.S. citizens; (2) unmarried minor children of U.S. citizens; and (3) parents of U.S. citizens age 21 or older.² The benefit of immigrating as an immediate relative is that there is no cap, or quota, on the number of visas available each year.

The Family Preference System

The family preference system allows the following persons to immigrate: (1) adult children (unmarried and married) of U.S. citizens; (2) brothers and sisters of U.S. citizens age 21 or older; and (3) spouses and unmarried children (both minor and adult) of LPRs.³ There are a limited number of visas available every year under the family preference system.

Legal immigration to the United States is controlled by numerical limitations called quotas, which are applied to the family-based category and to the overall number of permanent resident visas distributed per country, per year.⁴ Backlogs develop because there are more applicants in some countries and categories than there are visas. There are also the nonquota immigrants, such as immediate relatives, who are exempted from the yearly limitations.

Immigrant visas are issued by the U.S. consulates abroad.⁵ In addition, U.S. Citizenship and Immigration Services (USCIS) (formerly the Immigration and Naturalization Service [INS]) or the Executive Office for Immigration Review (EOIR) may

¹ Immigration and Nationality Act (INA) §101(a)(20).

² INA §201(b)(2)(A)(i).

³ INA §203(a).

⁴ INA §201(c).

⁵ INA §§221, 222.

adjust an applicant's status to LPR in the United States.⁶ Whether applicants for immigrant visas are eligible to adjust status or must consular process depends on several factors, including whether they made a lawful entry to the United States, whether they violated the terms of their nonimmigrant visa, when they filed the alien relative petition, and whether they are immigrating through the preference system or as an immediate relative.⁷

All citizens or LPRs wishing to petition for a family member must have an income of at least 125 percent of the federal poverty level and execute a legally enforceable affidavit to support their family member, or else secure the assistance of a joint sponsor.⁸

Requirements for Family Relationships

Many of the terms used in defining eligibility for a family-based visa are technical and are set forth in the statute and regulations. The following are the most important terms and requirements:

- **Petitioner**—the family member who is either a U.S. citizen or an LPR.⁹ However, some family members may self-petition, such as widows/widowers, battered spouses and children of U.S. citizens and LPRs, certain Amerasian children, and special immigrant juveniles.¹⁰
- **Beneficiary**—the alien seeking permanent resident status who is related to the U.S. citizen or LPR petitioner.¹¹ The beneficiary could be a principal (on whose behalf the alien relative petition is filed) or a derivative (spouse or unmarried children of the principal beneficiary in the preference categories).
- **Spouse**—the spousal relationship must be legally valid and recognized in the place where the relationship was created.¹² As of June 26, 2013, this includes same-sex marriages that are legal in the jurisdiction in which they are created.¹³ It must not be a sham marriage, *i.e.*, entered into for immigration purposes. There is a presumption that the marriage is a sham if the couple gets divorced within two years of obtaining LPR status based on the marriage. In addition, even a marriage is valid in a foreign country, it must not violate U.S.

⁶ INA §245.

⁷ INA §§245(a), (i).

⁸ INA §213A.

⁹ INA §204(a).

¹⁰ 8 CFR §§204.1(a)(1)–(5).

¹¹ 8 CFR §204.1(a).

¹² See *Matter of Bautista*, 16 I&N Dec. 602 (BIA 1978).

¹³ *U.S. v. Windsor*, 133 S.Ct. 2675 (2013); *Matter of Zeleniak*, 26 I&N158 (2013). As of June 26, 2013, same-sex marriage is legal in the District of Columbia and 12 states: Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington, as well as in 13 foreign countries.

federal or state public policy. Some marriages are therefore not recognized for immigration purposes: polygamous, incestuous, or proxy (unless later consummated).¹⁴ In some states common-law marriages are recognized. The marriage must be in existence—*i.e.*, not legally terminated—at the time the permanent residency application is adjudicated, although the marriage need not be “viable.”¹⁵ If the parties are separated, more proof will be required to demonstrate that the marriage was valid at the time it was entered. If the parties married while the beneficiary was in immigration proceedings, they will have to establish through clear and convincing evidence that the marriage is bona fide.¹⁶

- **Parent**—must meet the definition in the statute, INA §101(b)(2), and may include stepparent, adoptive parent, and parent of child born out of wedlock (though may have to establish the “parent-child relationship” by blood tests, evidence of cohabitation, support, and communication).¹⁷
- **Brother or sister**—siblings each must show they are the “child” of at least one common parent.¹⁸
- **Child**—must meet definition in the statute, INA §101(b)(1), and must be unmarried and under 21; “son or daughter” refers to children of any age.
 - **legitimacy**—a child who was born in wedlock¹⁹ or was legitimized before age 18 while in the father’s custody is a “child” for immigration purposes.²⁰ Marriage of the natural parents is the most common form of legitimation. Children born out of wedlock may obtain immigration benefits from the natural mother.²¹ Or they may obtain it from the natural father, so long as they have established a “bona fide parent-child relationship,” *i.e.*, cohabitation and provision of support, before age 21.²²
 - **stepchildren**—eligible to immigrate through stepparent if child was under 18 at the time of the marriage creating the relationship.²³ It is irrelevant whether the stepchild was born in wedlock or out of wedlock. The stepchild relationship may continue even after the natural parent dies or divorces the

¹⁴ INA §101(a)(35).

¹⁵ See *Matter of McKee*, 17 I&N Dec. 332 (BIA 1980).

¹⁶ INA §245(e)(3).

¹⁷ 8 CFR §204.2(c).

¹⁸ See *Matter of Mahal*, 12 I&N Dec. 409 (BIA 1967).

¹⁹ INA §101(b)(1)(A).

²⁰ INA §101(b)(1)(C).

²¹ INA §101(b)(1)(D).

²² See *Matter of Vizcaino*, 19 I&N Dec. 644 (BIA 1988).

²³ INA §101(b)(1)(B).

stepparent, provided the stepparent has maintained active parental interest.²⁴ Stepchildren may also serve as petitioners and immigrate their stepparents.

- ***adopted children***—eligible to immigrate if adopted before age 16 and have been in the legal custody and resided with the adoptive parent for at least two years.²⁵ The two years can be counted in the aggregate. The adoption must be legally valid in the jurisdiction where it took place.²⁶ Natural siblings of the adopted child are also eligible to immigrate if adopted while under 18 by the same adoptive parent.²⁷ Adoptions are also available under the Intercountry Adoption Act of 2000,²⁸ which the United States enacted to comply with its obligations under the Hague Convention.²⁹ U.S. citizens seeking to adopt and immigrate a child from one of the convention member countries must satisfy certain requirements.³⁰ The procedure for immigrating an adopted child pursuant to the Hague Convention is covered in chapter 2.
- ***orphans***—a U.S. citizen can petition for an orphan under age 16 if legal requirements are met under INA §101(b)(1)(F). In order to be an orphan, both parents must have died, disappeared, or abandoned the child. If there is a sole or surviving parent, he or she must be incapable of providing for the child and irrevocably release the child for emigration or adoption.³¹ The child must be under 16 and unmarried at the time the petition is filed on his or her behalf to classify as an immediate relative. The petitioner must be a U.S. citizen. Natural siblings of the orphan are also eligible to immigrate if adopted abroad while under 18 by the same adoptive parent.
- ***Unmarried***—not married at the time the I-130 petition was filed, at the time the application for the immigrant visa was filed, and at the time of admission to the United States as the unmarried son or daughter of a U.S. citizen or LPR, whether or not previously married. If immigrating as the beneficiary of a second-preference petition, the person must be unmarried from the filing of the petition until admission as a permanent resident. If the beneficiary marries at any time during that period, the petition is automatically revoked.³²

²⁴ See *Matter of Mowrer*, 17 I&N Dec. 613 (BIA 1981).

²⁵ INA §101(b)(1)(E).

²⁶ 8 CFR §204.2(d)(2)(vii)(C).

²⁷ INA §101(b)(1)(E).

²⁸ Pub. L. No. 106-279, 114 Stat. 825.

²⁹ Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, May 29, 1993, S. Treaty Doc. 105-51 (1998), 32 I.L.M. 1139. For in-depth guidance on international adoption issues, see *The International Adoption Sourcebook* (AILA 2008), www.ailapubs.org.

³⁰ INA §101(b)(1)(G); 22 CFR §42.24.

³¹ 8 CFR §204.3(d)(1)(iii).

³² 8 CFR §§205.1(a)(3)(i)(H), (I).

Immediate Relatives and the Preference System

Immediate Relatives

The term “immediate relative” is defined to include the following family relationships: spouse, child (unmarried, under 21), and parent of a U.S. citizen.³³ In the case of a parent, the U.S. citizen petitioner must be at least 21 years of age. The definition also includes widows or widowers of U.S. citizens who were not legally separated at the time of the spouse’s death, file an application within two years of the death, and did not remarry before acquiring the immigrant visa or status.³⁴ Immediate relatives immigrate outside of the numerical restrictions and thus are not subject to the long waiting period that exists in many of the preference categories. Nevertheless, there is a backlog at some USCIS service centers in adjudicating the relative petitions and at some USCIS district offices in scheduling adjustment interviews. This means that even immediate relatives can expect to wait six months or more to receive their immigrant status.

Preference System

Relatives immigrating through an LPR, as well as some immigrating through a U.S. citizen, are subject to numerical restriction. The following are the family preference categories:

- First—unmarried son or daughter (age 21 or over) of U.S. citizen parent³⁵
- Second—has two subsections:
 - F-2A: spouses or unmarried children (under 21) of LPR³⁶
 - F-2B: unmarried sons or daughters age 21 and over of LPR³⁷
- Third—married sons and daughters of U.S. citizens³⁸
- Fourth—brothers and sisters of U.S. citizens, where citizen is at least 21³⁹

Quota System

Congress has placed a limit on the number of foreign-born individuals who are admitted to the United States annually as family-based immigrants. They are limited by statute to 480,000 persons per year.⁴⁰ Family-based immigration is governed by a

³³ INA §201(b)(2)(A)(i).

³⁴ INA §204.2(b)(2)(A)(i), as amended by FY2010 Department of Homeland Security Appropriations Act, Pub. L. No. 111-83, 123 Stat. 2142, §568(c)(1), Oct. 28, 2009.

³⁵ INA §203(a)(1).

³⁶ INA §203(a)(2)(A).

³⁷ INA §203(a)(2)(B).

³⁸ INA §203(a)(3).

³⁹ INA §203(a)(4).

⁴⁰ INA §201(c)(1)(A)(i).

formula that imposes a cap on every family-based immigration category, with the exception of “immediate relatives” (spouses, minor unmarried children, and parents of U.S. citizens). The formula allows unused employment-based immigration visas in one year to be dedicated to family-based immigration the following year, and unused family-based immigration visas in one year to be added to the cap the next year. This formula means that there are slight variations from year to year in family-based immigration. Because of the numerical cap, there are long waiting periods to obtain a visa in most of the family-based immigrant categories.⁴¹

There is no numerical cap on the number of immediate relatives admitted annually to the United States as immigrants.⁴² However, the number of immediate relatives is subtracted from the 480,000 cap on family-based immigration to determine the number of other family-based immigrants to be admitted in the following year.⁴³ But no fewer than 226,000 visas are available each year.⁴⁴

The following are the number of visas available in each of the four family-based preference categories:

- *1st Preference* (unmarried sons and daughters of U.S. citizen)—23,400 visas/year, plus any visas left over from the 4th preference⁴⁵
- *F-2A Preference* (spouses and minor children of LPR)—87,900 visas/year, plus any visas left over from the 1st preference⁴⁶
- *F-2B Preference* (unmarried adult children of LPR)—26,300 visas/year, plus any visas left over from the 1st preference
- *3rd Preference* (married adult children of U.S. citizen)—23,400 visas/year, plus any visas left over from the 1st and 2nd preferences⁴⁷
- *4th Preference* (brothers and sisters of U.S. citizen over 21)—65,000 visas/year, plus any visas left over from the previous preferences.⁴⁸

The primary source of information on visa availability is the *Visa Bulletin*, available from the U.S. Department of State, Bureau of Consular Affairs, Visa Services, Washington, DC 20520. A copy of a *Visa Bulletin* for July 2013 is included as appendix 1. You can request to be sent the *Visa Bulletin* by e-mail; send your request to listserv@calist.state.gov. In the body of the message type “subscribe Visa Office Bulletin,” followed by your first name and last name. Alternatively, you may call the

⁴¹ INA §202(e).

⁴² INA §201(b).

⁴³ INA §201(c)(1)(A).

⁴⁴ INA §201(c)(1)(B)(ii).

⁴⁵ INA §203(a)(1).

⁴⁶ INA §203(a)(2)(B).

⁴⁷ INA §203(a)(3).

⁴⁸ INA §203(a)(4).

State Department for a recording on the status of priority dates, (202) 663-1541, or visit its website at http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html. Visa Bulletins are also posted to the AILA InfoNet, www.aila.org.

You will need to become familiar with how to read the *Visa Bulletin* to determine how long a particular visa application will take. In order to understand it, you must be familiar with the following concepts:

- **Priority date**—Under the quota system, family-based immigrant visas are distributed on a chronological basis determined by the date that the alien relative petition (Form I-130) was properly filed with USCIS. That filing date becomes the “priority date.”⁴⁹ To be properly filed, the application must be completed, signed, and submitted with the appropriate filing fee.⁵⁰

Once you know the priority date, you can determine whether it is “current,” *i.e.*, a visa is available, or approximately how long before it becomes current. Compare the priority date against the date indicated in the most recent monthly *Visa Bulletin*, taking into consideration the particular preference category and the alien’s country of origin. The priority date must be *before* the date on the *Visa Bulletin* to be considered current. For example, a Mexican LPR who is immigrating his spouse in the F-2A visa category will look at the most recent *Visa Bulletin* for that preference category under the column for Mexico. In July 2013, the date on the *Visa Bulletin* for that category and nationality was September 1, 2011. Only applicants whose I-130s were filed before that date are considered current.

- **Cross-Chargeability**—If the principal and derivative beneficiaries were born in different countries, it may be possible to apply cross-chargeability principles. Visas are usually chargeable to the country of the beneficiary’s place of birth.⁵¹ But a basic tenet of family-based immigration is maintaining the family intact. If one family member were being charged to a country that is oversubscribed, while the other family members in the same preference category were charged to countries that are current, this would result in separation and undue hardship. To remedy this potential problem, the law allows in some situations for the family to elect whichever foreign state is more beneficial. The law seems to limit application of this cross-chargeability, however, to the third- and fourth-preference categories and to situations in which it is necessary to prevent the separation of the spouses or separation of the children and parents.⁵² For example, if a U.S. citizen is petitioning for his married Mexican son, the son and his Guatemalan spouse can elect to have their visas charged to Guatemala,

⁴⁹ 8 CFR §204.1(c).

⁵⁰ 8 CFR §204.1(d).

⁵¹ INA §202(b).

⁵² 22 CFR §42.12.

since the third preference for Mexicans is backlogged farther than for Guatemalans. Similarly, if a U.S. citizen is immigrating his Japanese brother, the brother's Filipino wife would elect to be charged to her husband's country of birth. Their child, who was born in India, could elect to be charged to either parent's country, and in this example would elect the father's.

Derivative Beneficiaries

Family members on whose behalf the I-130 petition is filed are considered "principal beneficiaries." If they are being petitioned for in one of the preference categories and have minor, unmarried children or a spouse, those other family members also may qualify to immigrate as "derivative beneficiaries."⁵³ A derivative beneficiary is the spouse or unmarried child of a principal beneficiary in one of the preference categories.⁵⁴

Derivative beneficiaries, by definition, do not have separate I-130 petitions filed on their behalf. In fact, except for the F-2A preference category, they do not qualify to have a separate I-130 filed on their behalf. If the family member is immigrating as an immediate relative, he or she must have a separate I-130 petition on file.⁵⁵

Derivative family members are accorded the same preference status as the principal beneficiary. These derivatives may either accompany the principal beneficiary or "follow to join," which means immigrating more than six months after the principal beneficiary.⁵⁶ Derivative beneficiaries may not obtain lawful permanent residence unless and until the principal beneficiary does.

Retention of Priority Dates

Much can happen between the time the petitioner files an I-130 petition and the beneficiary adjusts status or immigrates. For example, the beneficiary might marry, divorce, turn 21, or die. In addition, the petitioner might divorce, naturalize, lose LPR status, or die. There also might be after-acquired children to consider. Similar events could happen in the lives of the derivative beneficiaries. When a new I-130 needs to be filed, sometimes the beneficiary can retain the original priority date. Let us review the effects in all of these situations.

GENERAL PRINCIPLES

The basic principle is that one can retain an earlier priority date if it is the same petitioner filing for the same beneficiary (including derivative beneficiaries) in the same preference category and the prior I-130 was not terminated or revoked.⁵⁷ If the

⁵³ INA §203(d).

⁵⁴ 9 *Foreign Affairs Manual* (FAM) 42.31 N2.

⁵⁵ 8 CFR §204.2(a)(4).

⁵⁶ 22 CFR §40.1(a)(1).

⁵⁷ 8 CFR §204.2(h)(2).

I-130 was lost or withdrawn and the petitioner wants to refile, he or she should be able to retain the priority date from the original petition.

MARRIAGE

If the beneficiary is an immediate relative, marrying will move him or her to the third-preference category.⁵⁸ If the beneficiary is already over 21 and started out in the first-preference category, then he or she also converts to the third preference.⁵⁹ In both situations, there is no need to file a new I-130; simply notify the appropriate service center, the National Visa Center (NVC), or the consulate of the automatic conversion to third preference. The priority date for the third preference visa petition would be the same as that for the immediate-relative or first-preference petition.⁶⁰

This conversion to third preference does not occur if the beneficiary is in the second-preference category. The child/son/daughter of an LPR cannot marry without automatically revoking the I-130 petition. If a second-preference category (F-2A or F-2B) beneficiary marries before immigrating or adjusting status, the I-130 petition is terminated.⁶¹

DIVORCE

Divorce tends to work the opposite way as marriage. The third-preference beneficiary moves into the immediate-relative category (if under 21) or the first preference (if over 21).⁶² Again, no need to file a new I-130, and the priority date remains the same. Inform the appropriate service center, the NVC, or the consulate of the automatic conversion from third preference to first preference or immediate-relative status and enclose proof of termination of the marriage.

If the second-preference beneficiary divorces, he or she cannot regain the status of an F-2A or F-2B preference holder, since the I-130 was automatically revoked. The LPR petitioner must file a new I-130 and cannot retain the earlier priority date. If the beneficiary obtains an annulment, however, that might serve to reinstate the second-preference status. Courts have determined that an annulment serves to void the marriage ab initio.

If the U.S. citizen or LPR petitioner is the one to divorce after filing an I-130 for a spouse, the I-130 is automatically revoked.⁶³ If the petitioner had filed an I-130 for a stepchild based on that marriage, in most cases the divorce severs the relationship and the I-130 is revoked. But those stepchildren who are able to establish an ongoing relationship with the stepparent may be able to proceed with their petition.⁶⁴ Divorce

⁵⁸ 8 CFR §204.2(i)(1)(ii).

⁵⁹ 8 CFR §204.2(i)(1)(i).

⁶⁰ 8 CFR §§204.2(i)(1)(i), (ii).

⁶¹ 8 CFR §205.1(a)(3)(i)(I).

⁶² 8 CFR §204.2(i)(1)(iii).

⁶³ 8 CFR §205.1(a)(3)(i)(D).

⁶⁴ *Medina-Morales v. Ashcroft*, 371 F.3d 520, 531–32 (9th Cir. 2004).

between the principal beneficiary and the derivative spouse in the third– or fourth-preference category terminates the derivative status of the spouse.

NATURALIZATION

When the LPR petitioner naturalizes, principal beneficiaries under 21 convert from the F-2A category to immediate relative. If the beneficiary is already over 21 and in the F-2B category, he or she would convert to the first preference. No need to file a new I-130; the priority date remains the same.⁶⁵ Inform the appropriate service center, the NVC, or the consulate of the automatic conversion from second preference to first preference or immediate-relative status and enclose a copy of the naturalization certificate.

For most beneficiaries, the first preference is more current than the F-2B category. But check the *Visa Bulletin*, since that has not been the case for Filipinos for quite awhile, and occasionally it is not the case for Mexicans. The Child Status Protection Act (CSPA)⁶⁶ neutralizes the negative effect that the petitioner’s naturalizing might have on these sons and daughters.

Beneficiaries with children, however, no longer will be able to count them as derivatives if they convert to the immediate-relative category when the petitioner naturalizes.⁶⁷ Derivatives in the F-2A category are most affected, since as immediate relatives they will be required to have a separate I-130 petition filed on their behalf. When the newly naturalized U.S. citizen petitioner files this separate I-130 petition for the unmarried child, the beneficiary retains the original priority date.⁶⁸ This is usually irrelevant because, as an immediate relative, the beneficiary is not subject to any annual quotas and the CSPA freezes the beneficiary’s age in many cases.⁶⁹ But should the beneficiary marry before obtaining LPR status, the earlier priority date might prove helpful. When you file the second I-130, state in the cover letter that you are requesting the original priority date, cite the regulatory authority, and attach proof of filing the original I-130.

DEATH OF THE PETITIONER

Death of the petitioner automatically revokes the I-130, but there is possible relief for widows/widowers of U.S. citizens who have not re-married and who file a Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, within two years of the citizen’s death.⁷⁰ The widow/widower adjusts or immigrates as an immediate relative,

⁶⁵ 8 CFR §204.2(i)(3).

⁶⁶ Child Status Protection Act (CSPA), Pub. L. No. 107-208, 116 Stat. 927 (2002). For in-depth guidance on the CSPA, see *AILA’s Focus on the Child Status Protection Act* (2008), www.ailapubs.org.

⁶⁷ 9 FAM 42.31 N2.2.

⁶⁸ 8 CFR §204.2(i)(3).

⁶⁹ INA §201(f).

⁷⁰ INA §204.2(b)(2)(A)(i), as amended by FY2010 Department of Homeland Security Appropriations Act, Pub. L. No. 111-83, 123 Stat. 2142, §568(c)(1), Oct. 28, 2009.

and unmarried children under 21 are classified as derivatives. The process for self-petitioning as a widow(er) is covered in more detail in chapter 5.

In addition to the spouses of U.S. citizens, other surviving family members may continue to receive immigration benefits from a pending or approved I-130 after the petitioner has died.⁷¹ If section 204(l) applies, it acts to nullify the petitioner's or the principal beneficiary's death. The main requirement is that the beneficiary must have been residing in the United States at the time of the petitioner's death and continue to be residing here. The other requirement is obtaining a substitute sponsor who can file an affidavit of support.

According to the USCIS, there are two ways to request 204(l) relief. If the petitioner died while the petition or application was pending, the beneficiary will simply notify the USCIS and request that the agency proceed with adjudication of the petition or application. This presumes that the petition or application was filed on or after October 28, 2009 or was pending on that date. If it was filed and adjudicated before that date, the Service will allow the affected beneficiary to file an untimely motion to reopen if he or she would otherwise be protected by the provisions of 204(l).⁷² The second manner of requesting relief applies to beneficiaries whose petitioner died after the petition or application was approved. Assuming the beneficiary satisfies the residency requirements, he or she can request reinstatement of the approved petition or application.

Reinstatement under 204(l) should not be confused with humanitarian reinstatement. Those beneficiaries who do not satisfy the residency requirement of 204(l) but whose petitioner died after the I-130 was approved may file to reinstate the revoked I-130 based on humanitarian factors.⁷³ This procedure is described in chapter 2. A sample motion to reinstate an I-130 petition based on humanitarian factors, with a list of supporting documents, is attached as appendix 2. A sample request to reinstate an I-130 petition based on 204(l), with a list of supporting documents, is attached as appendix 5.

Beneficiaries who can benefit from this 2009 statutory amendment include immediate relative children and parents of a U.S. citizen and all preference category principal and derivative beneficiaries in the family-based categories. In cases where the principal beneficiary meets the residence requirements, but the derivatives do not, they may still qualify for relief. It is not necessary that all of the derivative beneficiaries meet the residence requirements. According to the USCIS, if "any one beneficiary of a covered petition meets the residence requirements of section 204(l) of the Act,

⁷¹ INA §204(l), as amended by FY2010 Department of Homeland Security Appropriations Act, Pub. L. No. 111-83, 123 Stat. 2142, §568(d)(1), Oct. 28, 2009.

⁷² USCIS Memo, "Approval of Petitions and Applications after the Death of the Qualifying Relative under New Section 204(l) of the Immigration and Nationality Act" (Dec. 16, 2010).

⁷³ 8 CFR §205.1(a)(3)(i)(C).

then the petition may be approved...”⁷⁴ So this interpretation helps in cases where the principal beneficiary satisfies the residence requirements but the spouse and/or children have been residing abroad.

Section 204(1) also provides relief in situations where the principal beneficiary – not the petitioner – has died. In the past, when the principal beneficiary had died, either the derivatives were left without a basis for immigrating (e.g., derivative children in first preference cases or derivative spouses and children in third or fourth preference cases), or the petitioner had to file a new petition for the child (second preference cases). The statute now allows these derivatives "of the qualifying relative" in all the family-based preference categories to proceed unaffected by the principal beneficiary's death.

The DHS retains the power to deny relief under section 204(1) when it determines that approval of the petition or application "would not be in the public interest." The exercise of this discretion is non-reviewable. According to the USCIS, “only truly compelling discretionary factors should be cited as a basis to deny the visa petition under section 204(1).” And before making such a determination, the officer must first consult with Headquarters.⁷⁵

Section 204(1) does not allow a surviving family member to apply for adjustment of status if not otherwise eligible. Nor does it require approval of a petition or application if the officer believes the beneficiary/applicant is ineligible. For example the officer might determine that there was no good faith marriage in a marriage-based case. This statutory amendment does not waive or excuse the grounds of inadmissibility or deportability; it simply allows the petition or application to be adjudicated notwithstanding the death of the petitioner or principal beneficiary. But the agency interprets the statute as allowing the granting of a waiver of inadmissibility – even though the qualifying relative has died and even though there is obviously no extreme hardship to be suffered by the decedent – if the beneficiary meets the residence requirements of section 204(1). The Service will note the fact that the qualifying relative has died and the death will be “deemed to be the functional equivalent of a finding of extreme hardship.” This does not mean that the waiver will necessarily be approved. The Service retains the right to exercise its discretion in adjudicating waivers, even if extreme hardship is established.⁷⁶

The affidavit of support requirements are not waived for family-based cases involving a deceased petitioner – other than a widow or widower – though the beneficiary may submit one from a substitute sponsor. Substitute sponsors may include a close relative of the beneficiary (spouse, parent, mother-in-law, father-in-law, sibling, child at least 18 years of age, son, daughter, daughter-in-law, son-

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

in-law, sister-in-law, brother-in-law, grandparent, or grandchild) or a legal guardian. They must be either a U.S. citizen or LPR and be domiciled in the United States. If they have insufficient income to satisfy the 125 percent of poverty requirement for their household size, they may obtain a joint sponsor who does meet it. Beneficiaries residing in the United States whose petitioning family member has died will need to file a substitute affidavit of support as part of the adjustment of status or consular processing procedure. Those who are residing abroad and will be moving to reinstate the petition will need to include a substitute affidavit of support with the motion. Beneficiaries residing inside the United States who cannot secure a substitute sponsor will be unable to proceed with their application for adjustment of status or an immigrant visa; those residing outside the country will be unable to proceed with their motion to reinstate.

Death of the spouse/parent usually terminates the stepparent-stepchild petition, except when the parties establish an ongoing relationship.

AGE-OUT

The CSPA has solved the age-out problem for many beneficiaries. This will be explained in greater detail later in this chapter. But prior to the CSPA, turning 21 meant (and for those few who cannot take advantage of the law, still means) one of the following: (1) converting from immediate relative to the first-preference category; (2) converting from F-2A to F-2B; or (3) converting from derivative beneficiary and possibly losing status (derivatives in the F-2A preference category still convert to F-2B).

Prior to the CSPA, children who were under 21 at the time the I-130 was filed on their behalf by a U.S. citizen parent automatically converted from immediate relative to the first-preference category upon turning 21.⁷⁷ There was no need to file a separate I-130, nor was there a need to inform the service center, NVC, or consulate. The beneficiary in the first-preference category retained the same priority date as that obtained when the I-130 was filed as an immediate relative.⁷⁸

Children who were under 21 at the time the I-130 was filed on their behalf by an LPR parent automatically converted from the F-2A category to the F-2B category upon turning 21.⁷⁹ There was no need to file a separate I-130, nor was there a need to inform the service center, NVC, or consulate. The beneficiary in the F-2B category retained the same priority date as that obtained when the I-130 was filed in the F-2A category.

Derivatives in the second-preference category automatically lost their derivative status when they turned 21. But if they were the unmarried children of an LPR parent, they

⁷⁷ 8 CFR §204.2(i)(2).

⁷⁸ *Id.*

⁷⁹ 9 FAM 42.53 N2.4-2(c).

were able to convert from the F-2A to the F-2B category when the LPR petitioner filed a separate I-130 on their behalf. Fortunately, they were also able to retain the original priority date.⁸⁰ However, if they were the children of a principal beneficiary who was the unmarried child of an LPR, they lost their derivative status upon turning 21. That is because the LPR petitioner cannot petition for his or her grandchildren.

Derivatives in other preference categories also lost their derivative status when they turned 21. Unlike the children of LPRs, who converted automatically from the F-2A to the F-2B category, these sons and daughters did not automatically convert to another category upon turning 21. They had to start over again after their parent immigrated or adjusted status. The LPR parent then filed a new I-130 on their behalf. Prior to the CSPA—and even according to current USCIS interpretation after implementation of the law—these former derivatives did not retain the original priority date.

PRE-1977 WESTERN HEMISPHERE PRIORITY DATES

When Congress changed the immigration law at the end of 1976 that established our current family-based preference categories for Western Hemisphere immigrants (North America, Central America, South America, and adjacent islands), it allowed pending applicants—called registrants—to use their old, unused priority dates.⁸¹ It also allowed any derivatives in existence on the date of original filing (registering) to use their unused priority dates for later applications. Derivatives include the spouses and unmarried children under 21 on the date of original filing, as well as children born later from a marriage that existed on that date. This means that children born after January 1, 1977, can still qualify as derivatives if their parents were married and had filed (registered) prior to that date. The savings clause in the 1976 legislation allows the beneficiaries and derivatives to use the original date of filing (registering) for later I-130 applications. Once established, the priority date is retained by the derivatives, even if they subsequently marry or turn 21. The priority date can be used in conjunction with any properly approved visa petition filed on behalf of the alien.

The Child Status Protection Act

The CSPA went into effect on August 6, 2002. Since that date, USCIS and the Department of State (DOS) have together issued more than a dozen memos interpreting the statute and providing detailed information on how it will be implemented. The CSPA will help many children of U.S. citizens immigrate faster than they would have under the prior law. It provides a more limited form of relief for the unmarried children of LPRs and derivatives in the preference categories.

⁸⁰ 8 CFR §204.2(a)(4).

⁸¹ Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, 90 Stat. 2703; 9 FAM 42.53 N4.1.

Children of U.S. Citizens

The children of U.S. citizens are now allowed to preserve the status they held at the time their parent filed the I-130 petition. If they were immediate relatives on that date—unmarried and under 21—they will still be considered immediate relatives should they turn 21 before they obtain permanent residency.⁸² In other words, they will never “age out.” Under the prior law, they would have automatically moved into the first-preference category upon turning 21. The CSPA does not change their status, however, should they marry before immigrating. In that case, the son or daughter still converts to the third-preference category.⁸³

The children of LPR parents who naturalize also are able to take advantage of the CSPA. If the children are unmarried and under 21 on the date of the petitioning parent’s naturalization (*i.e.*, they are direct beneficiaries in the second-preference F-2A category), they then convert to immediate-relative status. They preserve that status if they subsequently turn 21 before immigrating.⁸⁴ Some LPR petitioners filed only one I-130 for their spouse with the intention that their children immigrate as derivatives. 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.⁸⁵ The current USCIS position is that these children will need a separate I-130 on file before they turn 21 in order to preserve their immediate-relative status.

The married children of U.S. citizens (*i.e.*, direct beneficiaries in the third-preference category) also benefit from the CSPA. If they divorce before turning 21, they convert to immediate-relative status. They will preserve that status even if they turn 21 before immigrating, since it is their age at the time of the termination of the marriage that controls.⁸⁶ If they divorce after turning 21, the CSPA does not affect their status—they would still convert to the first-preference category.

Children of LPRs and Derivatives

The CSPA provides a different form of relief to children of LPR parents who do not naturalize, and to derivative children in the preference categories. Children in the second-preference category previously would have converted from the F-2A to the F-2B category upon turning 21. Derivative children in the family-preference categories previously would have lost their derivative status upon turning 21. But under the CSPA, their age for purposes of determining their preference category and derivative status will be reduced by the period of time the I-130 petition was pending.⁸⁷ In other words, look at the biological age of the second-preference child, son, or daughter at

⁸² INA §201(f)(1).

⁸³ 8 CFR §204.2(i)(1)(ii).

⁸⁴ INA §201(f)(2).

⁸⁵ 8 CFR §204.2(a)(4).

⁸⁶ INA §201(f)(3).

⁸⁷ INA §203(h)(1).

the time the F-2A preference category becomes current for the priority date. If they are over 21, they still might qualify, depending on how long their I-130 was pending.

For example, take the case of an LPR who files an I-130 for his son. If USCIS took one year to approve the I-130 petition, subtract that period from the son's biological age (or add that period to the son's date of birth) to arrive at his "adjusted age." Use the son's adjusted age on the date the second-preference F-2A category becomes current to determine if he is under 21. If he is, he will be considered in the F-2A category (even though his biological age is over 21) and he will retain that status, assuming he does not marry.

Such children will preserve their F-2A status provided they seek to acquire lawful permanent resident status within one year of visa availability.⁸⁸ The USCIS has defined that to mean filing for adjustment of status.⁸⁹ DOS has defined it to include submitting a completed DS-230 Part 1, DS-260, or Form I-824.⁹⁰ This latter form is most commonly used by principal beneficiaries who adjusted status but have derivative family members who will be consular processing. In a published decision, the Board of Immigration Appeals has found that an alien may satisfy the "sought to acquire" requirement by filing one of the three applications or by establishing "extraordinary circumstances" that prevented filing within the one-year window. Such circumstances might include retaining an immigration attorney, completing the application within the one-year period, but then having the attorney unnecessarily delay the filing.⁹¹

The same age-adjusting principle applies for derivative beneficiaries.⁹² Look at the date that the principal beneficiary's priority date becomes current. If the derivative beneficiary is under 21 using his or her adjusted age, then he or she retains derivative status, even if he or she subsequently turns 21.

For example, take the case of a U.S. citizen who files a third-preference petition for his married son. The son's wife and minor daughter are derivatives. When the daughter turns 21, she loses derivative status, and the only way for her to immigrate is through a separate petition filed by her father or mother after they immigrate. But use the derivative child's adjusted age (biological age minus the time the I-130 was pending) on the date the third-preference visa became current to determine if the

⁸⁸ INA §203(h)(1)(A).

⁸⁹ INS Memorandum, J. Williams, "The Child Status Protection Act—Memorandum Number 2" (Feb. 14, 2003), *published on* AILA InfoNet at Doc. No. 03031040 (*posted* Mar. 10, 2003), replaced by USCIS Memorandum, D. Neufeld, "Revised Guidance for the Child Status Protection Act (CSPA)" (May 6, 2008), *published on* AILA InfoNet at Doc. No. 08050669 (*posted* May 6, 2008).

⁹⁰ Child Status Protection Act of 2002: ALDAC #2, State 015049 (Jan. 2003), *published on* AILA InfoNet at Doc. No. 03020550 (*posted* Feb. 5, 2003).

⁹¹ *Matter of O. Vasquez*, 25 I&N Dec. 817.

⁹² INA §203(h)(2)(B).

child retains derivative status. To preserve derivative status the child would need to seek to adjust status or consular process within one year.

To determine the adjusted age, it will be necessary to know the priority date and the date on the I-797 approval notice. It also will be necessary to know when the F-2A category—or other family- or employment-preference category for derivatives—first became current for the specific priority date. The date that a visa number becomes available is the first day of the month that the *Visa Bulletin* indicates availability of a visa for that preference category. Visa bulletins dating back to February 1995 can be accessed at http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html.

The CSPA codifies prior policy when a beneficiary ages out from the F-2A into the F-2B category. It now formally states that “the alien’s 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.”⁹³ The USCIS interpretation is that this provision applies only to second-preference F-2A derivatives who age out and thus convert automatically to the F-2B category. The agency has issued instructions clarifying that if a derivative beneficiary of a petition originally approved for F-2A classification is otherwise eligible to file for adjustment of status, the applicant can proceed to adjust status in the F-2B classification without filing a second I-130 petition.⁹⁴ Should the LPR petitioner elect to file a second I-130 petition for the son or daughter in the F-2B category, he or she will retain the original priority date for the first petition.⁹⁵ This is true even if the petitioner has naturalized and the second petition is being filed in the F-1 category.

Practitioners have argued that this conversion and retention language should apply to derivatives in all of the other family-based preference categories, and that they should automatically convert to the F-2B category upon aging out of derivative status. For example, a third or fourth preference derivative child, upon aging out, should be able to retain the original priority date when the principal beneficiary immigrates and files a separate petition in the F-2B category. At the present time, however, the USCIS does not agree with this interpretation and the BIA has similarly rejected it.⁹⁶ Nevertheless, two courts of appeal have agreed with this interpretation,⁹⁷ while one court of appeals has rejected it.⁹⁸ Those appellate court

⁹³ INA §203(h)(3).

⁹⁴ “Guidance to USCIS Offices on Handling Certain Family-Based Automatic Conversion and Priority Date Retention Requests Pending a Supreme Court Ruling on *Mayorkas v. Cuellar de Osorio*,” published on AILA InfoNet at Doc. No. 13112251 (posted 11/22/13).

⁹⁵ *Id.*, 8 CFR §204.2(a)(4).

⁹⁶ *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009).

⁹⁷ *Osorio v. Mayorkas*, 2012 U.S. App. Lexis 20177 (9th Cir. 2012); *Khalid v. Holder*, 655 F.3d 363 (5th Cir. 2011).

⁹⁸ *Li v. Renaud*, 654 F.3d 376 (2nd Cir. 2011).

decisions are stayed, however, pending a decision from the Supreme Court on this issue.⁹⁹

Relief for Filipinos

Based on current demand, the first-preference category is now backlogged further than the second-preference F-2B category for beneficiaries from the Philippines. There are also times when it is backlogged further for beneficiaries from Mexico. Therefore, when their parents naturalized, and these sons and daughters over 21 converted from F-2B to first preference, they actually extended the time they needed to wait for their visa to become current. The CSPA eliminates this disparity and penalty by allowing these beneficiaries to elect whether they want to automatically convert to the first preference or opt out and stay in the F-2B category.¹⁰⁰ Applicants for adjustment of status should write a simple letter attached to their application serving as notice of this election.¹⁰¹ Beneficiaries residing abroad will need to submit a similar statement when consular processing, but this formal election will have to be sent to and acknowledged by the Department of Homeland Security before the consulate proceeds with the immigrant visa application. Of course, if the children were under 21 at the time the parent naturalized, then they became immediate relatives and would not need to make this special election. The provision applies to petitioners who naturalized before, on, or after the effective date of the CSPA.

This same opt-out option is not available for children over 21 but who are still in the F-2A category based on their CSPA or adjusted age. The first preference is backlogged farther for all nationalities, and therefore it would be advantageous for those persons to remain in the F-2A category when their petitioning parent naturalizes. Unfortunately, the BIA has held that that option is only available for those in the F-2B category.¹⁰²

Effective Date

At the time of passage, the CSPA potentially affected thousands of cases pending before USCIS and DOS. Section 8 of the CSPA states unequivocally that the new law applies to I-130 petitions, adjustment of status applications, and immigrant visa applications pending before the agencies on August 6, 2002. It also applies to I-130 petitions approved before August 6, 2002, provided no final determination had been made on the subsequent adjustment or immigrant visa application. USCIS and DOS originally took the position that the CSPA required the filing of an application for adjustment of status or an immigrant visa prior to August 6, 2002, for those children who had approved I-130 petitions but who turned 21 before August 6, 2002. In other words, the agencies' position was that if such children did not have an application or

⁹⁹ *Mayorkas v. Osorio*, No. 12-930, ___ U.S. ___ (2014).

¹⁰⁰ INA §204(k).

¹⁰¹ INA §204(k)(2).

¹⁰² *Matter of Zamora-Molina*, 25 I&N Dec. 606 (BIA 2011).

petition pending on that date, the CSPA did not apply. But after a precedent BIA decision held that the CSPA applied retroactively,¹⁰³ the agencies reversed their prior positions.¹⁰⁴ Now, according to the agencies, as long as the child had not received a final denial on an application by August 6, 2002, the CSPA principles will apply.

Authority

Statutes

The following statutory cites provide legal authority for the issues discussed above:

- INA §201—the immigrant-visa selection system
- INA §202—numerical limitations and distribution of 2nd-preference visas
- INA §203—family-based preferences and order of consideration

Regulations

The following regulatory cites provide legal authority for the issues discussed above:

- 8 CFR §204.1—substantive basis for immediate relative and family preference petitions; evidentiary and documentary requirements
- 8 CFR §204.2—elements to be proven and the documentation to be submitted to establish each type of family relationship
- 22 CFR §40.1—definition of terms
- 22 CFR Part 42—documentary requirements

Agency Guidelines

The following guidelines provide additional authority for the issues discussed above:

- USCIS *Adjudicator's Field Manual* (AFM)—a comprehensive “how to” manual detailing policies and procedures for all aspects of the adjudications program. USCIS employees follow these detailed procedures and the agency’s interpretation of the law when adjudicating petitions and applications. The AFM is available at www.uscis.gov (Laws & Regulations tab, link to Immigration Handbooks, Manuals, and Policy Guidance).
- *Foreign Affairs Manual* (FAM)—provides guidance and interpretation of regulations for DOS officials. The FAM defines qualifying relationships, provides guidelines regarding immigrant visas, and availability of foreign documents. The portions relating to immigrant visas are located in volume 9. Portions of

¹⁰³ *Matter of Avila-Perez*, 24 I&N Dec. 78 (BIA 2007).

¹⁰⁴ USCIS Memorandum, D. Neufeld, “Revised Guidance for the Child Status Protection Act (CSPA)” (May 6, 2008), published on AILA InfoNet at Doc. No. 08050669 (posted May 6, 2008).

the FAM are available at www.travel.state.gov/law/law_1734.html. See also AILALink Online to access FAM volume 9 (visit www.ailalink.org for more information on how to subscribe to this service).