## INTRODUCTION TO IMMIGRATION LAW

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>What is Immigration Law About?</td>
<td>3</td>
</tr>
<tr>
<td>Chapter One</td>
<td>Family-Based Immigration: Immediate Relatives and the Preference System</td>
<td>10</td>
</tr>
<tr>
<td>Chapter Two</td>
<td>Overview of the Application Process for Permanent Residence</td>
<td>29</td>
</tr>
<tr>
<td>Chapter Three</td>
<td>Overview of Common Grounds of Inadmissibility and Deportability</td>
<td>39</td>
</tr>
<tr>
<td>Chapter Four</td>
<td>Immigrating Through Marriage</td>
<td>53</td>
</tr>
<tr>
<td>Chapter Five</td>
<td>Violence Against Women Act; Nonimmigrant Visas for Crime Victims</td>
<td>59</td>
</tr>
<tr>
<td>Chapter Six</td>
<td>Overview of Removal Proceedings and Defenses to Removal</td>
<td>70</td>
</tr>
<tr>
<td>Chapter Seven</td>
<td>Temporary Protected Status, Asylum, Withholding of Removal, Deferred Action for Childhood Arrivals</td>
<td>79</td>
</tr>
<tr>
<td>Chapter Eight</td>
<td>Overview of Employment-Based and Diversity Visas</td>
<td>87</td>
</tr>
<tr>
<td>Chapter Nine</td>
<td>Citizenship Through Acquisition, Derivation, and Naturalization</td>
<td>92</td>
</tr>
<tr>
<td>Chapter Ten</td>
<td>BIA Agency Recognition and Staff Accreditation</td>
<td>99</td>
</tr>
<tr>
<td>Chapter Eleven</td>
<td>Initial Interviews</td>
<td>102</td>
</tr>
<tr>
<td>Chapter Twelve</td>
<td>Legal Authority, Legal Research, and Citations to Authority</td>
<td>110</td>
</tr>
<tr>
<td></td>
<td>Additional Resources</td>
<td>123</td>
</tr>
</tbody>
</table>
INTRODUCTION

WHAT IS IMMIGRATION LAW ABOUT?

Immigration law regulates which non-U.S. citizens may enter the U.S., for how long, and for what purposes; which non-citizens may work in the U.S.; which non-citizens may become U.S. citizens, and how; and which non-citizens must leave the U.S. In this introductory chapter, we will introduce some of the key concepts in immigration law, including the different types of immigration statuses in the U.S.; the different types of immigration laws – who creates them, and how they fit together; and the roles of the different federal agencies responsible for carrying out U.S. immigration laws.

I. WHO’S WHO IN THE IMMIGRATION LAW UNIVERSE

When considering different types of immigration statuses, the first and broadest distinction to draw is between U.S. citizens (USCs) and non-citizens. The technical term for non-citizens under U.S. immigration law is “aliens” (which applies equally to those here in lawful status and those without lawful status), but because of the negative connotations of this term, we will use “non-citizen” throughout this manual.

All non-U.S. citizens who want to enter the U.S., and who are in the U.S., are subject to U.S. immigration laws. U.S. citizens are not subject to immigration laws, in the sense that citizens may come and go from the U.S. without immigration restrictions; are not subject to immigration scrutiny or enforcement either in the U.S. or at U.S. borders; and may not be deported from the U.S. U.S. citizens also enjoy a number of rights and privileges not available to non-citizens, such as voting in U.S. elections. Chapter Eight of this manual discusses the benefits of citizenship in greater detail.

A. CATEGORIES OF NON-CITIZENS

There are several categories of non-citizens, each with different immigration statuses. We will examine each category, beginning with Lawful Permanent Residents (LPRs), who have the greatest array of benefits, then considering other types of lawful immigration status, and ending with the undocumented, who have no lawful immigration status.

B. LAWFUL PERMANENT RESIDENTS

Lawful Permanent Residents, or LPRs – often referred to as “green card holders” – have more immigration benefits than other non-citizens. The term in immigration law for LPRs is “immigrants,” but we will refer to them throughout the manual as LPRs. LPRs have the right to live and work indefinitely in the U.S. LPRs may sponsor certain close family members – their spouses and unmarried sons and daughters – for lawful permanent residence. LPRs may generally travel in and out of the U.S. without advance permission, and in many circumstances are not subject to immigration-related scrutiny when returning to the U.S. from abroad. LPRs may also apply for U.S. citizenship – in a process called “naturalization” – after spending a
prescribed period of time in the U.S. as LPRs; Chapter Eight explains the eligibility requirements for naturalization.

LPRs have many benefits, but not as many as USCs. Despite its name, lawful permanent residence is not necessarily permanent. LPRs are potentially subject to deportation. Chapter Three describes the kinds of conduct that could lead to deportation for LPRs, including certain criminal convictions. LPRs may also lose their status if they reside outside the U.S. – this is known as “abandonment” of LPR status.

In order to become an LPR, a non-citizen must qualify to use one of the pathways to LPR status that are laid out in the immigration laws. The three largest pathways are through certain family relationships; through certain types of employment; and through certain types of humanitarian protection: asylum and refugee status, and U and T status for victims of serious crimes or human trafficking. Together, these pathways account for more than 95% of all non-citizens who become LPRs each year.

The remaining pathways account for far fewer LPRs. These pathways include the Diversity Visa Lottery (known as the “green card lottery”), which each year awards LPR status to about 50,000 non-citizens from countries of low rates of immigration to the U.S.; Cuban Adjustment for natives of Cuba; Special Immigrant Juvenile status for children who have been abused or neglected by their parents; and cancellation of removal, which is available to certain non-citizens in removal proceedings in front of an Immigration Judge, who have been in the U.S. for at least 10 years and have close USC or LPR relatives.

Non-citizens who do not qualify to use one of the pathways to LPR status cannot become LPRs. Even those non-citizens who do qualify to get on one of these pathways will not necessarily become LPRs. There are obstacles to lawful permanent residence that prevent some non-citizens from becoming LPRs; we will examine those obstacles – known as “grounds of inadmissibility” in Chapter Three of this manual.

C. ASYLEES AND REFUGEES

The U.S. grants protection to individuals who, in their home countries, have been persecuted, or fear persecution in the future, based on their race, religion, nationality, political opinion, or membership in a particular social group. This protection is labeled either “asylum” or “refugee status,” depending on where the determination about this persecution is made. Those granted refugee status are identified and interviewed outside the U.S. by the Departments of State and Homeland Security; they then enter the U.S. in refugee status. Individuals who come to the U.S. on their own (whether as tourists, students, entry without inspection, or in any other way) and seek protection once they are here are granted asylum.

Both asylum and refugee status are granted indefinitely. Refugees and asylees may work in the U.S. and may apply for their spouses and minor children to join them as refugees or asylees in the U.S. Asylees and refugees also have their own special pathway to LPR status – a pathway that allows forgiveness of many of the obstacles to LPR status – grounds of inadmissibility – outlined in Chapter Seven.
D. NON-IMMIGRANTS

Many non-citizens enter the U.S. every year in temporary legal statuses. These statuses, some of which allow employment in the U.S., and some of which do not, are known as “non-immigrant” status. Non-immigrant statuses are categorized by letters of the alphabet, from A through V. Some of the most common are:

A = diplomats
B = tourists
D = crewpersons
F = students
H = employment
J = exchange visitors
K = fiancés of USCs
P = artists and entertainers
R = religious workers
T = victims of severe forms of human trafficking
U = victims of certain serious crimes who have helped law enforcement

Most non-immigrant statuses have no built-in pathway to lawful permanent residence. Those present in the U.S. in most non-immigrant statuses will need to qualify for the family, employment-based, or humanitarian pathways in order to become LPRs. The only non-immigrant categories that have built-in pathways to LPR status are T status for victims of human trafficking, and U status for victims of certain serious crimes who have cooperated with law enforcement.

You will often hear these statuses referred to as “visas.” What is the difference between an immigration status and a visa? A visa is a document issued by the Department of State at a U.S. consulate abroad, that gives the bearer of the visa the opportunity to come to a U.S. port of entry and request admission in a particular immigration category. An immigration status is a particular type of lawful status given to a non-citizen present in the U.S.

E. TEMPORARY HUMANITARIAN CATEGORIES

1. TPS

Along with asylum and refugee status, the U.S. also offers a more temporary form of protection to individuals who are residing in the U.S., and who are citizens of certain designated countries that have suffered severe natural disasters or ongoing armed conflicts: Temporary Protected Status, or TPS. TPS offers protection from removal, and work authorization, to those who qualify for it. DHS determines which countries are designated for TPS – currently El Salvador, Haiti, Honduras, Nicaragua, Somalia, Sudan, South Sudan, and Syria. To qualify for TPS, nationals of these countries must have been physically present in the U.S. on a specific date, and must timely register for TPS. TPS does not have a built-in pathway to lawful permanent residence. Chapter Seven of this manual discusses TPS in greater detail.
2. **DACA**

The most recent humanitarian category is Deferred Action for Childhood Arrivals, known as DACA. “Deferred action” is not actually a lawful immigration status, but rather a determination by DHS that it will not currently seek to remove the non-citizen with deferred action. Another major benefit of DACA is that DHS may grant work authorization to those with deferred action. DACA is currently available to young people who came to the U.S. before they were 16, are attending or have attended school here, were in the U.S. on June 15, 2012, and have been living in the U.S. since at least June 15, 2007. DACA does not have its own pathway to lawful permanent residence. Chapter Seven of this manual discusses DACA in greater detail.

**F. UNDOCUMENTED**

There are millions of non-citizens in the U.S. who have no lawful immigration status. We will refer to these people throughout the manual as “undocumented” because they lack immigration documents. There are two ways for a non-citizen to become undocumented, and there are millions of non-citizens present in the U.S. in each of these categories. Many non-citizens enter the U.S. as non-immigrants, and then stay longer than their authorized periods of stay – tourists, students, exchange visitors, employees. These non-citizens were in lawful status at one time, but then became undocumented when they stayed past the expiration of their authorized stays.

The other way to become undocumented is to enter the U.S. other than at a port of entry, without being inspected by an immigration officer. We often refer to this as “Entry Without Inspection,” or EWI. Someone who enters without inspection is undocumented as soon as he or she enters the U.S.

Among the millions of undocumented people in the U.S., there are quite a few who may currently, or may in the future, qualify for a lawful immigration status. Being undocumented is not necessarily permanent.

**II. SOURCES OF IMMIGRATION LAWS**

There are numerous sources of immigration laws and rules, and they fit together in a hierarchy. We will examine each of the sources of laws, beginning with the highest in the hierarchy. All laws in the U.S. must conform to the U.S. Constitution, and so even the highest point in the immigration hierarchy, the Immigration and Nationality Act, may not violate the U.S. Constitution. Chapter Eleven of this manual explains each source of immigration law in greater detail.

**A. THE IMMIGRATION AND NATIONALITY ACT**

Immigration and nationality matters are reserved in the U.S. to the federal government. The U.S. Congress creates U.S. immigration laws. The main body of immigration law is the Immigration and Nationality Act, known as the INA. Immigration advocates often refer to the INA as “the Act” or “the statute.” Statute is another word for a law, and the INA is the
immigration statute. The INA forms part of the larger body of federal laws, known as the U.S. Code. The INA is found at volume 8 of the U.S. Code.

The INA sets out the framework of U.S. immigration laws: which non-citizens may enter the U.S., in what statuses; for how long; which non-citizens may work in the U.S.; pathways to permanent residence; naturalization; which non-citizens may be refused entry to the U.S.; and which non-citizens may be removed from the U.S., and how. The INA sets out the general structure of immigration law. All other immigration-related rules must conform to the INA.

The INA is not static; it changes every time Congress makes changes to the immigration laws. Even in the absence of major immigration reform, there are changes every year to the INA. For this reason, it is vitally important that every practitioner who handles immigration cases have access to an up-to-date copy of the INA.

B. REGULATIONS

There are several federal agencies charged with carrying out immigration laws, and they write rules called “regulations” that flesh out the framework of the INA, providing more detail about exactly how the immigration laws are to be carried out. The main body of immigration regulations are found at Volume 8 of the Code of Federal Regulations, referred to as 8 CFR. The regulations provide far more detail than the statute, including specific definitions of terms; filing procedures and fees; and greater detail about eligibility for specific benefits and other terms in the INA. The regulations, like the INA, change as the agency updates them, and so it is also necessary for practitioners have access to an up-to-date copy of the regulations.

C. AGENCY POLICY GUIDANCE

Although the immigration regulations are very detailed, and much longer than the INA, they do not address every question in immigration law. USCIS has not issued regulations on every aspect of immigration law; and even the regulations themselves sometimes have gaps. The agency handles this by issuing internal policy guidance for its adjudicators, in the form of policy memoranda, many of which are consolidated into a book called the Adjudicator’s Field Manual. None of these are sources of law themselves, but they provide useful guidance to practitioners seeking to understand how the agency interprets the law. The Adjudicator’s Field Manual and many of the policy memoranda are available on the USCIS website.

The Department of State also issues internal guidance to its consular officers, in the form of a book called the Foreign Affairs Manual (FAM). Volume 9 of the FAM deals with immigration matters. For practitioners working with non-citizens applying for benefits at U.S. consulates overseas, this is a very important resource. The FAM is available on the Department of State website.

D. CASE LAW

When disagreements occur between the government and immigrants over the meaning of specific sections of immigration laws, courts must make decisions about how the immigration laws should be interpreted. There are several types of courts involved in interpreting immigration
laws: the Board of Immigration Appeals (discussed below), which is part of the Department of Justice and hears appeals on many immigration cases; and federal courts, including federal district and circuit courts, and even on occasion the U.S. Supreme Court.

Case law sets precedents that other courts and federal agencies must follow. Immigration advocates must therefore keep abreast of court decisions, and have access to books that describe and locate important court decisions. Chapter ____ explains in greater detail how this works.

III. FEDERAL AGENCIES THAT CARRY OUT IMMIGRATION LAWS

Because immigration law is federal, federal agencies carry out U.S. immigration law. There are several different federal agencies involved in carrying out immigration laws, and we will examine each of them, and their different functions.

A. DEPARTMENT OF HOMELAND SECURITY

The Department of Homeland Security (DHS) has the largest role in carrying out U.S. immigration laws. DHS adjudicates immigration benefits; enforces immigration laws inside the U.S.; and enforces immigration laws at U.S. borders. There are three sub-agencies within DHS that carry out these functions: USCIS, ICE, and CBP.

1. U.S. Citizenship and Immigration Services (USCIS)

USCIS, www.uscis.gov, adjudicates immigration benefits inside the U.S. USCIS adjudicators make decisions on a wide range of applications for many kinds of immigration benefits, including adjustment of status to lawful permanent resident; naturalization; waivers of inadmissibility; asylum applications; TPS applications; applications to change or extend non-immigrant status; DACA applications; and many more. USCIS has field offices in many states at which adjudicators interview applicants in person; four Service Centers at which adjudicators adjudicate paper applications; and eight Asylum Offices at which Asylum Officers interview applicants for asylum.

2. Immigration and Customs Enforcement (ICE)

ICE, www.ice.gov, enforces immigration laws inside the U.S. ICE agents are responsible for finding removable non-citizens and instituting removal proceedings against them. ICE attorneys represent the government in removal hearings before Immigration Judges. ICE is also responsible for detaining non-citizens who are subject to immigration detention.

3. Customs and Border Protection (CBP)

CBP, www.cbp.gov, enforces immigration laws at the U.S. border and ports-of-entry. Ports-of-entry are found at both land borders and inside airports. CBP officers inspect non-citizens, and decide whether or not to admit them to the U.S. CBP also carries out border patrol at U.S. borders.
B. DEPARTMENT OF JUSTICE

The Department of Justice houses the administrative courts that review many decisions by USCIS. The immigration court system is in a part of the Department of Justice called the Executive Office for Immigration Review (EOIR), www.justice.gov/eoir. EOIR has two sub-parts: the Immigration Courts, the trial-level courts for immigration cases; and the Board of Immigration Appeals (BIA), which hears appeals of many Immigration Judge decisions. Immigration Judges in the 26 (check) Immigration Courts around the country hear testimony, consider evidence, and make decisions in cases for individual non-citizens charged with being removable from the U.S. Appeals from many of these decisions are decided by the BIA.

C. DEPARTMENT OF STATE

Many non-citizens apply for immigration benefits -- whether tourist, student, or other non-immigrant visas, or lawful permanent resident status -- at U.S. consulates overseas. Consular officers in the Department of State interview visa applicants and adjudicate these applications. The Department of Statue also plays a central role in the family and employment-based immigration process, maintaining the waiting lists (known as the Visa Bulletin) that determine which non-citizens are eligible to apply for permanent residence at any given time. Chapter One of this manual explains this system in greater detail.

D. DEPARTMENT OF LABOR

The Department of Labor plays an important role in employment-based immigration cases. It must provide certifications about the unavailability of U.S. workers in many employment-based applications for lawful permanent residence.
CHAPTER ONE

FAMILY-BASED IMMIGRATION: IMMEDIATE RELATIVES AND THE PREFERENCE SYSTEM

I. OVERVIEW OF FAMILY-SPONSORED IMMIGRATION

Family reunification has historically been the principal policy underlying U.S. immigration law. Family-based immigration allows for close relatives of U.S. citizens and legal permanent residents (LPR) to immigrate to the United States. These family members immigrate either as immediate relatives of U.S. citizens or through the family preference system. When these family members “immigrate” they themselves become legal permanent residents. A legal permanent resident is a foreign-born individual who has been admitted to live and work indefinitely in the United States. Proof of LPR status is the I-551, Permanent Resident Card, commonly referred to as a “green card.”

Immediate relatives include the following: (1) spouses of U.S. citizens; (2) unmarried minor (under 21) children of U.S. citizens; and (3) parents of U.S. citizens over age 21. 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 allows the following persons to immigrate: (1) adult (over 21) children (unmarried and married) of U.S. citizens; (2) brothers and sisters of U.S. citizens over 21; and (3) spouses and unmarried children (both minor and adult) of LPRs. 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. Backlogs develop because there are more applicants in some countries and categories than there are visas. There are also the non-quota immigrants, such as immediate relatives, who are exempted from the yearly limitations.

Immigrant visas are issued by the U.S. consulates abroad. In addition, the United States Citizenship and Immigration Services (USCIS) or the Executive Office for Immigration Review (EOIR) may adjust an applicant’s status to LPR in the United States. 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 relative petition, and whether they are immigrating through the preference system or as an immediate relative.

Citizens and LPRs wishing to petition for a family member must be domiciled in the United States and evidence an income at least 125 percent of the federal poverty level, or else obtain the assistance of someone who satisfies that income requirement.
II. 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. 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.

- **Beneficiary** - the alien seeking permanent resident status who is related to the U.S. citizen or LPR petitioner.

- **Spouse** - the spousal relationship must be legally valid and recognized in the place where the relationship was created. As of June 26, 2013, this includes same-sex marriages that are recognized in the jurisdiction in which they are created. 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 if valid in the foreign country, it must not violate federal or state public policy. Some marriages are therefore not recognized for immigration purposes: polygamous, incestuous, or proxy (unless consummated). In a small number of states common law marriages are recognized. The marriage must be in existence, i.e., not have been legally terminated, at the time the permanent residency application is adjudicated, although the marriage need not be “viable.” If the parties are separated, more proof will be required to demonstrate that the marriage was valid at the time it was entered.

- **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). See 8 CFR § 204.2(c).

- **Brother or sister** - siblings must show they are the “child” of at least one common parent.

- **Child** - must meet the definition in the statute, INA § 101(b)(1), and must be unmarried and under 21; “son or daughter” refers to children of any age.

  a. **legitimacy** - a child who was legitimate when born or who was legitimized before age 18 while in the father’s custody is a “child” for immigration purposes. Marriage of the natural parents is the most common form of legitimation. Illegitimate children may also obtain immigration benefits from the natural mother, or from the
natural father so long as they have established a “bona-fide parent-child relationship,” i.e., cohabitation and provision of support.

b. *stepchildren* - eligible to immigrate through stepparent if child was under 18 at the time of the marriage creating the relationship. The stepchild relationship may continue even after the natural parent dies or divorces the stepparent, provided the stepparent has maintained active parental interest.

c. *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. The two years can be counted in the aggregate; the adoption must be legally valid in the country where it took place. Natural siblings of the adopted child are also eligible to immigrate if adopted while under 18 by the same adoptive parent. Certain adopted children may immigrate under the Intercounty Adoption Act of 2000, which the United States enacted to comply with its obligations under the Hague Convention. U.S. citizens seeking to adopt and immigrate a child from one of the convention member countries are required to satisfy certain requirements.

d. *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. 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 derivative beneficiary of a first or 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.
III. IMMEDIATE RELATIVES AND THE PREFERENCE SYSTEM

A. IMMEDIATE RELATIVES

The term “immediate relative” is defined to include the following family relationships: spouse or child (unmarried, under 21) of a U.S. citizen, and parent of a U.S. citizen who is 21 or over. “Spouse” includes widows or widowers of U.S. citizens who file an application within two years of the citizen’s death. These persons can 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 still a considerable backlog at the USCIS service centers in their adjudicating the relative petitions and at the USCIS district offices in their scheduling adjustment interviews. This means that even immediate relatives can sometimes expect to wait more than a year to receive their immigrant status.

B. 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 parent
- **Second** - has two subsections:
  - 2A: spouses or unmarried children (under 21) of LPR
  - 2B: unmarried sons or daughters age 21 and over of LPR
- **Third** - married sons and daughters (any age) of U.S. citizens
- **Fourth** - brothers and sisters of U.S. citizens, where citizen is at least 21

1. Quota System

Congress has limited the number of foreign-born individuals who may be admitted to the United States annually as family-based immigrants to 480,000 persons per year. Family-based immigration is governed by a 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.

There is no numerical cap on the number of immediate relatives (spouses, minor unmarried children and parents of U.S. citizens) admitted annually to the U.S.
immigrants. 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. But no fewer than 226,000 visas are available each year.

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

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

The primary source of information on visa availability is the Visa Bulletin, available on the State Department website at [http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html](http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html). The State Department disseminates a new Visa Bulletin every month. You need to learn how to read the Visa Bulletin to determine how long a particular visa application will take. There is a sample visa bulletin in your materials after the exercises on the visa bulletin.

In order to understand the Visa Bulletin, you must be familiar with the following concepts:

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

Once you know the priority date, you can determine whether or not it is “current,” i.e., 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.
Cross-Chargeability - a preference visa is generally chargeable against the quota for the country where the applicant was born. Some special rules apply with spouses and children who accompany the principal beneficiary as derivatives where the principal and derivatives are from different countries. The couple can elect to charge their visa application to the country of either spouse, depending on which country’s priority dates are moving more quickly.

2. Derivative Beneficiaries

Family members who are being petitioned by a U.S. citizen or LPR through the preference system are considered “principal beneficiaries” if they are also immigrating with their minor, unmarried children or spouse; their spouse or minor, unmarried children may also be admitted as “derivative beneficiaries.” They can be accorded the same preference status as the principal beneficiary without having to file a separate I-130 petition. These derivatives may either accompany the principal beneficiary or “follow to join,” which means immigrating more than six months after the principal beneficiary. However, this procedure only operates through the preference system. If the family member is immigrating as an immediate relative, each family member must have a separate relative petition (I-130) on file. Immediate relatives are not allowed derivative beneficiaries.

Example: Carlos, an LPR from Peru, petitions for his spouse, Rosa. Rosa and Carlos have three young children, ages 9, 6, and 4. These children are “derivative beneficiaries”; when the priority date is current for Rosa’s petition, the children can immigrate with her even though only one visa petition was filed. If Carlos was a U.S. citizen (USC) with a spouse and three children, he would have to file four separate visa petitions because there are no derivative beneficiaries for immediate relatives.

3. Retention of Priority Dates

Intending immigrants may lose their ability to immigrate under the original I-130 while it is being processed or during the time it takes for the priority date to become current. For example, the unmarried son or daughter of an LPR may marry, thus terminating the petition. Or the dependent child of an immigrating parent may turn 21, thus requiring a separate I-130 to be filed. Or the petitioner may naturalize, upgrading the original petition from a second preference to an immediate relative, and thus requiring dependent children to have their own I-130 filed.

Alternatively, the intending immigrant may change from one preference category to another. For example, an unmarried son or daughter of a U.S. citizen may marry, thus moving from first preference to third preference. Similarly, the child of an LPR who is classified in the 2A category may “age out” and move into the 2B category.

In some of those examples, the intending alien retains the original priority date,
even if a new I-130 must be filed. In the following circumstances, the alien beneficiary retains the original priority date:

- Naturalization of the petitioner changes son or daughter (age 21 or over) from 2B to 1st preference (if the child is under age 21, change is to immediate relative and priority date is irrelevant)
- Divorce of son or daughter (age 21 or over) of a U.S. citizen changes 3rd preference to 1st preference (divorce of child under 21 changes 3rd preference to immediate relative)
- Marriage of a child of a U.S. citizen changes from immediate relative to 3rd preference
- Marriage of a son or daughter (age 21 or over) of a U.S. citizen changes from 1st to 3rd preference

Derivative beneficiaries of a 2A or 2B petition cannot retain or recapture a priority date when they marry and subsequently divorce. Not only must a new petition be filed in their behalf, but they must start over with a new priority date. However, some practitioners have been successful at recapturing the priority date if the marriage is annulled. Also, offspring of derivative beneficiaries cannot immigrate with the derivative beneficiary and cannot retain the original priority date. They may be able to immigrate as derivatives, however, if a separate visa petition has been filed for their parent.

Example: Eduardo, an LPR from Argentina, filed a visa petition for his wife Luisa. Their 18-year-old son Marco is a derivative beneficiary. Marco’s one-year-old son Walter cannot immigrate on this petition because he is the son of a derivative. Eduardo can file a separate 2A petition for Marco and Marco will be able to have the priority date from his mother’s case transferred to his case. As a principal beneficiary, Marco will then be able to have his son Walter immigrate as a derivative.

C. PROTECTION FOR “AGING OUT” IMMIGRANTS

As described above, the definition of “child” under immigration law requires the “child” to be under the age of 21. Until 2002, this meant that children who turned 21 before immigrating as an immediate relative or as second preference 2A beneficiary “aged out” of their categories and faced longer waits for visas. For example, a child of a USC who turned 21 while waiting to immigrate moved to the first preference category, and the child of an LPR moved from the 2A category to the 2B category. In both of these situations, the wait for a visa will be much longer.

The Child Status Protection Act, which went into effect on August 6, 2002, helps many children avoid these age out problems. Under this law:
(a) Children of USC who were under 21 on the date the I-130 was filed will retain immediate relative status if they turn 21 before becoming LPRs.

Example: Lucy is 20 years old when her USC father files a petition for her. While waiting to immigrate, Lucy turns 21. Lucy can still immigrate as an immediate relative.

(b) Children of LPRs who naturalize become immediate relatives if they are unmarried and under age 21 on the day of the petitioning parent’s naturalization, and preserve that status even if they turn 21 before immigrating. This presumes that the LPR parent had filed an I-130 petition before naturalizing.

Example: Micah is an LPR who filed an I-130 under the 2A category for his son Tomas. Micah becomes a USC on August 10, 2005, when Tomas is 20 years old. Tomas is now an immediate relative because he is the unmarried child of a USC and under age 21. Even if Tomas turns 21 before he immigrates, he will remain in the immediate relative category.

(c) Married children of USC (third preference category) who divorce before turning 21 become immediate relatives. They will also preserve that status even if they turn age 21 before immigrating.

(d) Children of LPR parents who do not naturalize have a more limited form of relief under the new law. These children previously would have moved from the 2A to the 2B category upon turning age 21. Under the new law, their age for purposes of determining their preference category will be reduced by the period of time the I-130 was pending.

Example: LPR Hyelom filed 2A petitions for his sons Abdul and Ali, and it took USCIS 10 months to approve the petitions. By the time the 2A priority date is current, Abdul is 21 years and eight months old and Ali is 23. Abdul will still qualify to immigrate in the 2A category because he is under age 21 if you subtract the 10-month period the visa petition was pending before approval. His brother Ali will not qualify to remain in the 2A category, however, because he is still over age 21 when you subtract the 10-month period. Ali will move into the 2B category, although he retains his old priority date.

Note that the intending 2A immigrant must apply for residency within one year of qualifying in order to take advantage of this “age-out calculation.”

(e) Unmarried children of asylum and refugee status applicants who turn 21 after an asylum application was filed remain eligible for derivative asylum status.

For family-based preference immigrants, any delay in petition adjudication has both negative and positive implications. All of the time that it takes to adjudicate the petition will be subtracted from the beneficiary’s age, thus tolling their age from the
filing date until the approval date. Hence, the longer it takes to adjudicate the petition, the greater the chances that the beneficiary will still be under 21 on the date the priority date becomes current. On the negative side, should the petitioner die while the petition is pending, the beneficiary will not be able to seek humanitarian reinstatement, because that remedy is only available once the petition is approved. Should the beneficiary be residing in the United States on the date of the petitioner’s death, however, he or she might be eligible for separate relief under INA § 204(l).

**AUTHORITY**

**A. 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

**B. 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 § 42 — documentary requirements
C. GUIDELINES

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

**USCIS Operations Instructions:** The procedures followed by the USCIS in adjudicating petitions, located in §§ 204.1-.9, 205

**Foreign Affairs Manual (FAM):** Defines qualifying relationships, provides guidelines regarding immigrant visas, and availability of foreign documents, located in Notes to 22 CFR § 42

**USCIS Examinations Handbook:** Detailed description of procedures and USCIS’s interpretation of the law
Appendices for Chapter One

Appendix 1: List of suggested documents to show bona fide marriage. 23

Appendix 2: February Visa Bulletin 24

Appendix 3: Flow Chart: Becoming an LPR Through a Family Relationship 25
Chapter 1 Appendix 1

SUGGESTED EVIDENCE OF BONA FIDE MARRIAGE

1. Photographs that show both spouses together, and with family and friends. These can be taken at the wedding, at other functions or events, and throughout their relationship.

2. Copies of joint income tax returns.

3. Evidence of joint checking or savings accounts.

4. Photo identification cards of both spouses with a new card for the wife showing her married name.

5. Driver’s licenses, credit cards, check-cashing cards, employment ID cards, video club memberships, etc, for both parties.

6. Real property deeds showing joint tenancy.

7. Apartment lease or a letter from the landlord indicating that both spouses live at the apartment, or copies of rent receipts showing both parties’ names.

8. Letter from an employer showing a change in records to reflect spouse’s new marital status.

9. Letter from an employer showing designation of the spouse as the person to be notified in event of accident, sickness, or other emergency.

10. Evidence of life insurance policies where the spouse is named as beneficiary.

11. Evidence of medical or health insurance plans that name the spouse as a member or beneficiary.

12. Evidence of correspondence between the parties, including letters, birthday and holiday cards, telephone calls and other correspondence addressed to the parties.

13. Religious marriage certificate if the couple was married in a religious ceremony.

14. Copies of gas, electric, telephone and other utility bills.

15. Evidence of joint ownership of automobile.


17. Evidence of vacations taken together, including airline tickets and hotel bills.

18. Evidence of all major purchases made together, such as stereo, television, refrigerator, washer, dryer, etc.
Chapter 1 Appendix 2
VISA BULLETIN FOR MARCH 2014

FAMILY SPONSORED PREFERENCES

**First preference:** unmarried sons and daughters of citizens

**Second preference:** spouses and children, and unmarried sons and daughters of LPRs.

   2A. Spouses and children
   2B. Unmarried sons and daughters

**Third preference:** married sons and daughters of citizens

**Fourth preference:** brothers and sisters of adult citizens

*(NOTE: Visa numbers are available only for applicants whose priority date is earlier than the cut-off dated listed below)*

<table>
<thead>
<tr>
<th>Family</th>
<th>All Charge-ability Areas Except Those Listed</th>
<th>CHINA-mainland born</th>
<th>INDIA</th>
<th>MEXICO</th>
<th>PHILIPPINES</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st</td>
<td>01-FEB-07</td>
<td>01-FEB-07</td>
<td>01-FEB-07</td>
<td>15-OCT-93</td>
<td>15-AUG-01</td>
</tr>
<tr>
<td>2A</td>
<td>08-SEP-13</td>
<td>08-SEP-13</td>
<td>08-SEP-13</td>
<td>15-APR-12</td>
<td>08-SEP-13</td>
</tr>
<tr>
<td>2B</td>
<td>01-SEP-06</td>
<td>01-SEP-06</td>
<td>01-SEP-06</td>
<td>01-MAY-93</td>
<td>08-JUN-03</td>
</tr>
<tr>
<td>3rd</td>
<td>15-JUN-03</td>
<td>15-JUN-03</td>
<td>15-JUN-03</td>
<td>08-JUN-93</td>
<td>15-FEB-93</td>
</tr>
<tr>
<td>4th</td>
<td>08-NOV-01</td>
<td>08-NOV-01</td>
<td>08-NOV-01</td>
<td>15-NOV-96</td>
<td>01-SEP-90</td>
</tr>
</tbody>
</table>
Chapter 1 Appendix 3

Becoming a Permanent Resident Through a Family Relationship

<table>
<thead>
<tr>
<th>STEP 1: Relative Petition</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>USC or LPR files _________________ Petition</em></td>
</tr>
<tr>
<td>Date USCIS receives petition is the ______________ date.</td>
</tr>
<tr>
<td>USCIS sends Receipt Notice indicating the ____________ date.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>STEP 2: IR or Preference?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Immediate Relative or Preference Category?</td>
</tr>
<tr>
<td>Proceed <strong>immediately</strong> to Step Three</td>
</tr>
<tr>
<td>USCIS sends Approval Notice</td>
</tr>
<tr>
<td>When ____________ date is current, proceed to Step Three</td>
</tr>
</tbody>
</table>
### STEP 3: Determine Admissibility

<table>
<thead>
<tr>
<th>Is beneficiary subject to any grounds of</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>_____________________________ at INA §________________________?</td>
<td></td>
</tr>
<tr>
<td>If so, is there an ________________ or a ______________ available?</td>
<td></td>
</tr>
<tr>
<td>If there is a ______________ available, does the beneficiary have a __________________ relative?</td>
<td></td>
</tr>
</tbody>
</table>
STEP 4: Eligible for Adjustment?

4.1) Some applicants may adjust under §245(a) and (c).

May applicant adjust under §245(a) and (c)?

YES: Proceed to ADJUSTMENT OF STATUS

NO: Ask next question, 4.2

4.2) Is applicant eligible to adjust under §245(i)?

YES: Proceed to ADJUSTMENT

NO: Can Beneficiary Consular Process?
### STEP 5: Can Beneficiary Consular Process?

Will beneficiary be subject to any of the bars at §___________ if he or she leaves the US?

If NO: Proceed to **Consular Processing**

If YES: Is he or she eligible for a _________________? If yes, does he or she have a ________________ relative for the ________________? Can he or she show ________________ to the ________________ relative? Does the beneficiary want to risk not returning to the US?

If YES: Proceed to **Consular Processing**

### STEP 6: APPLYING FOR PERMANENT RESIDENCE

<table>
<thead>
<tr>
<th>ADJUSTMENT OF STATUS</th>
<th>CONSULAR PROCESSING</th>
</tr>
</thead>
<tbody>
<tr>
<td>Beneficiary files ______ application with USCIS</td>
<td>NVC sends instructions to beneficiary to pay _____ and download _________form</td>
</tr>
<tr>
<td>Petitioner must file an _________ of _____________</td>
<td>Petitioner must file an _________ of _____________</td>
</tr>
<tr>
<td>Beneficiary (and petitioner) interviewed by ___________________</td>
<td>Beneficiary interviewed at US ______________ by officer from the ______________</td>
</tr>
<tr>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>If application approved, beneficiary becomes LPR</td>
<td>If immigrant visa granted, beneficiary becomes LPR when he or she enters the US</td>
</tr>
</tbody>
</table>
CHAPTER TWO

OVERVIEW OF THE APPLICATION PROCESS FOR PERMANENT RESIDENCE

I. FILING THE ALIEN RELATIVE PETITION (I-130)

A. I-130 form and fee - The I-130 and its supporting documentation establish that the petitioner is in fact an LPR or U.S. citizen, and that the claimed relationship to beneficiary is a legally qualifying one. The fee for the I-130 petition is currently $420.

B. Where to file - by mail with the appropriate USCIS lockbox. The USCIS website has instructions on where to mail I-130s.

C. Documents supporting the petition

1. evidence of U.S. citizenship - lists of acceptable primary and secondary evidence of citizenship are listed in the regulations at 8 CFR § 204.1(g)(1)

2. evidence of permanent resident status - copy of LPR card, or any other USCIS document showing LPR status (such as stamp in passport)

3. documents to prove the family relationship - requirements are outlined in the regulations at 8 CFR § 204.2

II. APPLICATION FOR PERMANENT RESIDENCE

A. ADJUSTMENT OF STATUS IN THE UNITED STATES OR VISA PROCESSING ABROAD AT AMERICAN CONSULATE?

There are two ways to become a permanent resident based on a family petition: through consular processing in the person’s home country, and through adjustment of status at an USCIS district office in the United States. We will discuss consular processing later. First we’ll describe how someone who has an approved petition and a current priority date goes about filing for permanent residence in the United States.

1. WHO IS ELIGIBLE TO ADJUST?

a. Background

Under INA § 245(a), only aliens who entered with inspection and met other requirements may adjust status in the US. Many aliens who were ineligible to adjust had to return to their country with an appointment at the American consulate, where they would apply for their permanent residence in a consular interview. This caused a great hardship to many applicants...
who had to spend greater amounts of money because of the travel and time involved. Applicants who can qualify for adjustment under INA § 245(a) do not have to pay any penalty fee, simply the normal permanent residence application fee.

In 1994, the law on adjustment was complicated, but also improved, by the three-year addition of Section 245(i) to the INA, which added many new classes of aliens who were eligible to adjust in the U.S. if they would pay a penalty fee. This section was created with a sunset clause, and it temporarily disappeared from the law in 1998, except for the applicants grandfathered by Congress, i.e., those who filed an I-130, I-360 (special immigrants), or labor certification on or before January 14, 1998. On December 21, 2000 Congress passed the Legal Immigration and Family Equity Act (“LIFE”), which included a temporary reinstatement of 245(i). Under the LIFE Act, Congress restored section 245(i) to cover aliens who filed an I-130, I-360, or labor certification application prior to April 30, 2001 and who were physically present in the U.S. on December 21, 2000. Aliens who adjust under Section 245(i) must pay a penalty fee of $1,000, in addition to the normal fee for adjustment. There are some exceptions to the penalty for people such as minor children.

The grounds of inadmissibility at INA § 212(a) further complicate the question of who is eligible to adjust, because in order to be eligible to adjust, a noncitizen must be admissible – which means either not subject to any of the grounds of inadmissibility; or inadmissible but eligible for, and granted, a waiver. Now we will review the Section 245(a), 245 (c), and 245(i) adjustment criteria and describe the key bars to admissibility.

b. Section 245(a): Adjustment Eligibility Without Penalty Fee

Under INA § 245(a), an alien may adjust to permanent residence in the United States rather than apply at a consulate if the alien was inspected and admitted or paroled into the United States, an immigrant visa is available at the time of filing, and the alien is admissible.

Certain aliens who entered with inspection may nevertheless be ineligible for adjustment under INA § 245(a) because of other provisions in the law found at INA § 245(c). This section bars 245(a) adjustment eligibility for the following categories of aliens:

2. alien crewmen
3. aliens admitted in transit without visa
4. aliens who worked without permission of USCIS and/or who otherwise violated their status (there is an exception to this for immediate relatives of U.S. citizens), and
5. aliens deportable under anti-terrorism provisions of the INA.

Example: Corina, from Croatia, came to the United States on an F-1 visa in 2005. She dropped out of school after two years and began working. She married Lucas, an LPR, in May 2009. Under current law, Corina is not eligible for adjustment of status under INA § 245(a). Even though Corina entered with inspection, she violated her nonimmigrant status, which made her ineligible to adjust under INA § 245(c).

Note that Section 245(a) was amended in October 2000 to allow approved self-petitioners
under the Violence Against Women Act (“VAWA”) to adjust status under Section 245(a) even if they entered without inspection or fell out of status. VAWA eligibility is discussed in more detail in Chapter 5 of this manual.

c. **Adjustment under Section 245(i)**

Applying for permanent residence in the United States was extended to a broader group of applicants by the changes to the law in 1994 but only on a temporary basis until on or before January 14, 1998. At that point, Congress let 245(i) adjustment expire, while grandfathering in all applicants who had already filed an I-130 relative petition, I-360 special immigrant petition, or a labor certification by that date. Prior to INA § 245(i) adjustment, only aliens who had entered the United States with inspection and fulfilled other requirements could apply for adjustment. All others had to apply abroad at American consulates. The 1994 law at INA § 245(i) permits many aliens who entered without inspection to adjust here. With passage of the LIFE Act, Congress extended 245(i) eligibility for persons who filed an I-130, I-360, or labor certification on or before April 30, 2001. If they filed after January 14, 1998, they must also submit proof of physical presence on December 21, 2000.

i. **Eligibility** - The amendments of 1994 and 2000 made those previously unable to adjust under INA § 245(a) eligible if they paid a penalty fee. The standard filing fee is $315; the penalty fee is an additional $1,000.

ii. **Exceptions from the penalty** - These are provided for children under age 17 and for Family Unity applicants (Family Unity is a special status for spouses and unmarried children of LPRs who gained their status through the legalization programs. The relative must have been in the United States before May 5, 1988, or December 1, 1988, depending on the legalization program, and must have applied to INS for the status.)

iii. **Sunset** - Congress first allowed this section to expire on January 14, 1998, but later extended it to include applications filed by April 30, 2001.

iv. **Grandfathered aliens** – Aliens eligible to file for adjustment under INA § 245(i) include not only the principal beneficiary of the petition but also any derivative beneficiaries. To qualify for “grandfathering,” the petition must have been approvable when filed. A grandfathered alien may apply later for 245(i) adjustment of status on a different basis than that of the original petition, e.g., a grandfathered beneficiary of a sibling petition (4th preference) may use his grandfathered status to apply for adjustment as a diversity visa lottery winner.

*Example:* Lily’s LPR father filed a 2A petition for Lily’s mother on January 10, 1998, when Lily was 19. Lily is now over 21 and she has
married Hector, an LPR from Cuba. If Hector files a visa petition for Lily, she will be eligible to adjust status under INA Section 245(i) when her priority date is current, because she is “grandfathered” for 245(i) purposes; the petition for her mother was filed by the 245(i) deadlines, and she qualified as a derivative beneficiary at that time.

v. Process for adjustment application - The application for adjustment is made on Form I-485. It is possible to file an I-130 visa petition along with the I-485 application in a “one-stop” process for a person who will be eligible to adjust as soon as the visa petition is approved, such as an immediate relative. Other persons will have to file their I-485 with an approval notice of their previously filed petition (I-130, I-360, or I-140) when the priority date is current. If applying under section 245(i) and the I-130, I-360, or labor certification was filed after January 14, 1998, the applicant must also submit proof of physical presence on December 21, 2000. All 245(i) applicants must also submit an I-485A supplement form.

d. Forms and Documents Included in Adjustment Application Packet

The following forms and documents comprise a complete adjustment application:

i. Form I-485, the adjustment application, completed and signed.

ii. Form I-485A if applying for adjustment under 245(i)

iii. Proof of physical presence in the United States on December 21, 2000 (if applicable)

iv. Form G-325A, the biographic data form (not required for persons under 14)

v. Photos

vi. An I-130 petition with supporting documents, or an approval notice of a previously approved visa petition (if filing an I-130, the applicant must also file a separate fee)

vii. Filing fee - the adjustment filing fee effective November 23, 2010 is $985 ($635 for applicants under 14 who are filing along with at least one parent) and is best paid with a money order to “Department of Homeland Security.” The penalty fee is $1,000 in addition to the $985, for people adjusting under INA § 245(i). An additional $85 biometrics fee must be included for applicants ages 14 and older. USCIS will send a fingerprint appointment notice to the applicant before the adjustment interview takes place.

viii. Sealed medical exam by USCIS approved civil surgeon, on Form I-693 (including vaccination report on USCIS vaccination report form)

ix. Copy of passport and I-94, or other proof of lawful entry (if applicable)

x. Evidence of financial support, which must include an I-864 Affidavit of Support signed by the petitioner for all family-based
adjustment applicants, and for employment-based applicants whose relative has a significant (at least 5%) ownership interest in the for-profit entity that filed the employment petition. The I-864 must be accompanied by one year of federal income tax returns from the sponsor/petitioner.

xi. Form I-765, application for employment authorization (optional) (no fee for those paying the adjustment of status filing fee)

xii. Copy of applicant’s birth certificate, with translation

xiii. Copy of marriage certificate, and translation (if applicable)

xiv. Form I-131, application for advance parole, if travel is contemplated before the adjustment is granted. No fee is required for those who pay the adjustment of status filing fee.

Applicants applying through marriage will also have to provide evidence that a marriage is bona fide, such as joint bank accounts, credit accounts, insurance policies with both names, rental agreements with both names, birth certificates of children, etc. (See list of documents to prove bona fide marriage at Appendix 1 to Chapter 1.)

e. Where to File

All family based adjustment of status applications are required to be filed at the Chicago Lockbox facility. Check the USCIS website for the most up-to-date address for the Lockbox.

f. Interviews

Depending on how soon an interview for adjustment is scheduled, some documents may have to be updated at the interview, especially financial documentation and offers of employment, and perhaps medical exams. At the interview, the USCIS officer will go over the information in the application to confirm that it is accurate. The applicant should bring the originals/certified copies of any document they submitted as a copy. Applicants immigrating through marriage should be prepared to answer questions about the validity of their marriage.

g. Unlawful Presence Bars to Adjustment

The inadmissibility grounds found at INA § 212(a)(9)(B) are known as the three- and ten-year bars; they complicate an alien’s ability to return to the United States after she or he has been living here unlawfully. The three-year bar applies to aliens who have been unlawfully present in the United States for more than 180 days but less than one year, who then depart the United States and seek readmission. Such an alien is ineligible to re-enter the United States for three years unless a waiver is granted. The ten-year bar applies to aliens who have been unlawfully present in the United States for one year or more, who then depart the United States and seek readmission. In this case, the alien is ineligible to return to the United States for ten years unless a waiver is granted. The only waiver for the three- and ten-year bars is for aliens who are the spouse, child, son or daughter of a USC or LPR, where the alien applicant can show that the USC or LPR relative would suffer extreme hardship if the bar is enforced.

The existence of these bars underscores the importance of qualifying for adjustment of status; many potential applicants for residency who are now living in the United States
unlawfully will be subject to the bars if they do not qualify for adjustment of status under 245(a) or (i) and have to leave the United States to consular process.

**Example:** Natalia entered the U.S. without inspection in December 2000 and married her citizen husband in July 2005. She is ineligible for adjustment under INA §245(a) or 245(i). Natalia has now been in the U.S. unlawfully for over one year; if she leaves the U.S. to consular process, she will be subject to the 10-year bar unless a waiver is granted.

The three- and ten-year bars and other grounds of inadmissibility are discussed in more detail in Chapter 3 of this manual.

**B. CONSULAR PROCESSING FOR PERMANENT RESIDENT VISA ABROAD**

Applicants for a family-based immigrant visa will be applying for lawful permanent residence at an American consulate abroad if they are ineligible or elect not to adjust status in this country.

1. **Overview of the Procedure**

This process is handled by the National Visa Center (NVC) and immigrant visa sections at United States consulates abroad. During the period of time when applicants were able to take advantage of section 245(i), many people elected to pay the penalty fee and adjust status rather than suffer the inconveniences and uncertainties of consular processing. Since many intending immigrants are now ineligible for section 245(i), more applicants for permanent residence need to consular process. In addition to the added time and monetary expense, leaving the United States may trigger certain bars to reentry.

If the petitioning U.S. citizen or LPR relative is residing in the United States, he or she will first petition for the alien relative by filing an I-130 petition with the USCIS. If the petitioner is residing abroad, he or she will likely be filing the I-130 petition at the nearest U.S. consulate or USCIS overseas office. After the I-130 is approved, notice is sent to the petitioner and the approved petition is forwarded to the NVC. The NVC sends out an initial set of instructions informing the beneficiary listed on the I-130 — now the applicant for permanent residency — that he or she may begin the consular processing stage. These initial instructions include fee bills that inform the applicant that certain fees must be paid in order to continue the processing of the case. Once the necessary fees are paid, the NVC instructs the applicant to go to the Department of State website to download and complete the appropriate forms and gather the necessary documents. Once the required forms are completed and sent with the requested documentation to the NVC, the file is forwarded to the post, and, in most cases, the NVC will schedule the interview. The process is explained in greater detail below.

2. **National Visa Center**

After the USCIS approves the I-130 petition and sends an approval notice to the petitioner, it forwards the approved petition to the NVC in cases where the parties will be consular processing. The NVC is responsible for centralizing the next processing stage. It advises the intending immigrant on when the priority date is “current,” the documents that will
be needed, and the process of obtaining the immigrant visa through the consulate. For almost all consular posts, the NVC reviews the original documents and schedules the immigrant visa appointment. After this initial processing is complete, the NVC forwards the approved I-130, the completed forms, and documentation to the appropriate consular post abroad.

The intending immigrant will apply for an immigrant visa at one of the following U.S. consulates to complete the process for obtaining immigrant status: (1) the consulate in the country where the person last resided; (2) the consulate in the country where the person is currently residing and intends to remain throughout the processing stage; (3) any other consulate that will accept jurisdiction of the case if the person is currently residing in the United States and establishes hardship if forced to return to the country of last residence. In the last situation, hardship can be civil unrest or war, but cannot simply be economic factors. Applicants from a country with which the United States does not maintain diplomatic relations will process their applications at a consulate designated by the State Department.

If the applicant is in a preference category that is not current, the NVC stores the approved I-130 petition and sends the intending immigrant a letter informing him or her that further documents will be sent once the priority date becomes current and there is a visa immediately available.

The NVC sends instructions on paying the required immigrant visa and affidavit of support fees. The NVC payment letter explains the payment options and includes the Affidavit of Support (I-864) Fee Bill and Immigrant Visa Application Processing Fee Bill. The letter and fee bills will be sent to the attorney or accredited representative who assisted in filing the I-130 and submitted a Form G-28 Notice of Appearance as Attorney or Representative. If no G-28 was filed, or if the petitioner filed the I-130 pro se, the NVC informs the beneficiary to complete a Form DS-261, Online Choice of Agent and Address, and sends the petitioner the Affidavit of Support Fee Bill. The DS-261 requires the intending immigrant to either appoint an agent or attorney who will receive further communication from the NVC or consulate or indicate that correspondence be sent to the intending immigrant. Once the DS-261 is completed, the Immigrant Visa Fee Bill is sent to the agent, attorney or visa applicant. The fees can be paid electronically from a checking or savings account held at a U.S. financial institution. The fees can also be paid by cashier’s check or money order to the NVC post office box in St. Louis, Missouri. All of the fee bills contain a unique bar code and fees paid by cashier’s check or money order must be accompanied by the original fee bill invoice. Currently, the fee for the affidavit of support is $88 and the immigrant visa fee is $230.

3. Pre-screening

The next step in consular processing is a “pre-screening” to determine that the applicant is ready to present all the required documents and forms for the consular interview. After the necessary fees have been paid, all applicants must complete and submit the DS-260, Online Immigrant Visa and Alien Registration Application. The form is completed and submitted through the Consular Electronic Application Center (CEAC) website. All of the information entered online is accessible by the NVC and consular posts and the applicant is not required to submit a paper version to the NVC or bring a copy to the visa interview.

The petitioner must complete and submit the I-864 and supporting documentation to the
NVC. Additionally, the applicant must submit the original or certified copies of civil documents and police certificates (unless the applicant is from a country where one is not available) to the NVC. It is important to return these documents with the original NVC instruction letter that contains the case number and bar code. The NVC will review the documents and forms for completeness and may send a notice to the representative or agent if there are any deficiencies on the forms or missing documents. This notice will include a list of the missing documents and/or instructions on correcting incomplete forms. Again, it is important to return the missing documents and/or corrected forms with the checklist letter response sheet that contains your client’s case number and barcode.

The State Department has implemented the Electronic Processing Program for processing at select posts. Under this program the I-864 is downloaded, completed, signed, scanned, and saved as a PDF file and e-mailed to the NVC. Also, the required civil documents and supporting documents must be converted to PDF files and then e-mailed to NVC. For the select consular posts participating in this program, it is not required to mail the original forms, civil documents and supporting documents to the NVC, but the applicant must be prepared to present the original physical documents at the time of the visa interview. At the present time, the agency is phasing this program in, making electronic processing mandatory for some consulates and optional for others. More consular posts will be added to this program in the future.

For information on the status of a case still pending at the NVC, one may call the automated voice center at (603) 334-0700. Telephone operators are available to answer questions Monday through Friday from 7:30 a.m. to midnight (Eastern). The mailing address is 31 Rochester Avenue, Portsmouth, NH 03801-2909. Representatives with a G-28 on file also can inquire about a client’s case via email at nvcattorney@state.gov. The inquiry should be limited to one case per email and should contain the NVC case number as the subject heading of the email. The inquiry also should contain the petitioner’s and beneficiary’s name, date of birth, and country of chargeability, the representative’s full name, and agency or firm name and address.

4. Consular Appointment

Approximately four to six weeks before the scheduled immigrant visa interview, the applicant will receive an appointment letter that contains the date and time of the visa interview. This letter will be issued by the NVC, with the exception of some cases processing through Guangzhou, China. The appointment letter again instructs applicants to visit the DOS website for interview preparation instructions and to review consulate specific instructions.

The website provides information to the visa applicant on preparing for the medical examination and reminds the applicant of all the necessary original documents that must be available at the time of the interview. Additionally, applicants are provided with a number of important notices about the visa interview process. These notices advise the applicant that:

- Failure to bring a copy of the appointment letter to the interview may delay the interview.
- He or she should not make any travel arrangements or give up employment or property prior to the issuance of the visa.
- It is possible that the applicant will have to spend several hours at the consulate
before a decision is made on the application. Should complications arise, the applicant may not receive a visa on the day of the appointment and may have to return to the consulate at a later date.

- No assurances can be given in advance that a visa will be issued.

In addition to the general notices provided on the website, applicants are advised to look at the specific instructions provided by the individual consulate to determine if there are other requirements or documents needed.

5. Consular Interview

During the interview the consular official will confirm the information contained in the application, screen for any applicable ground of inadmissibility, and review the supporting documents that are required to be submitted. During the visa interview, the consular officer may inquire into the validity of the marriage or the relationship that forms the basis of the immigrant petition. If the applicant is found inadmissible for a ground that is able to be waived, the applicant will be given an opportunity to submit a waiver form and supporting documentation to a USCIS lockbox in the United States. The USCIS Nebraska Service Center will adjudicate the waiver and once a decision is made, will notify the appropriate consulate. The consulate will then notify the visa applicant of the decision on the waiver and immigrant visa application.

When an immigrant visa is issued, it is usually valid for six months. In order to obtain permanent resident status, the immigrant visa holder must travel to the United States and be admitted within the visa validity period. Additionally, in order to obtain a visa, the applicant must present a passport that is valid for at least 60 days beyond the validity of the immigrant visa. Immigrant visa holders in the first and second preference categories should be warned by consular officials that they are admissible in those categories only if they remain unmarried at the time of application for admission at the port of entry.

If an immigrant visa is refused, the consular officer will inform the applicant of the reasons for the denial, including the provision of law or regulation on which the refusal was based. If the reason for the refusal may be overcome with the submission of additional documents and the applicant indicates an intention to submit the additional evidence, the file will remain open for up to one year. Once the applicant has obtained the necessary documentation, the interview should be rescheduled. However, if no action is taken on the case for one year after the interview, registration, or eligibility to apply for an immigrant visa, will be terminated. The consular officer at the post should notify the applicant of the termination and the right to have the registration reinstated within one year by demonstrating that the failure to act was due to circumstances beyond his or her control.

If the consular officer is requesting information or documentation that you believe is inappropriate or unnecessary, communicate directly with the consular post, preferably by e-mail, fax or telephone. The same is true in situations where the consulate has indicated an intention to deny the application. Put your concerns in writing and cite the regulations, Foreign Affairs Manual, or State Department cables that support your position. If you are unsuccessful in persuading the consular official that is handling the case, you may seek a review from the principal consular officer at that post. You are also encouraged to seek intervention from officials at the State Department Visa Office in Washington, DC at legalnet@state.gov.
6. **Immigrant Visa Fee**

Immigrant visa holders are required to pay a USCIS Immigrant Fee of $165.00 after they receive the visa packet from the consulate or embassy. This fee is separate from the immigrant visa fee paid to the DOS. The fee covers the cost of producing and delivering the permanent resident card once the visa holder is admitted to the United States. The fee must be paid online through the USCIS website with a debit or credit card or a checking account from a U.S. financial institution. If the fee is not paid, the visa holder will still be admitted to the U.S. and receive a passport stamp valid for one year evidencing lawful permanent residence status. However, the new resident will not receive an I-551 Permanent Resident Card until the required fee is paid.

7. **Termination of Registration**

Under INA §203(g), DOS is authorized to terminate the registration of anyone who fails to apply for an immigrant visa within one year of notification of the availability of the visa. This provision applies if the applicant fails to contact the NVC after being notified of visa availability or if the applicant fails to appear for a scheduled interview and does not contact the consulate within a year of the missed appointment. Registration is also terminated if an alien fails to submit evidence to overcome the basis for a visa denial within one year after visa refusal.

The regulations require that the consulate notify the registrant of the termination of registration and the right to seek reinstatement within one year of notification by establishing that the failure to apply for an immigrant visa within one year was due to circumstances beyond the applicant’s control. Such circumstances include illness preventing the alien from traveling and inability to get travel documents.
CHAPTER THREE

OVERVIEW OF COMMON GROUNDS OF INADMISSIBILITY AND DEPORTABILITY

I. CONCEPTS OF INADMISSIBILITY AND DEPORTABILITY

The grounds of inadmissibility, found at INA § 212(a), constitute the reasons an alien may be refused admission to the U.S. at the border, or may be removed after entering the U.S. without inspection. These inadmissibility grounds apply both at the border and in removal proceedings for persons seeking admission. Establishing admissibility (which means showing that one is not inadmissible) is also a requirement for many immigration applications, such as adjustment of status.

The grounds of deportability are contained in INA § 237(a). These are the grounds for the USCIS and the immigration judge to find that a person who entered the U.S. with inspection must be removed from the United States. We will discuss the grounds of deportability and inadmissibility together in the following section, since many grounds of deportability have a parallel or similar ground of inadmissibility.

An alien must have been lawfully “admitted” to be subject to the grounds of deportability. Otherwise, an alien is subject to the grounds of inadmissibility. An “admission” is an entry to the United States that is lawful, after inspection. A lawful admission is one in which an alien physically presents himself or herself for inspection, and did not make a false claim to U.S. citizenship. Persons who entered the United States without inspection are not considered to have been admitted, even if they have resided in the United States for years. Under the current law, they are considered to be seeking admission, and are subject to the grounds of inadmissibility.

Example: Kristina came to the United States on a B-2 visa and remained longer than her authorized stay. If Kristina is arrested by DHS she will be charged with a ground of deportability because she is in the United States unlawfully after an inspection and admission by a DHS officer.

Example: Lorena entered the United States without papers in February 2005. Even though she has lived in the United States for nine years, if she is placed in removal proceedings, Lorena will be charged with a ground of inadmissibility because she was never inspected by DHS when she entered the United States.

II. SUMMARY OF INADMISSIBILITY AND DEPORTABILITY GROUNDS

There are many similarities between the grounds of inadmissibility and the grounds of deportability. For example, a conviction for many types of crimes will have both inadmissibility and deportability consequences. Other immigration law violations, however, may constitute a ground of inadmissibility or deportability, but not both. From the following list of inadmissibility and deportability grounds, you can see that some, but not all, categories of
immigration law violations are common to both concepts.

Deportability Categories

- Inadmissibility at the time of entry or adjustment of status or violation of status
- Criminal grounds
- Failure to register and falsification of documents
- Security related grounds
- Public charge
- Unlawful voters

Inadmissibility Categories

- Health-related grounds
- Crime-related grounds
- National security grounds
- Public charge
- Labor protection grounds
- Fraud or other immigration violations
- Documentation requirements
- Grounds relating to military service in the United States
- Prior removal orders, unlawful presence
- Miscellaneous grounds

Some of these grounds can be waived in limited circumstances, depending on the specific statutory provision. Many waivers require the alien to have certain LPR or USC relatives to qualify. Such waivers are only mentioned in overview in this introductory training, and are covered in more detail in other trainings, including Bars and Waivers.

III. REVIEW OF SELECTED GROUNDS OF INADMISSIBILITY AND DEPORTABILITY

The inadmissibility and deportability grounds discussed below represent the most common issues you are likely to encounter in preparing family-based immigration applications.

A. INADMISSIBILITY AND DEPORTABILITY

1. Health Grounds, INA § 212(a)(1)

Communicable diseases, INA § 212(a)(1)(A)(i) - The Department of Health and Human Services determines which diseases render an alien inadmissible. The grounds of inadmissibility include aliens who have tuberculosis, and those who have diseases such as gonorrhea and syphilis. Note that as of October 29, 2009, HIV is no longer a health-related ground of inadmissibility. There is a waiver for the communicable diseases ground under INA § 212(g)(1) if an alien has certain U.S. citizen or LPR relatives.
Vaccinations, INA § 212(a)(1)(A)(ii) - The required vaccinations include mumps, measles, rubella, polio, tetanus, diphtheria toxoids, pertussis, influenza type B, hepatitis B, varicella, haemophilus influenza type B, and pneumococcal vaccines. The requirement can be waived under INA § 212(g)(2) if the civil surgeon certifies that it is medically inappropriate, or if the vaccination is contrary to religious or moral beliefs.

Mental or physical disorder, INA § 212(a)(1)(A)(iii) - Disorders that may pose a danger to property or persons, including alcoholism. This ground may be waived if the person posts a bond.

Drug addicts/abusers are inadmissible under INA § 212(a)(I)(A)(iv).

2. Alien smuggling, INA § 212(a)(6)(E), § 237(a)(1)(E)

Immigrants and nonimmigrants are inadmissible from the U.S. if they have at any time knowingly encouraged, induced, assisted, abetted or aided any other alien to enter the U.S. illegally. There is no requirement that the smuggling have been for gain. Individuals who qualified for Family Unity and who are applying for either Family Unity or an immigrant visa under the immediate relative or the second preference family visa provisions of the INA are not subject to this ground. Information about the Family Unity program is contained in the appendix to this chapter. Smuggling is also a ground of deportability under INA § 237(a)(1)(E).

Congress created a waiver to ameliorate the possible harsh effects of the smuggling ground of inadmissibility. However, only two groups of aliens can take advantage of this waiver: (1) LPRs who are returning from a visit abroad, and (2) aliens seeking permanent residence as immediate relatives of U.S. citizens or in the first, second, and third family preference categories (not the fourth preference). Even for these individuals, the waiver is available only if the alien they encouraged or assisted to enter illegally was, at the time of the smuggling, his or her “spouse, parent, son or daughter (and no other individual).” The attorney general is authorized to grant these waivers for humanitarian purposes, to assure family unity, and when it is in the public interest. It should also be noted that any conviction for smuggling is now an “aggravated felony,” unless the smuggling was done only to assist a spouse, parent, son or daughter.

Example: Gloria came to the United States with her six-year-old daughter, Nina. They entered together without inspection. Even though Nina is Gloria’s child, USCIS is likely to view this as smuggling and require Gloria to file a waiver.

3. Fraud and False Claim of U.S. Citizenship, INA § 212(a)(6)(C)

This ground of inadmissibility applies if by fraud or willful misrepresentation of a material fact an alien sought or seeks admission to the United States or to procure an immigration benefit. The fraud must have been to a DHS official.

Example: When Leticia applied for a tourist visa at the United States consulate in San Salvador, she falsely told the consul that she was married with two children. Leticia’s misrepresentation may be viewed as meaningful because she was attempting to show non-immigrant intent - that she would return to El Salvador -
by lying about her family ties there.

The only waiver available under INA § 212(i) is for an applicant who has a USC or LPR spouse or parent who will suffer extreme hardship.

**Example:** If Leticia’s only USC or LPR family is the USC brother who is petitioning for her, Leticia will not be eligible for a waiver.

The false claim of U.S. citizenship ground of inadmissibility is broader and harsher. It applies to any alien who, on or after September 30, 1996, falsely represents himself or herself to be a citizen of the United States for any purpose or benefit under the INA or any federal or state law. This could include false claims of citizenship to a DHS agent for purposes of gaining admission, as well as false claims to citizenship upon registering to vote, or applying for a driver’s license. There is no waiver available for this ground. A false claim to U.S. citizenship made by a person under age 18 will not trigger this ground of inadmissibility where the individual can establish that she or he lacked the capacity to understand the nature and consequences of the false claim.

### 4. Document Fraud, INA §§ 212(a)(6)(F), 237(a)(3)(C)

This is both a ground of inadmissibility and deportability. This is very different from visa fraud and is defined in INA § 274C. There is a separate civil hearing and penalty process for aliens charged with document fraud, and only an alien subject to a “final order” under this process is inadmissible or deportable.

Document fraud is very broad under § 274C, and relates to the misuse of documents and applications. It is unlawful for a person to forge or alter any document in an effort to obtain an immigration benefit or to use, attempt to use, possess, obtain, accept, receive or provide any such document to satisfy any requirement of the INA. Under the 1996 Act, the definition also includes preparing or assisting another in filing an application for any immigration benefit with knowledge or reckless disregard that the statements in it were false. It also includes putting false statements on a valid USCIS application or form, such as an I-9, or attaching documents that do not relate to the applicant.

Most persons who were subject to final orders of document fraud have now had those orders vacated. Those ordered deported based, in whole or in part, on a document fraud order will have the right to reopen their cases due to settlement of a nationwide class action. The court in *Walters v Reno* found that the notice and hearing process that INS set up to implement the document fraud provisions was unfair and confusing. However, the DHS is now authorized to enforce the provisions of INA § 274C civil document fraud.

Note that one of the positive things changed by the 1996 Act is that there is now also a waiver for document fraud, though the waiver is limited to LPRs and people immigrating through family members who committed the offense to help or support their spouse or child. INA § 237(a)(3)(C)(ii).
5. Grounds Related to Immigration Violations

Present without admission, INA § 212(a)(6)(A) - Persons who are unlawfully present in the U.S. without admission or parole are inadmissible. This ground may be waived through INA § 245(i) or circumvented by consular processing.

Example: Dalia entered the United States without papers in 1998. This makes her “present in the United States without admission.” If Dalia has a USC or LPR spouse who petitioned for her before April 30, 2001, Dalia can adjust status under 245(i) even though she is inadmissible under INA § 212(a)(6)(A).

There is an exception for battered spouses and children if they can show a substantial connection between the battery and their unlawful status in the U.S.

Three/Ten-Year Bar, INA § 212(a)(9)(B) - One of the most significant immigration violations results in a three- or ten-year bar for those unlawfully present who depart and then apply for admission or re-enter the United States. This has two provisions:

- 180-day presence/three-year bar - aliens who are unlawfully present after April 1, 1997 for more than 180 days but less than one year, who depart the U.S. voluntarily (not in proceedings) and then seek admission are barred from admission for three years from date of departure.

- One-year presence/ten-year bar - aliens who are unlawfully present after April 1, 1997 for one year or more, who depart the U.S. and then seek admission are barred from admission to the U.S. for ten years from date of departure.

Family Waiver: there is a discretionary waiver for an alien who is the spouse, son or daughter of a U.S. citizen or LPR, if extreme hardship would be caused to that spouse or parent.

Under this ground of inadmissibility, “unlawfully present” means that the alien is present after overstaying an authorized period of stay, or without being admitted or paroled. For aliens who entered with a nonimmigrant visa but who subsequently violate the terms of the visa, such as by working without authorization, unlawful presence begins only after a determination by the USCIS or immigration judge that the alien violated status. For purposes of this ground, the USCIS considers the following classes of aliens to be present in the U.S. pursuant to a period of authorized stay:

- Aliens with properly filed applications for adjustment of status under INA § 245(a) and (i), including aliens in removal proceedings to renew adjustment applications that were denied by the USCIS, but not including aliens who first apply for adjustment in removal proceedings
- Aliens admitted to the United States as refugees under INA § 207
- Aliens granted asylum under INA § 208
- Aliens granted withholding of deportation/removal under INA § 241(b)(3) or its predecessor, INA § 243(h)
- Aliens granted relief under the Convention Against Torture Act
• Aliens under a current grant of deferred enforced departure (DED) pursuant to an order issued by the President (of the United States)
• Aliens under a current grant of temporary protected status (TPS)
• Cuban/Haitian entrants under Pubic Law 99-603 section 202(b)
• Aliens granted voluntary departure, during the period of time allowed
• Aliens who have filed an application for legalization under either of the two amnesty programs, but excluding “late amnesty” applicants
• Applicants for asylum during the pendency of the application, provided the alien did not work without employment authorization
• Aliens under 18 years of age
• Aliens who have been granted Family Unity, during the authorized period
• Battered spouses and children, provided there is a substantial connection between the abuse and the unlawful presence
• Applicants for relief pursuant to the Nicaraguan Adjustment and Central American Relief Act (NACARA)
• Conditional resident aliens who have had their status terminated by the USCIS but who have appealed that determination administratively, through the appeals process
• Nonimmigrants who have made a timely application for an extension of stay or change of status
• Persons granted Deferred Action for Childhood Arrivals (DACA)

Aliens not considered to be in a period of authorized stay under this ground would be unlawfully present.

Example: Ninetta entered the United States on a B-2 visa on December 20, 2008 and she was admitted to the United States with an authorized stay of six months, until June 20, 2009. Ninetta has been accruing unlawful presence in the United States since June 21, 2009. Ninetta’s daughter Inez, age 12, came to the United States with Ninetta. Inez has not accrued any unlawful presence under 212(a)(9)(B) because she is under age 18.

Example: Darcy entered the U.S. without inspection in January 2005, and all of the time she spent in the United States was unlawful. Darcy’s U.S. citizen daughter turned 21 in May and filed a visa petition for Darcy, which has just been approved. If Darcy leaves the United States to consular process, she will be subject to the 10-year bar and she will not be eligible for a waiver because she does not have a qualifying family relationship.

For purposes of this ground, the USCIS considers the following classes of aliens to be unlawfully present in the United States:

• Aliens under an order of supervision (pending removal)
• Aliens with pending applications for cancellation of removal
• Aliens with pending applications for withholding of removal
• Asylum applicants who have worked without employment authorization
• Aliens in removal or deportation proceedings, unless found to be not deportable (if I-94 expires while in proceedings, unlawful presence begins on date of deportation order; if
granted relief from deportation by an immigration judge, unlawful presence ends on date of order)

- Aliens present pursuant to pending federal court litigation, including late amnesty cases
- Aliens who file a timely application for extension or change of status

**Permanent Bar For Unlawful Presence After Previous Immigration Violations, INA § 212(a)(9)(C)** – This inadmissibility ground applies to aliens who were previously unlawfully present for an aggregate period of one year or more who leave the United States and then reenter or attempt to reenter illegally after April 1, 1998. This ground also applies to an alien who was deported or removed and who enters or attempts to reenter illegally after April 1, 1997.

There is no waiver. However, these persons can apply for permission to reenter (Form I-212) after they have remained outside the United States for ten years. According to the current USCIS interpretation, only time spent in the U.S. after April 1, 1997 will count in calculating the unlawful presence.

**Example:** Luis entered the United States from El Salvador with a tourist visa on March 18, 2003. He was authorized to stay for 60 days, but he stayed for 6 months. In January 2007, Luis returned to the United States, this time without inspection. He returned to El Salvador in October 2007, and came back to the U.S., again without inspection, in October 2009. Luis is inadmissible - and ineligible for residency through either consular processing or adjustment of status - because he is subject to the permanent bar of 212(a)(9)(C). The bar applies because Luis has been unlawfully present for an aggregate period of one year or more since April 1, 1997 and then reentered the United States unlawfully.

**Past Removal, INA § 212(a)(9)(A)(i) and (ii)** - The 1996 Act provides that aliens ordered removed at the border based on the grounds of inadmissibility (expedited removal or removal initiated at the person’s arrival in the United States) are inadmissible for 5 years after their removal. INA § 212(a)(9)(A)(i). Other aliens who are removed for being inadmissible or deportable face a ten-year bar. INA § 212(a)(9)(A)(ii). The USCIS can waive these bars by approving an application for consent to reapply. INA § 212(a)(9)(A)(iii).

**Example:** Pierre was removed for being deportable in March 2005, when he violated his student visa by working without authorization. Pierre’s priority date to immigrate as the unmarried son of a permanent resident is now current. He will need a waiver to immigrate because he is otherwise inadmissible for ten years after his removal.

The same section also provides that the bar increases to 20 years for a second removal, and that the bar is permanent for aliens removed as aggravated felons.

**Failure to Attend Removal Proceedings without Reasonable Cause, INA § 212(a)(6)(B)** - This bars the alien from admission for five years subsequent to a departure or removal.
Reinstatement of Removal

Under INA § 241(a)(5), DHS may reinstate a prior removal order against someone who was removed and is now in the U.S. after entering illegally. Based on this provision, if DHS finds that an alien has reentered the United States illegally after having departed under an order of removal, the prior order is “reinstated” from its original date and the alien is not eligible for most forms of relief and shall be removed under the prior order. DHS has interpreted this section to apply to orders of deportation/removal and subsequent reentries regardless of when they occurred. The Supreme Court recently upheld this retroactive application of the law.

Example: Lucia was removed for being inadmissible in January 2006. She later re-entered illegally and married a USC. Lucia is subject to reinstatement of removal. If she applies for adjustment of status, she may be arrested by DHS and processed for reinstatement of her prior removal order.

7. Criminal Grounds, INA §§ 212(a)(2), 237(a)(2)

Over the past several years, Congress has repeatedly amended the law to create new immigration law consequences for criminal offenses, making this area of law increasingly complex and harsh in its impact on immigrants. In the inadmissibility context, INA § 212(a)(2) includes several categories of offenses, including bars to admission for an alien who admits committing certain types of crimes for which she/he has not been charged. On the deportability side of the law, INA § 237(a)(2) also includes multiple categories of offenses, including deportability for an “aggravated felony offense,” which includes 21 types of crimes. Frequently encountered categories of offenses triggering inadmissibility and deportability consequences are listed below:

INA § 212(a)(2) – Crime Based Inadmissibility. These include the following:

- General crimes (crimes of moral turpitude; crimes related to controlled substance violations). This includes aliens who admit acts constituting the essential elements of crimes falling within this category.
- Multiple criminal convictions, where there is an aggregate prison sentence of five years or more
- Controlled substance traffickers
- Crimes related to prostitution and commercialized vice
- Aliens involved in serious criminal activity who have asserted immunity from prosecution.

INA § 237(a)(2) – Crime Based Deportability. These include the following:

- General crimes – including convictions for crimes of moral turpitude, aggravated felony,
and high speed flight.

- Controlled substance violations
- Firearms offenses
- Miscellaneous crimes (relating to espionage, treason, sedition)
- Crimes relating to domestic violence, stalking and violation of protection orders.

With this background, it is very important to not make casual judgments about the impact of a crime on a possible immigration benefit or on the status of a non-citizen client. All non-citizens may have their immigration status placed at risk by criminal activity, even if they are lawfully residing here. For this reason, personal conclusions like “It doesn’t sound too serious,” or “He only paid a fine, so it’s okay” are not a sound basis for counseling in this area and may compromise a client’s status.

a. **A crime may have deportation consequences even when no jail time was imposed.**

*Example:* Luca was convicted of possession of 2 pounds of marijuana but was only sentenced to probation because it was her first offense. Luca may be inadmissible under INA § 212(a)(2) or deportable under INA § 237(a)(2).

b. **A minor crime, like shoplifting, may not have immigration consequences the first time but may lead to deportability if there is a second offense.**

*Example:* Jonah, an LPR since 1998, was convicted in 2007 of shoplifting a sweater from Target. Because of the small value of the sweater and the fact that this was Jonah’s first offense, Jonah was sentenced to 3 months probation and paid a fine. Six months later, Jonah was caught shoplifting a pair of socks from the same store. Jonah’s first conviction did not make him deportable, but now Jonah faces deportability based on convictions for two crimes of moral turpitude.

c. **The same crime may have different immigration consequences depending on the sentence imposed.**

*Example:* Jack and Jill, LPRs from the UK, were each charged with theft. Judge A sentenced Jack to one year of probation but Judge B, a stricter judge, sentenced Jill to a one-year prison term, which he then suspended, imposing a one-year probation term. Although Jack and Jill had the same conduct and have the same conviction, and neither of them actually spent any time in jail, the one year suspended sentence that Jill received makes her deportable for an aggravated felony.
d. The same crime and the same sentence may have different immigration consequences depending on the immigration status of the non-citizen.

Example: Susana and Francesca, non-citizens from Italy, were each convicted of possession of cocaine and were sentenced to 6 months in jail. Susana, a longtime LPR, is deportable but she will be eligible to seek a waiver. Francesca, married to a USC, is waiting for her adjustment of status interview. The conviction will make her inadmissible and no waiver is available.

What can you do as a counselor if you are not equipped to analyze the immigration consequences of a crime? You can help your client by doing the following:

- Question all clients carefully about any police contact; this is an area where many individuals are confused by terminology. Some people may misunderstand a reference to “arrest” or “conviction” as only referring to situations where time was spent in jail. Other people may answer that they have never been convicted where they had a court disposition that allowed their record to be erased. For immigration purposes, however, it is important to find out about all police contacts your client had and the outcome of each contact.

- Help the applicant you are assisting determine his or her criminal record by requesting an FBI rapsheet to check on all arrests, and by obtaining court records to determine what charges were actually brought and what outcome resulted from the charges. You can get an FBI arrest report by completing a fingerprint card and sending it with an $18 money order to FBI, Special Correspondence, 1000 Custer Hollow Road, Clarksburg, WV 26306 with a letter requesting that your client’s records be checked and sent to you.

- Encourage any non-citizen with a criminal record not to apply for any USCIS benefit until s/he can obtain competent legal advice from someone knowledgeable in this field.

- Counsel any immigrant charged with a crime to be sure to get immigration law counseling as well as criminal defense counseling before making a decision about how to plead to the criminal charges. Many criminal defense lawyers are not familiar with the technicalities of the immigration consequences of crimes, and the defense lawyer may not even know that his or her client is a non-citizen.

Where you determine that a non-citizen has a disqualifying conviction, or a conviction that renders the person deportable, encourage consultation with a criminal defense lawyer to see if post-conviction relief to vacate a conviction or modify a sentence may be available to remove the immigration law problem.

8. Public Charge and Affidavit of Support, INA §§ 212(a)(4), 213A, 237(a)(5)

Public charge inadmissibility: Under INA § 212(a)(4), an alien is inadmissible if he or she is likely to become a public charge. In making this determination, a USCIS or consular officer must consider various factors, including the alien’s age, health, family status, assets and financial resources, and education and skills.

Receipt of public benefits does not necessarily create public charge problems. Only the following benefits are subject to public charge consideration:
• Supplemental Security Income (SSI)
• Cash Assistance from the Temporary Assistance to Needy Families (TANF) program
• State or local cash assistance programs
• Medicaid that is used to support aliens residing in a long-term care institution

In order to be considered a public charge an alien must be “primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance, or institutionalization for long-term care at government expense.” Benefits received by one member of the family will not be attributed to other family members for purposes of public charge determinations. The exception to this rule is where a family solely relies on cash benefits received by another family member.

**Affidavit of Support:** In most family-based immigration cases, and in some employment-based immigration cases where a relative has a “significant” (five percent or more) ownership interest in the petitioning business entity, the petitioner must submit an “affidavit of support” for the intending immigrant. This provision of the law is found at INA § 213A.

Certain family petitions are exempted from this requirement. These include self-petitioning widows and widowers of U.S. citizens; and battered spouses and children immigrating under the Violence Against Women Act. Children who will be deriving citizenship status pursuant to the Child Citizenship Act of 2000 (discussed in Chapter Eight) because they are under 18 and residing with at least one USC parent are exempt from the affidavit of support requirement. Persons applying for residency status under other laws (e.g., Cuban adjustment, diversity visa lottery, special immigrant juveniles) are not subject to the affidavit of support requirement.

Another important exemption applies to those intending immigrants who have already acquired 40 qualifying quarters. A “qualifying quarter” is a legal term relating to a unit of wage that, if earned in most types of employment, counts toward coverage for Social Security benefits. One earns up to four qualifying quarters in a calendar year. But the spouse and child may also be credited with the quarters earned by the spouse or parent: spouses may be credited with all the quarters earned by the other spouse during marriage, assuming the marriage did not end in divorce; children may be credited with all quarters earned by either or both parents up until the child turns 18. Since the affidavit of support requirements terminate when the sponsored immigrant earns or is credited with 40 qualifying quarters, intending immigrant who demonstrate through Social Security earnings statements that they have already satisfied that requirement do not have to submit an affidavit of support.

Under INA § 213A, an affidavit of support must be filed for the intending immigrant by a “sponsor,” who must be a USC or LPR, at least 18 years old, and domiciled in the U.S. or a territory or possession. The sponsor must show that he or she has the means to maintain an annual income equal to at least 125 percent of the federal poverty income guidelines for his or her household unit, including the intending immigrant. In family-based immigration cases, the petitioner must always be a sponsor and complete an affidavit of support, even if he or she cannot meet the 125 percent requirement.

**Example:** Tran is a 1st preference beneficiary applying for adjustment of status.
His petitioner father Linh Quach is a USC receiving SSI benefits, with an income below 125% of the poverty income guidelines. Linh Quach must still file an affidavit of support for his son.

The size of the household unit is defined in the regulations at 8 CFR § 213a.1 as including:

- The sponsor
- The sponsor’s spouse and children
- All persons who the sponsor claimed as a dependent on his/her most recent tax return
- The intending immigrant and all accompanying family members, and
- Aliens on whose behalf the sponsor has filed prior I-864 affidavits.

In addition, the sponsor may include a “relative” – parent, spouse, sibling, or child/son/daughter – if including them would allow the sponsor to count their income. Make sure that no household member is counted more than once.

**Example:** Linh Quach lives with his two sons, Thien and Tran, and his grandmother. He is petitioning for his wife. Linh Quach’s household size is four, including himself, his wife, and his two sons. The grandmother is not part of the household for affidavit of support purposes, even though she lives with Linh Quach.

The affidavit of support, Form I-864, requires the sponsor to estimate his or her current annual income, indicate income on the last three income tax returns, and include a copy of the past income tax return. The sponsor can also include in the income calculation the income from any household members who are residing with the sponsor, provided they complete a Form I-864A, which is a contract between the sponsor and the household member. The sponsor may also include the income from the intending immigrant, who would not need to complete an I-864A unless other derivative family members are also immigrating. If the intending immigrant is the spouse of the sponsor, that person does not need to be residing with the sponsor. Household members signing an I-864A form do not need to be USCs or LPRs. These household members do not need to have resided with the sponsor for any set period as long as they currently share their principal residence with the sponsor.

**Example:** Linh Quach’s son Thien makes $35,000 as a grade school teacher. If Thien is willing to sign an I-864A form, his income can be included in the affidavit of support filed by his father for Tran. Thien will have to include a copy of his last tax return. It does not matter how long Thien has been living with Linh.

Significant assets, such as cash, stocks, and real estate, may be combined with the sponsor’s income to meet the 125 percent requirement, and these can be assets of the sponsor, other household members who executed an I-864A, or the intending immigrant. The value of the assets must be at least five times the difference between the sponsor’s total household income and the appropriate 125 percent of the poverty income guidelines. If the intending immigrant is the sponsor’s spouse or child over 18 and the sponsor is a U.S. citizen, the value of the assets must only be three times the shortfall.
Example: USC Martin is submitting an affidavit of support in connection with his brother Neil’s immigrant visa application. Neil is immigrating with his wife and four children, so Martin must show sufficient income for a household of 6. Under the 2011 poverty guidelines, Martin needs to show an income of at least $37,487, and Martin only earns $32,487. Martin is $5,000 short of this amount; if he can show assets in the amount of $25,000—five times the income shortfall—he will be able to satisfy the affidavit of support requirement.

If the petitioning relative cannot meet the affidavit of support requirements, even with household members’ income and assets, another person can also submit an affidavit of support if he or she agrees to be jointly and severally liable with the petitioner. The joint sponsor must be either a U.S. citizen, LPR, or national and be domiciled in the United States.

Each intending immigrant—whether a principal beneficiary or derivative—may have only one joint sponsor. But in family-based preference category cases comprised of a principal beneficiary and at least one accompanying derivative, the sponsor may use up to two joint sponsors. The sponsor may apportion the financial burden between the two joint sponsors, so that, for example, one joint sponsor bears responsibility for the principal beneficiary and the second joint sponsor bears responsibility for the derivative. In that situation, the first joint sponsor would include the principal beneficiary as a household member and would bear the financial responsibility for that person, while the second joint sponsor would include the derivative. Each joint sponsor would identify on the I-864 the intending immigrant(s) that he or she is sponsoring and must meet the full 125 percent income requirement; the joint sponsor can’t combine income with the petitioner sponsor and his or her household.

Example: In the example above, assume that Martin is unemployed and will need to use a joint sponsor. Another brother, Bill, is married and has one child. Bill does not make enough money to sponsor both Neil, Neil’s wife, and their four children, since that would total nine people in Bill’s household. But Bill can sign an affidavit of support on behalf of Neil and Neil’s wife. That would mean that Bill’s household totaled five. A second joint sponsor would need to sign another affidavit of support on behalf of the four children. Martin still has to file an affidavit of support because he is the petitioning relative.

Note that the affidavit of support is a binding contract that is legally enforceable against the sponsor by the sponsored immigrant, or any entity that provides a means-tested benefit to the alien. The affidavit of support obligation ends when the sponsored immigrant becomes a citizen of the United States; has worked or can be credited with 40 qualifying quarters of work; ceases to hold the status of LPR and departs the United States; or dies. The sponsor’s obligation also terminates if the sponsor dies.

Although the USCIS regulations provide that the I-130 petition terminates automatically with the death of the petitioner, the regulations also allow an exception where the beneficiary establishes that it would be “inappropriate” to revoke the application based on humanitarian factors. Once the I-130 has been reinstated, the intending immigrant is now allowed to submit a substitute affidavit of support from another close relative. The list of family members of the intending immigrant who can act as alternative sponsors in that situation include the following:
spouse, parent, mother-in-law, father-in-law, sibling, child (at least 18 years old), son, daughter, son-in-law, daughter-in-law, sister-in-law, brother-in-law, grandparent, grandchild, or guardian.

**Public Charge Deportability:** The public charge ground of deportability under INA § 237(a)(5) is rarely invoked. To be found deportable under this section, the following factors must be present:

- The receipt of the public benefits must have created a legal debt
- The receipt of benefits must have occurred within five years of the alien’s entry and for reasons not arising after entry to the U.S.
- The agency from which the alien received the public benefits must have demanded repayment pursuant to its legal authority, obtained a final judgment, and taken all steps to collect on the judgment
- The alien must have refused to re-pay the debt.
CHAPTER FOUR
IMMIGRATING THROUGH MARRIAGE

I. CONDITIONAL RESIDENCE

A. OVERVIEW (INA § 216)

The Immigration and Nationality Act requires a two-year “conditional residence” if an alien is immigrating marriage that is less than two years old at the time the alien immigrates. At the end of the two-year period, the couple must petition jointly to remove the condition, so that the beneficiary can become a full permanent resident. The INA also contains severe penalties for marriage fraud, such as an absolute prohibition on approval of future alien relative petitions.

B. CONDITIONAL RESIDENT STATUS

Many spouses who immigrate through a U.S. citizen spouse must first obtain this two-year conditional status before they can become full permanent residents. The persons affected are the spouses/children who apply for LPR status based on a marriage that occurred within two years of their entering the U.S. as a permanent resident or adjusting to permanent resident status within the U.S. Conditional status applies to sons or daughters if they obtain immigrant visas based on their parent’s marriage to a U.S. citizen or permanent resident.

Example: Peggy, from Ireland, married Tom, a U.S. citizen, in June 2011. Peggy has two children, ages 8 and 10, from a prior marriage. Peggy and the children all immigrated through petitions filed by Tom; they adjusted status in May 2012. Peggy and her children are all conditional residents because they all obtained LPR status based on Peggy’s marriage to Tom, and all received residency status within two years of that marriage.

C. REMOVING THE CONDITION ON RESIDENCE

1. Filing a Joint Petition to Remove Condition (8 CFR § 216.4)

The conditional resident should file a joint petition within 90 days before the second anniversary of the conditional residence on Form I-751. The supporting evidence must include documentation establishing a bona-fide marriage. File within the 90-day period, or conditional residence may be terminated and the alien subject to removal proceedings.

2. Filing a Waiver of the Joint Petition Requirement (8 CFR § 216.5)

If the couple cannot complete a joint petition, then a waiver may be applied for by the conditional resident on certain grounds. Use the same I-751 form for these waivers:

a. Good faith marriage waiver - divorce is required, or death of the petitioner. Should document termination of the marriage, and provide
evidence that marriage was bona fide.

b. Extreme hardship waiver - USCIS will consider hardship to the alien, children of the marriage, or a new spouse. Only hardship factors arising after the alien’s entry as a conditional resident will be considered. Good faith marriage not required.

c. Battered spouse waiver - even though still married, the alien may apply for this waiver if s/he can demonstrate that s/he has been battered or subjected to extreme cruelty by the citizen spouse or parent. Must also show that marriage was entered into in good faith.

D. TERMINATION OF CONDITIONAL RESIDENCE BY USCIS

Termination occurs if no joint petition or waiver is filed, or if the joint petition/waiver filed is denied by USCIS.

E. DENIAL OF WAIVERS, REVIEW IN REMOVAL PROCEEDINGS

When USCIS terminates conditional residence, it will normally issue a Notice to Appear and initiate removal proceedings. A denied I-751 waiver may be reviewed in removal proceedings before an immigration judge.

II. FIANCÉ/E PETITIONS (INA § 214(d))

Fiancé/e petitions provide a streamlined procedure by which U.S. citizens (but not permanent residents) can help aliens they intend to marry to immigrate. A petitioner may obtain a “K-1” nonimmigrant visa for the alien fiancé/e, which permits the alien to enter the U.S. to marry the petitioner. To obtain a K-1, there is a requirement that the parties must have met within two years of filing the fiancé/e petition.

A. INITIATING THE PROCESS (INA § 214.2(k))

The process of obtaining a nonimmigrant fiancé/e visa begins when the citizen fiancé/e files a petition with the USCIS. Form I-129F requests basic information regarding both parties, such as their addresses, whether either has been married previously, and the names of any children of the alien fiancé/e. The petitioner must submit proof that he or she is a U.S. citizen and that each party is free to contract a valid marriage with the other. The petitioner must swear that each party intends to marry the other within 90 days of the alien fiancé/e’s entry into the United States.

If, based on the evidence submitted, the USCIS is satisfied that the parties have the legal capacity and the intention to marry, it will approve the petition and forward the file to the appropriate consular office. Upon receiving the approved “K” visa petition, a consular officer will notify the alien fiancé/e of the documents he or she needs to submit. The consulate will interview the alien after he or she has obtained security clearances and collected necessary documents. If it finds the alien to be admissible and eligible as a fiancé/e, the consulate will issue a “K” visa.
B. PREVIOUS MEETING REQUIREMENT

As a result of Congress’ attempt to deter cases involving “mail order brides,” a couple must have “met in person” within two years preceding the filing of the fiancé/e petition. However, in some countries it is still common practice for persons to enter prearranged marriages that are not based on love. In those countries, strict and long-established customs may prevent couples from meeting between the time the marriage is arranged and the wedding day. To accommodate these situations, the law allows the Attorney General to waive the “previous meeting” requirement “in his discretion.” The regulations permit this exemption in two situations: (1) for persons who can show that they are following strict cultural or social practices; or (2) for those who would experience extreme hardship if forced to comply with this requirement.

1. Established Custom Exemption

To satisfy requirements for the first exemption, the petition must show both that the personal meeting would violate established customs and that all other aspects of the traditional marriage arrangements will be followed. In cases where the couple is following cultural or social practices, they should submit affidavits from religious or other appropriate officials attesting to the details of those traditional arrangements. Letters from family members might also help prove that the parties are complying with requirements that they not meet before the marriage.

2. Extreme Hardship Exception

If the petitioner is claiming extreme hardship, he or she should submit all possible supporting evidence. This might include evidence of the couple’s having met before the two-year period; of political conditions preventing travel to the fiancé/e’s country; of problems preventing the fiancé/e from leaving the home country and traveling to the U.S.; of financial barriers; or of medical problems that have affected the mobility of either party. The regulation offers no guidance for defining the term “extreme hardship” under the second waiver option.

The statute, regulations, and legislative history provide little guidance as to what factors the USCIS should consider in granting exemptions under either of the two grounds. As a result, petitioners should provide as much documentation as possible to show a bona fide intent to marry and eligibility for the requested exemption. There are many conceivable situations that could give rise to a legitimate claim by the parties that hardship prevented their being able to see each other during the preceding two years. Cases are common in which couples have met and carried on a long-distance relationship, but due to financial, political, or medical reasons have been unable to meet during the preceding two years.

3. Documenting the Petition

The fiancé/e petition and all supporting documents should be filed by the citizen fiancé/e with the USCIS service center having jurisdiction over the petitioner’s residence. The new statutory requirements have forced fiancé/e petitioners to document instances where the couple
has met over the course of the preceding two years. Such evidence could include copies of airline tickets, passport stamps, photos of the couple together, and affidavits from third parties who have knowledge of the meeting(s). Evidence of a couple’s bona fide intention to marry could include copies of correspondence or long-distance telephone charges. The practitioner should err on the side of over-documenting these cases.

C. ADDITIONAL REQUIREMENTS FOR FIANCÉE PETITIONERS

The International Marriage Broker Regulation Act of 2005 (“IMBRA”), incorporated into the Violence Against Women and Department of Justice Reauthorization Act of 2005, included several amendments to INA Sec. 214(d) regarding eligibility requirements for fiancé/e petitioners. These legal provisions, intended to protect a prospective spouse from abuse, require a fiancé/e petitioner to disclose certain criminal convictions on the fiancé/e visa application and be subject to limitations on the number of fiancé/e petitions that may be filed. IMBRA also requires consular officers to advise K visa applicants of protection orders or criminal convictions disclosed in the fiancé/e visa petition and provide them with a copy of the a resource pamphlet developed by DHS addressing marriage-based immigration issues, including the legal rights of survivors of domestic violence.

D. TWO-YEAR CONDITIONAL RESIDENCE FOR FIANCÉ/ES

If the parties marry within three months after the alien fiancé/e’s entry, the alien is eligible to apply for adjustment of status. However, like all other marriage-based immigrants, they are subject to the two-year conditional residence requirement discussed above.

An alien fiancé/e is required to marry the citizen petitioner within 90 days of entry or lose his or her lawful status and be subject to deportation. After the marriage the alien spouse must follow the INA § 245 adjustment procedures and will be subject to the two-year conditional residence requirement discussed above; as long as the parties have married within 90 days of the alien spouse’s entry, no I-130 is required. Note that where an alien fiance/e marries the citizen petitioner after 90 days, it is still possible to pursue adjustment of status, but the citizen petitioner will have to file an I-130 petition for his/her spouse.

A “K-1” visa holder must marry the fiancé/e petitioner to be able to file for adjustment. In other words, if the parties do not marry but instead break their relationship, and the alien fiancé/e subsequently marries another U.S. citizen, the alien cannot adjust status in the U.S. He or she will instead have to go through consular processing abroad and reenter the U.S. as a conditional resident.
III. K-3 AND K-4 FOR SPOUSES OF U.S. CITIZENS AND THEIR CHILDREN

The Legal Immigration and Family Equity (LIFE) Act and LIFE Act Amendments of 2000 expanded eligibility for a K visa to spouses of U.S. citizens (USCs) and their dependents who are residing outside the United States. These categories of nonimmigrant fiancé/e visas are called K-3 (spouses) and K-4 (dependents). The requirements include:

- Concluded valid marriage with USC petitioner, is beneficiary of relative visa petition filed by petitioner, and seeks to enter the United States to await approval of I-130 petition and availability of immigrant visa, or
- Child of alien described above and is accompanying or following to join the principal alien
- If married to a USC, consular officer must have received a K visa petition filed in the United States by USC spouse and approved by USCIS
- If marriage took place outside the U.S., the alien spouse must receive the K visa from consulate in the country where marriage took place

The period of authorized admission terminates 30 days after denial of the underlying I-130 petition, application for immigrant visa, or application for adjustment of status.

This expansion of the K visa took place on December 21, 2000. The law applies to any alien who is beneficiary of I-130 petition filed under INA § 204 before, on, or after that date.

IV. V VISMA FOR SPOUSES AND CHILDREN OF LPRs

The V nonimmigrant visa allows the spouses and unmarried children (under 21 years of age) of LPRs to obtain non-immigrant status, with the right to work in the United States, while they wait for their immigrant visa. Congress created this visa as a way to remedy the extensive waiting periods created by the backlog in the second preference 2A category. Note, however, that V visas are only available to people for whom I-130s were filed before December 21, 2000.

The requirements include:

- Beneficiary under INA § 203(a)(2)(A) [only spouses and minor children of LPRs in the 2A category] or child of principal beneficiary if eligible under § 203(d)
- I-130 petition filed on or before Dec. 21, 2000
- I-130 petition either pending for three or more years or I-130 petition approved and three years elapsed since filing date, and
- Immigrant visa not available because of backlog or application for immigrant visa or adjustment remains pending.
The benefits include:

- Employment authorization. This will allow the spouse to work legally in the U.S. and count income toward meeting the affidavit of support requirements.

- Certain grounds of inadmissibility do not apply, including INA § 212(a)(9)(B) [3- and 10-year bars for unauthorized presence], 212(a)(6)(A) [present without permission or parole], and 212(a)(7) [documentation requirements]. Other grounds might be waived under INA § 212(d)(3), which has a generous standard.

- Aliens physically present in the U.S. can “adjust status” in the USCIS’s discretion to V visa classification. Those outside U.S. will receive nonimmigrant visa from the consulate.

- V visa holders can later adjust status to LPR under INA § 245(i) and possibly under 245(a).

Like the K-3/K-4 visas, the period of authorized admission for V visa holders terminates 30 days after denial of the underlying I-130 petition, application for immigrant visa, or application for adjustment of status. This law took effect on Dec. 21, 2000 and applies to aliens who are beneficiaries of I-130 petitions filed on or before that date.

Note that the regulations regarding V status provide that minor V-2 and V-3 status holders will “age-out” of eligibility upon turning age 21. Following a lawsuit challenging this interpretation of the law, USCIS announced in May 2005 that an alien physically present in the U.S. may continue to extend V status beyond age 21 until he or she becomes a permanent resident.
CHAPTER FIVE

OVERVIEW OF IMMIGRATION RELIEF FOR IMMIGRANT VICTIMS OF ABUSE AND CRIME

I. INTRODUCTION

Immigrant victims of domestic abuse and crime are particularly vulnerable in both the criminal and immigration processes. Uncertainty as to their immigration status, coupled with fear of removal and the resulting separation from family and support networks, frequently make immigrant victims reluctant to report their abusers to the authorities or to seek relief. Over the past two decades, through the advocacy of immigrant, domestic abuse, and human rights activists, Congress has become increasingly aware of the special vulnerability of immigrant victims and has implemented a number of special forms of immigration relief for them. This section will first list those forms of immigration relief that apply in particular to immigrant victims of abuse and crime and will then briefly describe the requirements and process for the forms of relief not covered elsewhere in this manual.

The forms of immigration relief in the following list are specifically directed to spouses and children of abusive United States citizens (USCs) and lawful permanent residents (LPRs). Self-petitioning also applies to parents of abusive USC sons and daughters:

- VAWA self-petitioning for lawful permanent resident status
- VAWA cancellation of removal, and
- the abused spouse waiver for conditional permanent residence.

In addition, there are now several forms of immigration relief for victims of abuse and crime, even though they are not related to USCs or LPRs. These are:

- T nonimmigrant status for victims of severe forms of human trafficking;
- U nonimmigrant status for persons who have suffered substantial harm as a result of being the victim of certain listed crimes;
- Special Immigrant Juvenile Status for children found dependent on a juvenile court, and;
- Asylum and related protections.

Of course, these victims may also apply for any other form of immigration relief for which they are eligible.

The abused spouse waiver for conditional permanent residents, Special Immigrant Juvenile Status, and asylum and related protections are covered elsewhere in this manual. This chapter will focus on VAWA self-petitioning, VAWA cancellation of removal, and T and U visas.
II. SELF-PETITIONING FOR ABUSED SPOUSES AND CHILDREN OF UNITED STATES CITIZENS AND LAWFUL PERMANENT RESIDENTS (INA §§ 204(a)(1)(A)(iii) – (vi); (B)(i) – v); (C); (D); (J)

A. OVERVIEW

Under the regular family immigration process, the USC or LPR spouse or parent files a visa petition with USCIS asking that his or her spouse or child be granted permanent resident status. If that petition is approved, then the foreign spouse or child applies for a visa, based upon the USC or LPR relative’s approved petition. Unfortunately, this process can work great hardship on victims of domestic abuse, because the abuser, who initiates the immigration process, can use that process as a tool to control the victim. For example, the abuser may refuse to begin or continue in the immigration application, or may threaten to report the victim to the immigration authorities if the victim seeks help or attempts to report the abuse.

In response to this problem, Congress devised a procedure known as “self-petitioning” in the Violence against Women Act of 1994, updated in the Battered Immigrant Women Protection Act of 2000 (VAWA 2000) and the Violence Against Women Reauthorization Acts of 2005 and 2013. “Self-petitioning” allows the foreign spouse or child (defined as unmarried and under 21 years of age) of a USC or LPR abuser to file his or her own petition for a visa (called a “self-petition”), thereby allowing the victim, instead of the abuser, to initiate and control the immigration process. An important new benefit was added by VAWA 2005, which provides that parents of abusive USC sons and daughters may also self-petition.

VAWA self-petitions are filed with the CIS’s Vermont Service Center, on Form I-360. An abused spouse or child may file the self-petition even if he or she is in the United States in unlawful status.

If the self-petition is approved, the self petitioner and his or her children are given permission to remain in the United States, with employment authorization, until a lawful permanent resident visa is available for them. This permission to remain is known as “deferred action status.” Status as an abused spouse or child generally also entitles the victim to certain public benefits.

The following persons are eligible to self-petition:

- Abused spouses of USCs and LPRs
- Non-abused spouses whose children have been abused by the USC or LPR spouse, even if the children and abuser are not related
- Abused persons who believed that they were validly married to a USC or LPR abuser, but whose marriage was invalid solely because the abuser was already married (known as “intended spouses”)
- Abused children of USCs and LPRs (abused sons and daughters of USCs and LPRs who are now over 21 but under 25 may self-petition up to age 25 if the abuse was “at least one central reason” for the filing delay)
- Abused parents of USC sons and daughters.
Moreover, applicants in the first four of the foregoing categories may include their children in their self-petitions. This applies even to those applicants who are themselves children.

A self-petitioning spouse must establish the following:

- Marriage or “intended marriage” to the abuser
- The abuser is a USC or LPR
- The victim entered into the marriage in good faith, meaning that he or she intended to establish a life together with the spouse and did not enter into the marriage solely for immigration purposes
- Battery or extreme cruelty by the USC or LPR spouse during the marriage on the self-petitioner or his or her child
- Past or present residence with the abuser (but there is no minimum amount of time that the victim must have lived with the abuser)
- Either (a) current residence in the United States or (b) if living abroad, the abuser is an employee of the U.S. government or a member of the U.S. uniformed services or abused the alien spouse or the alien spouse’s child in the United States; and
- Good moral character.

A self-petitioning abused child must establish the following:

- Relationship to the abusive parent
- The self-petitioner is a child, meaning unmarried and under 21, at the time the application is filed (Note exception described above for abused sons and daughters of USCs and LPRs)
- The USC or LPR parent battered or inflicted extreme cruelty upon the self-petitioner
- The self-petitioner is of good moral character (presumed for children under 14)
- Past or present residence with the abuser (visitation is sufficient), and
- Either (a) current residence in the United States or (b) if living abroad, the abusive parent is an employee of the U.S. government or a member of the uniformed services or subjected the applicant to abuse in the U.S.

A self-petitioning parent must establish the following:

- Relationship to the abusive son or daughter
- The self-petitioner is a person of good moral character
- Is an immediate relative under INA § 201(b)(2)(A)(i) (indicating that the abusive USC son or daughter must be at least 21 years of age), and
- Past or present residence with the abusive USC son or daughter.

It is not yet clear whether self-petitioning parents may apply outside the United States.

In regard to the requirement of good moral character, there is a special waiver, allowing CIS to find that the self-petitioner is a person of good moral character despite falling under one of the statutory bars to good moral character in INA § 101(f), if the act or conviction that creates the statutory bar was connected to the applicant’s having been abused.
B. BATTERY OR EXTREME CRUELTY

The term used for abuse under the INA is “battery or extreme cruelty.” This phrase is defined broadly under the INS/USCIS regulations (8 C.F.R. § 204.2 et seq.) and includes both physical and mental abuse. The term includes, but is not limited to:

- Acts and threatened acts of violence
- Forceful detention causing physical or mental injury
- Psychological abuse
- Sexual abuse, rape, molestation
- Forced prostitution
- Acts that may not appear violent but are part of an overall pattern of violence
- Social isolation
- Accusations of infidelity
- Stalking
- Interrogating the victim’s friends, family, or coworkers
- Economic abuse (such as not allowing the victim to work outside the home), and
- Actions against some other person or thing if these acts were deliberately used to perpetrate extreme cruelty against the self-petitioner or the self-petitioner’s child.

C. DOCUMENTING THE ABUSE

Congress has imposed a special standard of proof for self-petitions, known as the “any credible evidence” standard. This means that forms of proof that might not necessarily meet the evidentiary standards for introduction into evidence in court must be considered in a VAWA self-petition and may well meet the self-petitioner’s burden of proof. Police reports and law enforcement records of telephone calls or visits to the victim’s address are excellent forms of evidence to support a VAWA self-petition. However, neither police reports nor law enforcement records are required to meet the burden of proof in VAWA self-petitions.

D. CERTAIN CHANGES IN STATUS DO NOT AFFECT THE SELF-PETITION

Both before a self-petition is filed and while it is pending, a number of changes in status can occur. These might include a child turning 21, or a self-petitioning abused spouse obtaining a divorce from the abuser. There are a number of special provisions under VAWA governing these sorts of changes. A summary of those types of changes and their effect on a self-petition follows:

An abused spouse may self-petition up to two years after a divorce from the abuser, if there was a connection between the divorce and the abuse. CIS does not require that the divorce decree specifically state that the termination of the marriage was due to domestic violence. Instead the self-petitioner must demonstrate that the battering or extreme cruelty led to or caused the divorce.

An abused spouse of a USC may self-petition up to two years after the abuser’s death.
An abused parent of a USC son or daughter may self-petition up to two years after the death of the USC son or daughter or, if the USC lost or renounced citizenship related to an incident of domestic violence, up to two years after the loss or renunciation of citizenship.

Spouses and children of USCs and LPRs can self-petition up to two years after the USC or LPR loses immigration status, if the loss of status is related to domestic violence.

A self-petitioner’s remarriage after the self-petition is approved will not revoke the approval.

Self-petitioning and derivative children do not “age out” of eligibility, as long as they were under 21 when the self-petition was filed. Moreover, the Child Status Protection Act applies to VAWA self-petitions.

Abused sons and daughters of USCs and LPRs who qualified to self-petition before turning 21 may file the self-petition prior to reaching age 25, if the abuse the person suffered was at least one central reason for the filing delay.

E. BENEFITS FOR APPROVED VAWA SELF-PETITIONERS

Deferred action status until the self-petitioner is eligible to adjust status to that of lawful permanent resident.

- Employment authorization
- Public benefits, generally including medical care, food stamps, and TANF
- Relaxed requirements for obtaining lawful permanent residence through “adjustment of status,” and
- Special waivers of inadmissibility grounds.

III. VAWA CANCELLATION OF REMOVAL FOR ABUSED SPOUSES AND CHILDREN OF USCs AND LPRs WHO HAVE BEEN IN THE UNITED STATES FOR THREE YEARS – INA § 240A(b)(2)

Some abused spouses and children of LPRs and USCs may not be eligible to self-petition, but may still be eligible for a related form of relief known as VAWA cancellation of removal. A grant of cancellation of removal gives the recipient lawful permanent resident status, with accompanying employment authorization, and may also make the recipient eligible for public benefits. Unlike self-petitioning, however, cancellation of removal may be applied for only in removal proceedings in the Immigration Court, as a form of relief from removal. Where the cancellation case is very strong, the victim may wish, after thorough explanation of the consequences from his or her advocate, to consider asking ICE to implement removal proceedings, so that the victim may apply for cancellation.

The following persons are eligible to apply for cancellation of removal:

- Abused spouses of USCs and LPRs
Abused sons and daughters (both children and persons over 21) of USCs
Parents of abused children of USCs or LPRs, even if not married to the abuser, and
Abused “intended spouses” of USCs or LPRs.

A grant of cancellation does not include the recipient’s children, but DHS must parole the recipient’s child, or, if the recipient is a child, the recipient’s parent, into the United States and grant them employment authorization. This parole status lasts until the child or parent is able to obtain a permanent resident visa based upon a visa petition filed by the recipient, now an LPR.

As can be seen from the list of persons eligible to apply for cancellation of removal, that list is wider than the group of persons eligible to self-petition. For example, the following persons are eligible for cancellation, even though they could not self-petition:

- An adult son or daughter of an abusive USC or LPR
- Spouses of abusive USCs or LPRs who were divorced or widowed more than two years ago
- Persons who are parents of abused children of USCs or LPRs and who are not married to the abuser; and
- Sons and daughters whose USC or LPR abusive parent died more than two years ago.

An applicant for cancellation must meet the following requirements:

- Three years continuous physical presence in the United States (brief absences and abuses related to abuse do not interrupt this period)
- Good moral character during that time
- The USC or LPR spouse or parent has subjected the applicant or the applicant’s child to battery or extreme mental cruelty
- Removal would cause extreme hardship to the applicant or his or her USC, LPR, or “qualified alien” child or parent
- The applicant is not inadmissible under the inadmissibility grounds dealing with commissions of crimes or security and related risks, nor deportable under the deportation grounds dealing with marriage fraud, crimes, failure to register, falsification of documents, or security and related issues, and
- The applicant has not been convicted of an aggravated felony, as defined at INA § 101(a)(43).

In regard to the good moral character requirement listed above, there is a special provision, similar to that for VAWA self-petitioners, allowing CIS to find that the applicant is of good moral character, despite falling under a statutory bar to good moral character, where the act of conviction creating the bar was connected to the applicant’s having been abused.
IV. T AND U NONIMMIGRANT VISAS

In the Victims of Trafficking and Violence Protection Act of 2000, Congress devised two extraordinary types of nonimmigrant visas, known as the T and U visas from their locations at INA § 101(a)(15)(T) and (U). These visas are intended to protect victims of serious crime who have gathered the courage to come forward, report the crime, and assist in its investigation and prosecution. The T visas apply to victims of severe forms of human trafficking and reflect Congress’ concern with the growing impact of human trafficking and its intention to vigorously prosecute traffickers and protect their victims. The U visa applies to non-citizens who suffer substantial physical or mental abuse resulting from a wide range of criminal activity, including felony assault; rape; manslaughter; and domestic violence. Note that while domestic violence is one of the qualifying crimes for U status, there are many other qualifying crimes that are not connected to domestic abuse.

The benefits of T and U visas are similar. Both provide authorized stay in the United States and employment authorization. After three years in either T or U nonimmigrant status, the nonimmigrant may apply to adjust status to that of lawful permanent resident. In addition, family members of the principal applicant may obtain derivative T or U status. An adult T or U nonimmigrant may apply for admission of his or her spouse and children. A T or U victim who is under 21 may apply for admission of his or her spouse, children, parent, and unmarried siblings under 18.

Importantly, neither T nor U visas require that the victim be related to a USC or LPR. The victim may apply for T or U visas regardless of his or her current immigration status and regardless of whether he or she is in the United States lawfully.

The T and U visas are an important collaboration between immigrant victims of crime and law enforcement. Through the law enforcement certificates required for U visa applicants and strongly recommended for T visa applications, law enforcement gains a new means of helping victims deal with the traumatic effects of crime and rebuild their lives. At the same time, immigrant victims gain security in their immigration status, enabling them to better assist law enforcement in investigating and prosecuting crime.

A. REQUIREMENTS FOR T NONIMMIGRANT VISAS FOR VICTIMS OF HUMAN TRAFFICKING, INA §§ 101(a)(15)(T), 214(o), 212(d)(13); 8 CFR § 214.11.

To be eligible for a T nonimmigrant visa, the applicant must meet the following requirements:

- The applicant is or has been a victim of a “severe form of trafficking in persons.” This term is defined as trafficking for sex or labor. Sex trafficking is defined as the recruitment, harboring, transportation, provision, or obtaining a person for the purpose of a commercial sex act, where the act is induced by force, fraud, or coercion, or where the person induced to perform the act is under 18 years of age. Labor trafficking means recruiting, harboring, transporting, providing, or obtaining a person for labor or services, through force, fraud, or coercion, for the purpose of subjecting the person to involuntary servitude or debt bondage.
The applicant must be physically present in the United States, American Samoa, or the Northern Mariana Islands on account of the trafficking.

The applicant must have complied with any reasonable request for assistance from federal, state, or local law enforcement in the investigation or prosecution of acts of trafficking, or must not have attained 18 years of age.

The applicant would suffer extreme hardship involving unusual and severe harm upon removal. In determining whether the applicant has experienced this level of hardship, CIS considers factors such as the applicant’s age and personal circumstances, the physical or psychological consequences of the trafficking, the impact of loss of access to the U.S. criminal justice system for protection and criminal and civil redress, and whether the applicant would be protected in his or her country against retaliation or re-victimization.

The T visa application, like VAWA self-petitions, is adjudicated by the USCIS Vermont Service Center, rather than by local USCIS district offices.

Because of the foregoing requirements that the applicant have complied with any reasonable request for assistance in the investigation or prosecution of the crime, the applicant must have had contact with a law enforcement agency (LEA), in order to report the crime and be available for requests for assistance. Advocates should explain this requirement to clients and explain what the law enforcement agency may expect of witnesses, so that the client can make an informed decision on how he or she wishes to proceed. CLINIC is available to consult with Catholic Charities offices providing services to trafficking victims on trafficking cases in general and on the client’s decision of whether to contact law enforcement agencies. A trafficking victim who has not yet had contact with an LEA may contact the Department of Justice, Civil Rights Division, Trafficking in Persons and Worker Exploitation Task Force complaint hotline, at (888) 428-7581, to file a complaint and be referred to an LEA.

A determination of whether an LEA’s request for assistance is reasonable requires considering the totality of the circumstances, taking into account general law enforcement and prosecutorial practices, the nature of the victimization, and the victim’s specific circumstances, including fear, severe trauma, and age and maturity.

An application for a T visa is made on Form I-914 and must be supported by evidence to establish the requirements set forth above. One way to establish two of those requirements (that the applicant has been a victim of human trafficking and the applicant’s compliance with any reasonable request from prosecutors) is through Supplement B to Form I-914, the Declaration of Law Enforcement Officer for Victim of Trafficking in Persons. It is important to remember, however, that a law enforcement certificate is not required for the T visa, although the applicant must present evidence that he or she has contacted a law enforcement agency and made himself or herself available to assist law enforcement.

B. OTHER RELIEF FOR VICTIMS OF TRAFFICKING

Not all trafficking victims wish to apply for the T visa. Instead, they may simply want to return home. Nonetheless, they may want to stay in the United States long enough to pursue civil
remedies such as wage and hour claims and damages lawsuits, or law enforcement may need them to stay in the United States in connection with a criminal investigation or prosecution. An alternate route to temporary authorized stay in the United States is a status known as “continued presence.” Only law enforcement agencies or CIS may request continued presence. Requests for continued presence are sent to the USCIS Office of International Affairs/Parole/Humanitarian Affairs Branch (OIA/PHAB) in Washington, D.C. The OIA/PHAB telephone number is 202-305-2670; fax number is 202-514-0542.

When a trafficking victim receives either continued presence or a T visa, he or she is eligible for public benefits to the same extent as refugees in the United States.

C. REQUIREMENTS FOR U NON-IMMIGRANT RELIEF FOR VICTIMS OF CRIME – INA §§ 101(a)(15)(U), 214(p), 212(d)(14)

In 2007 USCIS issued regulations implementing the U visa statute. Prior to the issuance of regulations, CIS was granting “interim relief” in the form of deferred action status to persons who appeared to be potential U nonimmigrants.

Persons who may be eligible for U visas should not be removed from the United States until they have had the opportunity to avail themselves of the law. In addition, the immigration authorities should help in referring crime victims for services, such as medical care and reasonable protection.

An applicant for U nonimmigrant status or a U visa must establish the following:

- The applicant has suffered substantial physical or mental abuse as a result of having been a victim of certain criminal activity;
- The applicant (or, if the applicant is under age 16, his or her parent, guardian or next friend) possesses information concerning the criminal activity and has been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution;
- The criminal activity violated the laws of the United States or occurred in the United States or its territories or possessions, and;
- The application includes a certification from a federal, state, or local law enforcement official, prosecutor, judge, or other authority investigating criminal activity, or from a DHS official, stating that the applicant “has been helpful, is being helpful, or is likely to be helpful” in the investigation or prosecution of the listed criminal activity. In contrast to T visas, U visas require a law enforcement certification.

Criminal activity, for purposes of the U visa, is defined as rape, torture, trafficking, incest, domestic violence, sexual assault, abusive sexual contact, prostitution, sexual exploitation, female genital mutilation, being held hostage, peonage, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, false imprisonment, blackmail, extortion, manslaughter, murder, felonious assault, witness tampering, obstruction of justice, perjury, fraud in foreign labor contracting, stalking or attempt, conspiracy, or solicitation to commit any of the above-mentioned crimes, or any similar activity in violation of federal, state or local criminal law.
Applications for U status, or for issuance of a U visa abroad, are made on an I-918 form, and are adjudicated at the Vermont Service Center. All applications must include a law enforcement certification completed on an I-918B form, and derivative status for eligible family members of the U applicant made be sought through submission of an I-918A form. There is no fee for the application, but applicants must pay a biometrics fee unless a fee waiver is granted.

An application for a U visa requires close collaboration with law enforcement, because of the requirement that the petition contain a certification from a federal, state, or local law enforcement agency. USCIS has

U status is granted for a four year period, and the U status recipient may apply for adjustment of status after three years. Applicants for adjustment of status must show

- Physical presence in the U.S. for three years since date of approval of U status;
- No unreasonable refusal to provide assistance to law enforcement in connection with the qualifying criminal activity leading to U status;
- No inadmissibility under INA § 212(a)(3)(E) (related to participants in Nazi persecution, genocide, torture, or extrajudicial killing);
- Presence in the U.S. justified on humanitarian ground, to ensure family unity or in the public interest

Adjustment applications are filed with the Vermont Service Center, and only CIS has jurisdiction to adjudicate these applications. U status holders who are in proceedings should seek termination of proceedings before applying for adjustment of status, and those with outstanding orders of removal should file for reopening and termination.

U status holders may also apply for certain “qualifying family members” at the time of applying for residence. These include the spouse, parent or child of the principal U status beneficiary as long as that family member did not have U nonimmigrant status. An application for the family member is submitted by the U status holder on Form I-929 and must also include proof that either the U status holder or the qualifying family member will suffer extreme hardship if not allowed to remain in or be admitted to the United States. Upon approval of the I-929, the qualifying family member may apply for residency through adjustment of status or at a U.S. Consulate abroad.

By statute, U status or U visa approvals for principal beneficiaries are capped at 10,000 per year; there is no limit imposed on the number of derivative beneficiaries who may be approved for derivative U status or a U visa. When the cap is reached in a fiscal year, approvable applicants are granted deferred action until the following fiscal year when U status or a U visa may be issued.

V. ADDITIONAL INFORMATION

• **A Guide for Legal Advocates Providing Services to Victims of Human Trafficking**, by CLINIC, The United States Conference of Catholic Bishops, Migration and Refugee Services, and the Legal Aid Foundation of Los Angeles (LAFLA), available for free download at [www.cliniclegal.org](http://www.cliniclegal.org) (T visas and interim relief; explanatory material, primary source documents, and samples).


CHAPTER SIX

OVERVIEW OF REMOVAL PROCEEDINGS AND DEFENSES TO REMOVAL

I. OVERVIEW OF REMOVAL PROCEEDINGS

A removal proceeding is an immigration court hearing to decide whether a noncitizen will be expelled from the United States. Any person who is not a citizen of the United States, whether without authorization to be present or with legal residency (LPR) status, may be removed if he or she falls within one of the grounds of inadmissibility or deportability found in the Immigration and Nationality Act at INA §§212 and 237. Removal proceedings under INA § 240 begin with the issuance of a document that charges the noncitizen with acts or conduct that violates the immigration law. (See below) An individual who was never lawfully admitted to the U. S. is subject to removal based on a charge or charges of inadmissibility, and a person who was lawfully admitted is subject to removal based on a charge of deportability.

Example: Craig, an LPR from Norway, was convicted of selling drugs. In removal proceedings, Craig will be charged with a crime-based ground of deportability.

Example: Craig’s brother Peter, also from Norway, entered the U.S. from Canada by hiding in the back of a car. Peter was also convicted of selling drugs. In removal proceedings, Peter will be charged with a crime-based ground of inadmissibility as well as for being inadmissible for being present without admission.

In all immigration court proceedings, the immigration judge must first determine whether the charges may be upheld, i.e. whether the noncitizen is inadmissible or deportable as charged. In some cases, the charges may be successfully contested, and then the immigration judge will terminate proceedings. Where the charge of inadmissibility or deportability is upheld, the noncitizen may then be eligible to seek a remedy in immigration court to avoid removal. Some of the possible remedies that may be sought in immigration court are reviewed at the end of this chapter.

The noncitizen placed in removal proceedings is called the "respondent." The Fifth Amendment of the Constitution guarantees individuals in removal proceedings the right to due process and the opportunity for a full and fair hearing.

In addition to the removal proceedings before an immigration judge under INA § 240, there are circumstances where an order of removal is issued by other government officials. Expedited removal is a process that permits DHS to order certain arriving noncitizens removed without a hearing before the immigration judge. Individuals subject to expedited removal are those who attempt to enter the U.S. with no documents or false documents. (See below)
This structure of removal proceedings, and expedited removal proceedings, commenced on April 1, 1997. Prior to that date, immigration court proceedings were referred to as “deportation proceedings” or “exclusion proceedings,” depending on whether the individual was charged with a ground of deportability or inadmissibility. The old deportation and exclusion law and procedures continue to exist for noncitizens whose proceedings began prior to April 1, 1997.

II. REMOVAL PROCEEDINGS UNDER SECTION 240

A. NOTICE TO APPEAR

Removal proceedings under INA § 240 are initiated by a charging document called a Notice to Appear (NTA). A sample NTA is found at the appendix to this chapter. The NTA cites the reason DHS believes the person is deportable or inadmissible, and the section of the law the person is charged with violating. The NTA also specifies the time and place of the hearing and the consequences of failing to appear, including the entry of an in absentia removal order. For deportation proceedings commenced before April 1, 1997, the charging document is known as the Order to Show Cause (OSC). A sample OSC is also found at the appendix to this chapter.

B. BURDEN OF PROOF

If charged with a ground of inadmissibility, the noncitizen will bear the burden of proof by showing “clearly and beyond doubt” that he or she is entitled to admission. If an noncitizen is charged with a ground of deportability, the burden of proof remains on DHS to show by “clear and convincing” evidence that the noncitizen is deportable.

C. REPRESENTATION BY COUNSEL/LEGAL SERVICES LISTS

Respondents in proceedings have a right to counsel at their own expense, and they must be given an adequate opportunity to obtain counsel. INA § 239(a). Respondents must also be given a list of available legal services, and these lists are to be updated quarterly.

D. BOND HEARINGS

Some noncitizens in removal proceedings will be released on bond or never taken into custody; others, including noncitizens in summary removal proceedings and many noncitizens convicted of a crime, are not eligible for a bond. Where a bond is set, the minimum amount is now $1,500. Bond reduction may be sought in a bond redetermination hearing before the immigration judge. These hearings are informal and evidence is frequently presented through argument by the legal representatives rather than by direct testimony.

E. VIDEO/TELEPHONIC HEARINGS

The law now allows removal proceedings to go forward by video or telephonic conference. Consent of the noncitizen is needed to proceed by telephone. The noncitizen must be advised of his or her alternative “right to proceed in person or through video conference.”
F. IN ABSENTIA ORDER

An immigration judge may uphold the charges against an noncitizen and order the noncitizen removed from the United States when the noncitizen does not appear at his or her scheduled hearing. This is known as an “in absentia” order. There are strict limitations on reopening such an order; unless the individual failed to appear because there was no proper notice of the hearing or the individual was in custody, the in absentia order can only be reopened if the failure to appear was based on “exceptional circumstances,” such as serious illness or death of an immediate family member. A motion to reopen an in absentia order based on exceptional circumstances must be filed within 180 days of the order.

Practice tip: Whenever you see someone with an NTA, it is very important to immediately determine where and when the next court date is taking place, to avoid an in absentia order. You can easily check this information by calling the automated EOIR Information line at (800) 898-7180. You will need the noncitizen’s A number in order to use this information line.

III. EXPEDITED REMOVAL UNDER SECTION 235(b)

A. "ARRIVING ALIENS"

"Arriving aliens"¹ who attempt to enter the United States with false documents or no documents, are subject to summary procedures. Initially, this type of proceeding only applied to noncitizens arriving at ports of entry who were seeking admission or transit through the U.S. or who are interdicted at sea and brought to the U.S., including noncitizens paroled upon such arrival. Now expedited removal can also be applied to two groups of individuals encountered within the United States: (1) individuals who arrived by sea and were encountered within two years, and (2) individuals who are encountered within 100 miles of an international land border and within 14 days of entering the country. For the present, the DHS has decided not to invoke the expedited removal process for persons who entered without admission.

B. CREDIBLE FEAR

If an noncitizen subject to expedited removal indicates a wish to apply for asylum, or expresses a fear of persecution, he or she must be referred to an asylum officer for an interview. Consultation with counsel is limited to consultations that will not unduly delay the process. An noncitizen found to have a credible fear – that is, who can show that there is a significant possibility that he or she could satisfy the qualifications for asylum – shall be detained for further consideration of his or her claim in removal proceedings under INA § 240. The asylum officer is to keep a written record of the interview.

If it is determined that the noncitizen does not meet the credible fear standard, this may be reviewed, either in person or telephonically, by an immigration judge. Such review shall take place within seven days, and the noncitizen must be detained during the process.

¹ INA § 101(a)(13). “Arriving aliens” generally include noncitizens who attempted an entry at a port-of-entry but were not admitted, and those who were interdicted at sea.
IV. OVERVIEW OF DEFENSES TO REMOVAL

A. SUSPENSION OF DEPORTATION AND CANCELLATION OF REMOVAL

1. Suspension of Deportation

Suspension of deportation is a statutory remedy that permits an immigration judge to grant discretionary relief from deportation to any noncitizen in deportation proceedings who can meet certain eligibility requirements. Following the grant of suspension of deportation, the noncitizen becomes a LPR.

In order to be eligible for suspension of deportation, the noncitizen must be in deportation proceedings initiated prior to April 1, 1997 and satisfy the following requirements:

- Continuous physical presence in U.S. for not less than seven years (note that physical presence is cut off by service of the Order to Show Cause, except for certain NACARA applicants);
- Good moral character for seven years;
- Extreme hardship to applicant, or to his LPR or U.S. citizen spouse, parent, or child; and
- Deserving of the favorable exercise of discretion.

Hardship is often the most difficult element to establish in a suspension case. Generally, extreme hardship to the applicant's spouse, child or parent is the basis for the grant of suspension of deportation. However, one BIA decision found hardship based solely on the suffering that noncitizen himself would experience was sufficient. Matter of O-J-0, 21 I&N Dec. 381 (BIA 1996). The BIA case, Matter of Anderson, set forth the primary factors that should be evaluating in determining whether hardship exists. Matter of Anderson, 16 I&N Dec 596 (BIA 1978). Hardship should be assessed by looking at the following factors as well:

- Family ties and community ties in the U.S.;
- Social adjustment in the U.S.;
- Health-related issues - including psychological and physical problems;
- Age both at the time of entry and at the time of relief;
- Economic and political conditions in the individual's home country - including quality of life factors;
- Ability to raise children if family members not available to help;
- Educational opportunities for children and applicant;
- Separation from family members, especially in single-parent situations;
- Separation from family members when qualifying family member ill or elderly;
- Length of time in the U.S.;
- Financial situation, including business or occupation and economic hardship (generally not sufficient by itself, but severe economic hardship may constitute extreme hardship).
2. Cancellation of Removal for Non-LPRs, INA § 240A(b)

The post-IIRIRA replacement for suspension is called cancellation of removal. Like suspension of deportation, a grant of cancellation of removal results in the termination of removal proceedings and awarding of LPR status. However, the availability of and eligibility requirements for cancellation of removal are much more restrictive than suspension of deportation in several ways. Cancellation of removal for non-LPRs requires:

- Ten years of physical presence immediately preceding the application. Note that physical presence is cut off by service of a Notice to Appear;
- Good moral character during the ten-year period;
- Exceptional and extremely unusual hardship to a U.S. citizen or LPR spouse, parent or child. Hardship to the noncitizen applicant is not relevant in an application for cancellation of removal and may not be considered;
- No conviction for an offense that would make the applicant inadmissible or deportable; and
- Deserving of a favorable exercise of discretion.

The hardship requirement for cancellation of removal is significantly more restrictive than that for suspension of deportation. Instead of extreme hardship, the noncitizen must establish exceptional extremely unusual hardship to the qualifying relative. Interpreting this standard of hardship, the BIA found that an applicant who had lived in the United States for 20 years, had three U.S. citizen children, two of whom were ages 12, and 8, and parents and seven siblings who were LPRs, was unable to establish exceptional and unusual hardship. See Matter of Monreal, 23 I&N Dec. 56 (BIA 2001).

There is also a numerical cap on the number of non-NACARA suspension and cancellation applications which can be granted each fiscal year (4,000). USCIS is supposed to carefully track these cases because the numbers granted are to be offset against diversity visas and the other worker category (EW3) of immigrants. Immigration judges have been instructed to make only conditional grants of non-NACARA suspension/cancellation cases due to the need to track these numbers. 8 CFR § 240.21(a).

3. Cancellation of Removal for LPRs, INA 240A(a)

The remedy of cancellation of removal for LPRs is also a successor remedy to a pre-IIRIRA form of relief referred to as a 212(c) waiver. Like cancellation for non-LPRs, this form of cancellation for LPRs is also more restrictive than its predecessor remedy in several ways. To be eligible, the LPR must show that he or she:

- Has been an LPR for not less than five years
- Has resided continuously in the U.S. for seven years after having been admitted in any status
- Has not been convicted of an aggravated felony
- Warrants relief as a matter of discretion.
Unlike suspension and cancellation for non-LPRs, neither a showing of hardship nor a United States citizen or LPR qualifying relative is necessary to qualify for this form of relief. However, on the negative side, the very broad range of offenses that fall within the aggravated felony definition, prevent many LPRs from eligibility for this remedy. Even if an applicant is eligible for cancellation of removal, he or she still must convince the immigration judge that he or she merits the relief in the exercise of discretion.

4. Cancellation for Abused Spouses and/or Children

There is a cancellation provision for abused spouses/children of LPR/USCs that only requires three years of physical presence. It also requires good moral character and extreme hardship. INA § 240A(b)(2). This remedy is also described in Chapter 5.

B. NACARA SUSPENSION AND CANCELLATION

The Nicaraguan and Central American Relief Act (NACARA), enacted in December 1997, provides several forms of relief for specific nationalities. One section of the law provides for adjustment of status for Nicaraguans and Cubans who were continuously present in the U.S. since December 1, 1995. The application period for this relief ended on April 1, 2000. A second provision of the law provides certain Salvadoran, Guatemalan and Eastern Europeans with the opportunity to file for suspension of deportation and cancellation of removal under relaxed rules.

1. Who is Eligible for NACARA Suspension or Cancellation

In order to qualify for NACARA, the person must satisfy the following requirements:

- Guatemalan nationals who first entered the U.S. on or before October 1, 1990 who were not apprehended at the time of entry by INS after December 19, 1990 and either registered for benefits under the American Baptist Churches v. Thornburgh (ABC) case before December 31, 1991 or applied for asylum on or before April 1, 1990, or applied for asylum on or before January 3, 1995.

- Salvadoran nationals who first entered the U.S. on or before September 19, 1990 who were not apprehended at the time of entry by INS after December 19, 1990 and either registered for benefits under the ABC case before October 31, 1991, applied for TPS on or before October 31, or applied for asylum on or before October 31, 1991, or applied for asylum on or before February 16, 1996.

- Nationals of the Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Estonia, Lithuania, Poland, Czech Republic, Slovakia, Romania, Hungary, Bulgaria, Albania, East Germany, Yugoslavia, or any state of the former Yugoslavia who entered the U.S. on or before December 31, 1990 and applied for asylum on or before December 31, 1990 and applied for asylum before December 31, 1991.

Derivatives of the groups listed above are eligible to apply for NACARA once the principal is granted relief if they are the spouse or child of the principal noncitizen at the time the decision granting suspension/cancellation is made. Unmarried sons or daughters aged 21 or older
at the time of the grant of suspension/cancellation are eligible for relief if they entered the U.S. on or before October 1, 1990.

Eligibility requirements for NACARA include:

- Seven years of continuous physical presence preceding the date of their application (continuous presence is broken by one absence in excess of 90 days, or absences that aggregate to more than 180 days);
- Good moral character during the seven year period;
- Establish that the removal would result in extreme hardship to the noncitizen or to the noncitizen’s spouse, parent, or child, who is a citizen of the U.S. or an LPR. Hardship is presumed in the case of Salvadorans and Guatemalans principal applicants;
- The DHS may rebut this presumption of hardship provided it can show with clear and convincing evidence that the presumption should not apply.

Aggravated felons are not eligible for NACARA relief.

C. ADJUSTMENT OF STATUS

Noncitizens in removal proceedings may obtain or re-obtain lawful residency by asserting the defense of adjustment of status in removal proceedings. The eligibility requirements are the same as those for adjustment applicants before USCIS. If noncitizen is in removal proceedings and there is no final order from the court, an application can be made to the immigration judge for adjustment. Adjustment is not available in removal proceedings for arriving noncitizens. If there is a final order of removal, a motion to reopen can be made, but the motion will have to comply with the time and number limitations for motions to reopen unless it comes within one of the exceptions allowed. The exceptions are narrow, and include motions that are stipulated to by the DHS.

Eligibility for adjustment may be under INA § 245, on the basis of an approved family or employment-based visa petition, a self-petition under the Violence Against Women Act (VAWA); by applicants for special immigrant juvenile status; and by T and U nonimmigrants seeking to adjust status. Eligibility for adjustment also may be based on refugee and asylee status.

In some situations, although a noncitizen may be eligible to adjustment status before the immigration court, it might be preferable to proceed with adjustment of status before USCIS. In other situations, a noncitizen is only eligible to adjust status before the immigration court or before USCIS. If it is possible to terminate removal proceedings to apply for adjustment before USCIS, a request for termination to proceed with adjustment before USCIS should be made to the immigration judge.

D. VOLUNTARY DEPARTURE

Voluntary departure is a form of relief that allows noncitizens to return voluntarily at their own expense to their home country. The advantage to obtaining voluntary departure is that the
noncitizen would not be subject to the grounds of inadmissibility based on an order of removal. However if the noncitizen obtains voluntary departure and does not depart the United States, he or she is barred for ten years from adjustment of status and many other immigration benefits.

The requirements to qualify for voluntary departure if immigration proceedings were commenced after April 1, 1997 include:

1. **Before or at Master Calendar Hearing**

   An Immigration judge (IJ) may grant a maximum of 120 days voluntary departure before the completion of removal proceedings. The IJ may require a bond of $500 or more. To qualify a respondent must:

   - Make a request for voluntary departure at the master calendar hearing;
   - Make no additional requests for relief;
   - Concede removability; and
   - Waive appeal.

2. **Voluntary Departure at Conclusion of Merits Hearing**

   The IJ may only grant a maximum of 60 days voluntary departure at the conclusion of removal proceedings, and only if the applicant satisfies these requirements:

   - Has been physically present in the U.S. for at least one year preceding service of the Notice to Appear;
   - Has been a person of good moral character for five years;
   - Has established that he has the means and intent to depart the U.S.

   The IJ must require the noncitizen to post a bond of $500 or more to guarantee departure. The regulations require that the noncitizen present a valid travel document in proceedings as well to qualify, unless the receiving country does not require it, or the DHS already has it.

   If a travel document is not immediately available to the noncitizen, the IJ may grant up to 120 days of voluntary departure subject to the condition that the noncitizen secure the document and present it to DHS within 60 days.

**E. TEMPORARY PROTECTED STATUS**

This remedy was created in 1990 to provide temporary relief for people from countries suffering from natural disasters, e.g., Hurricane Mitch in Central America, or war and violent conflicts, e.g., the civil war in Somalia. TPS is discussed in more detail in Chapter 7.

**F. ASYLUM/WITHHOLDING OF REMOVAL**

For noncitizens fleeing persecution, asylum and withholding are available as forms of relief in removal proceedings. See INA § 208(a) (asylum); INA § 241(b)(3)(A) (withholding); 8
CFR §§ 208, 235.3(b)(4), 240.11(c). Asylum is covered in this manual in more detail in Chapter Seven.
CHAPTER SEVEN

TEMPORARY PROTECTED STATUS, ASYLUM, WITHHOLDING OF REMOVAL, DEFERRED ACTION FOR CHILDHOOD ARRIVALS

I. TEMPORARY PROTECTED STATUS

INA § 244 authorizes the Attorney General to designate foreign states or parts thereof if he or she finds that there is an emergency situation there, such as ongoing armed conflict which would endanger nationals if they returned, or an environmental disaster, such as an earthquake, flood, drought or epidemic, resulting in substantial, but temporary, disruption of living conditions there. For environmental disaster designations, the foreign state must have requested the designation.

Nationals of a designated foreign state or area who are in the United States may be granted temporary protected status and employment authorization for the effective period of the designation if they register for TPS by a specified date. Persons in valid nonimmigrant status may apply within 30 days of the expiration of the nonimmigrant status. The effective period will continue for a minimum of six and maximum of 18 months, and TPS may be terminated at the end of the effective period. Upon termination of TPS for some nationalities, the Attorney General has granted a further temporary relief known as Deferred Enforced Departure (DED) for a specified period of time for persons who were covered by TPS.

In order to be eligible for TPS, nationals of the designated state or area must satisfy the following individual requirements:

- Have been continuously physically present in the United States since the effective date of the most recent designation;
- Have continuously resided in the United States since such date as the Attorney General may designate (typically, TPS is available to nationals of the designated state or area who have been physically present in the United States since a specified date in the past);
- Be admissible as an immigrant under INA § 212. INA §§ 212(a)(5) (lack of labor certification) and 212(a)(7)(A) (lack of valid immigrant visa and passport) are waived for TPS applicants. All other inadmissibility grounds, with the exception of INA §§ 212(a)(2)(A) and (B) (relating to criminal inadmissibility grounds), 212(a)(2)(C) (relating to drug offenses, except as to single offense of simple possession of thirty grams or less of marijuana), and 212(a)(3)(A),(B),(C) and (E) (relating to national security and participation in genocide or Nazi persecutions), may be waived for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.
- Not have been convicted of any felony or two or more misdemeanors, and not have participated in the persecution of any person on account of race, religion, nationality, political opinion, or membership in a particular social group.

Countries currently designated for TPS are Haiti, El Salvador, Honduras, Nicaragua, Somalia, Sudan, South Sudan and Syria.

II. ASYLUM
To qualify for asylum, the alien must meet the definition of a refugee at INA § 101(a)(42)(A) – person who is outside the country of his or her nationality, and who is unable or unwilling to return to his native country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

A. SUBSTANTIVE REQUIREMENTS FOR ASYLUM CLAIM

The applicant for asylum must establish the following:

- He or she has a well-founded fear of persecution or has suffered past persecution;
- Such persecution is on account of race, religion, nationality, membership in a particular social group or political opinion; and,
- Asylum should be granted in the exercise of discretion.

B. WELL-FOUNDED FEAR

This is defined as a reasonable fear of persecution, rather than the higher standard of a clear probability of persecution, which is the proper standard for withholding INS v. Cardoza Fonseca, 480 U.S. 421 (1987). An alien possesses a well founded fear if a “reasonable person in her circumstances would fear persecution if she were returned to her country.” Matter of Mogharrabi, 19 I & N Dec. at 445.

C. GROUPS INELIGIBLE FOR ASYLUM

Aliens who are ineligible for asylum include the following:

- Persecutors of others, INA § 101(a)(42)(B);
- Aliens who pose a danger to the security of the U.S., INA § 208(b)(2)(iv);
- Aliens who are inadmissible or removable for terrorist activity, INA § 208(b)(2)(A);
- Aliens convicted of a particularly serious crime who constitute a danger to the community (aggravated felonies are deemed to be particularly serious crimes), INA § 208(b)(2)(A).

D. PROVING ELIGIBILITY FOR ASYLUM

Keep the following tips in mind when assisting an asylum applicant:

- Complete the asylum application as thoroughly as possible.
- Give as comprehensive an accounting of the applicant’s claim as possible.
- Submit corroborating evidence when it is available. If not available, explain why.
- The applicant should provide the asylum officer or the immigration judge with extensive detail on all relevant aspects of the case.
- If, due to cultural, age, psychological, or other factors the applicant has difficulty recalling and providing great detail, this should be explained. The appropriate professional, a psychologist, social worker, psychiatrist, MFCC, political scientist, anthropologist, or
other expert should submit an affidavit as to the communication or memory problem. If the applicant is in immigration court, then the expert will have to testify.

E. ASYLUM PROCEDURES

1. One-Year Filing Deadline

Applicants must file an application for asylum within one year of arrival in the U.S. INA § 208(a)(2)(B)

An exception to the deadline is allowed for persons who can show that changed country conditions materially affect their eligibility for asylum, or who can show that changes in the U.S. (including changes in U.S. law) have changed the person’s possibility of qualifying for asylum. There is also an exception for persons who can show “extraordinary circumstances” that prevented the timely filing. 8 CFR § 208.4(a)(4).

2. Frivolous Applications

Applicants who file a frivolous asylum claim after receiving notice of the consequences are permanently ineligible for immigration benefits. INA § 208(d)(6).

3. Previous Applications

An alien cannot reapply if he or she was previously denied asylum unless the alien can show changed or extraordinary circumstances. An application is only “denied” if it has been denied by an Immigration Judge or BIA, 8 CFR § 208.4(a)(3).

4. Limited Judicial Review

The discretionary decision to deny asylum may be reviewed by a court, but the decision is conclusive unless manifestly contrary to law or an abuse of discretion, INA § 242(a)(2)(B).

5. Derivative Spouse/Children of Asylee

Derivative refugee/asylee status is available if the principal files for his or her spouse or children within a two-year period after being admitted as a refugee or being granted asylum. A separate Form I-730 (January 2013 Edition) must be filed for each derivative.

6. Asylum for Aliens in Expedited Removal

If an arriving alien who arrives at a port of entry with false documents or no documents and who indicates a desire to apply for asylum expresses a fear of persecution to a DHS officer, he or she will be referred for a credible fear screening. Credible fear is a significant possibility, taking into account the credibility of the statements made by the alien and other facts known to the officer, that the alien could establish eligibility for asylum. If there is a negative determination of credible fear, and the alien requests review, there will be an Immigration Judge review within 7 days, either in person, telephonically or by video. If the IJ reverses, that alien will be placed in removal proceedings and normal procedures for presenting an asylum
application will apply. 8 CFR § 208.30(d). Right to counsel is very limited during the expedited removal process. The alien is allowed to consult with counsel before an interview, so long as it does not cause unreasonable delay.

III. WITHHOLDING OF REMOVAL

This is also a form of relief for aliens fearing persecution, and it is available in immigration proceedings. Unlike asylum, withholding is a mandatory form of relief if the alien can meet the high standard of proof it requires. The standard of proof for withholding is that the alien must show a “clear probability” of persecution, rather than the more generous “well founded fear” standard for asylum.

Unlike asylum, the grant of withholding does not eventually lead to a permanent status. An asylee can apply for permanent residence in the U.S. after one year. In contrast, an alien granted withholding may remain in the U.S. and obtain employment authorization, but he has no right to apply for permanent status.

IV. DEFERRAL OF REMOVAL

This remedy stems from the U.S.’s participation in the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture). The remedy is available to individuals who cannot obtain asylum or withholding of removal.

Torture consists of the following elements:

- Extreme form of cruel and inhuman treatment
- Intentionally causing pain and suffering (lawful sanctions like death penalty are not torture)
- Victim must be in custody or physical control of perpetrator
- Inflicted by official instigation or with consent or acquiescence of same or others acting in an official capacity.

Aliens barred from asylum and withholding of removal due to INA § 241(b)(3)(B), i.e., conviction of a particularly serious crime, security threat, or persecutor of others, may receive deferral of removal if they demonstrate that it is more likely than not that they will be tortured if they are returned to the proposed country of removal. This remedy is available only in Immigration Court and a grant or denial of such relief may be appealed by the DHS or the applicant.

The DHS may detain aliens granted deferral of removal and may request that the Immigration Court reopen the proceedings based on subsequent evidence or evidence which was available at the time of the initial hearing which demonstrates that the alien no longer merits protection under the Convention Against Torture.

If the government of the country to which the alien would be returned furnishes the Secretary of State with assurances that the Attorney General finds are sufficiently reliable, the alien may be removed to that country. An immigration judge may not controvert the Attorney
General’s finding that these assurances are reliable and may not consider an application under the Convention Against Torture in such cases.

Aliens claiming fear of torture during the expedited removal process shall have that claim reviewed by an asylum officer during the process. Such a claim may be reviewed by an Immigration Judge if the Asylum Officer makes a negative credible fear determination.

I. Deferred Action for Childhood Arrivals (DACA)

A. Deferred Action for Childhood Arrivals (DACA) Overview

On June 15, 2012, Janet Napolitano, the former Secretary of DHS issued a memorandum addressed to CBP, USCIS, and ICE titled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children.” In this memorandum, the DHS announced that certain individuals who entered the U.S. as children and who meet certain guidelines may request deferred action for two years (subject to renewal) and are eligible to apply for work authorization. Deferred action is a discretionary decision to defer removal action against an individual. Deferred action is an act of prosecutorial discretion.

B. Eligibility Requirements

To be eligible for DACA, an individual must submit evidence to show the following:

1. On June 15, 2012, s/he was under 31 years old;
2. Came to the U.S. before turning 16;
3. Continuously resided in the U.S. since June 15, 2007 until the present;
4. On June 15, 2012, s/he was physically present in the U.S.;
5. At the time of the DACA request, s/he is physically present in the U.S.;
6. Entered without inspection prior to June 15, 2012 or have expired lawful immigration status as of June 15, 2012;
7. Currently in school, graduated or obtained certificate of completion from high school, possess general education development (GED) certificate, or honorably discharged veteran of Coast Guard or Armed Forces of the U.S.; and
8. Not convicted of a felony, significant misdemeanor, three or more other misdemeanors, and are not a threat to national security or public safety.

1. Age & Continuous Residence

Individuals must be at least 15 years old to apply for DACA, unless they are in removal proceedings, has a final removal order or voluntary departure order. Applicants who have brief, casual, and innocent absences from the U.S. may still be able to show that they “continuously resided” in the U.S. An absence will be considered brief, casual, and innocent if it occurred on or after June 15, 2007 and before August 15, 2012, and was short, reasonably calculated to satisfy a lawful purpose, and not a response to a removal order or voluntary departure order.

2. “Currently in School”
Applicants may be considered “currently in school” if they are enrolled in elementary, junior high, middle, high school or secondary school (public or private), in education, literacy, career training, or vocational training program leading to placement in post secondary education, job training, or employment. Furthermore, enrollment in a program in which students are seeking a high school diploma or some other recognized equivalent as defined by state law, certificate of completion, or certificate of attendance or alternate award, or enrollment in GED program, is also satisfactory.

3. Criminal History & Juvenile Delinquency

Individuals who have been convicted of a felony, significant misdemeanor, or three or more other misdemeanors that did not occur on the same day and did not arise out of the same act, omission, or scheme are not eligible for DACA. DHS considers the totality of circumstances, including an individual’s full offense history, when evaluating requests for deferred action.

- A “felony” is defined as a federal, state, or local criminal offense that may lead to a term of imprisonment of more than one year.
- A “significant misdemeanor” is a crime that may lead to a term of imprisonment of one year or less, but greater than five days and is a domestic violence, sexual abuse or exploitation, burglary, unlawful possession/use of a firearm, drug distribution or trafficking, or driving under the influence offense (regardless of the actual sentence given). A “significant misdemeanor” also includes other offenses where an individual was sentenced to time in custody of more than 90 days (a suspended sentence is not included).
- A “non-significant misdemeanor” is a crime that may lead to a term of imprisonment of one year or less, but greater than five days. It cannot be a domestic violence, sexual abuse or exploitation, burglary, unlawful possession or use of a firearm, drug distribution or trafficking, or driving under the influence offense and the individual must have been sentenced to time in custody of 90 days or less. Non-significant misdemeanors may include trespass, petty theft, or disorderly conduct.

In addition, individuals with juvenile adjudications are not automatically barred from DACA and such cases are subject to a case-by-case review.

C. Supporting Documentation for DACA Application

Applicants must provide supporting documentation to demonstrate that they are eligible for DACA. For example, adequate proof that an individual came to the U.S. before turning 16 includes, but is not limited to, passport with admission stamp, U.S. school records, and/or hospital/medical records. Proof that may be used to show that a person is “currently in school” includes, but is not limited to, acceptance letters, transcripts, and/or report cards. The USCIS website includes a DACA Frequently Asked Questions (FAQs) section that contains a list of examples of documents that may be used.
In general, affidavits alone are not sufficient to prove eligibility for DACA. However, with regard to certain eligibility requirements, affidavits may be used (only if the applicant lacks sufficient documentation):

- For the five years of continuous residence requirement, affidavits may be used to fill gaps in documentation; and
- For brief, casual, and innocent absences from the U.S., affidavits may be used to fill gaps in documentation.

The FAQs issued by USCIS regarding DACA contain further information regarding documentation.

D. DACA Application Process

DACA applicants must submit Form I-821-D, Consideration of Deferred Action for Childhood Arrivals (June 2013 Edition), to USCIS, unless the applicant is detained by immigration authorities. If applicants are in immigration detention, they must contact ICE. Form I-765 (Application for Employment Authorization) and Form I-765 WS (Worksheet), which explains the applicant’s economic necessity, must accompany Form I-821-D. All supporting documents, the filing fee, and two passport-style photos must accompany these forms.

DACA applicants must pay a filing fee is $465. Fee waivers are limited and must be supported by a letter and supporting documentation showing to USCIS that applicant is as follows: (1) under 18, income is less than 150% of U.S. poverty level, and is in foster care or lacking parental/familial support; (2) under 18 and homeless; (3) cannot take care of his/herself because of a serious, chronic disability and income is less than 150% of U.S. poverty level; or (4) accumulated $25,000 or more in debt in past year because of medical expenses for his/herself or immediate family member and income is less than 150% of U.S. poverty level.

If USCIS deems the application complete, USCIS will issue a receipt notice. USCIS then sends an appointment notice instructing the applicant to visit an Application Support Center (ASC) to provide fingerprints. If the applicant complies with the necessary steps and is deemed eligible for DACA and work authorization, the applicant will receive an approval letter and a work authorization card.

E. Appealing DACA Decisions

Generally, applicants cannot appeal a DACA denial or file a motion to reopen or reconsider a DACA denial.

However, USCIS guidelines provide that applicants may request review of denials if they believe that the reason was one of the following:

- USCIS denied request on abandonment grounds and applicant responded to a Request for Evidence in a timely fashion; or
- USCIS mailed Request for Evidence to the wrong address despite the fact that
applicant provided proper notice of change of address (Form AR-11) prior to the time the RFE was issued.

Applicants and advocates are encouraged to seek review of denials based on other types of USCIS errors. To request review of a denial, applicants may use the Service Request Management Tool by calling the USCIS National Customer Service Center to make a service request. Applicants may also contact the service center that handled their case to seek review of a denial. In addition, applicants may file a case assistance request with the USCIS Ombudsman’s office.

F. Benefits of DACA

A person who is granted DACA is considered lawfully present in the U.S. during the deferred action period. An individual benefiting from DACA does not accrue unlawful presence during the deferred action period; however, any prior unlawful presence is not erased. DACA does not afford an individual lawful status in the U.S. DACA also does not offer a path to lawful permanent residency or path to citizenship. DACA also does not offer any benefits to derivative family members and may be terminated. In certain situations, denial of a DACA application can lead to enforcement action.

DACA allows individuals to apply for work authorization for the two-year deferred action period, which is subject to renewal. A person who is granted DACA also becomes eligible for a social security number and in most states, a driver’s license.

DACA recipients who seek to travel outside the U.S. must apply for advance parole (permission to leave and re-enter the U.S.) using Form I-131 (Application for Travel Document). Individuals must show that the proposed travel is for humanitarian purposes, such as medical treatment, funeral of a family member, or visiting a sick relative, educational purposes, such as study abroad programs or academic research, or employment purposes, such as overseas assignments, interviews, conferences, trainings, or client meetings. Travel for the sole purpose of taking a vacation is not allowed.
CHAPTER EIGHT

OVERVIEW OF EMPLOYMENT-BASED AND DIVERSITY VISAS

II. Summary of Employment-Based Immigrant and Nonimmigrant Visas

Individuals seeking permission to enter the United States to work may be eligible for temporary nonimmigrant visas and legal residency (LPR) status. While family-based immigration is premised on family unity and family relationships, employment-based immigration is intended to benefit U.S. employers who need certain qualified workers.

Temporary employment-based nonimmigrant visas allow employers to hire noncitizens to work in a specific job for a limited period of time. Permanent employment-based immigrant visa categories have limited numerical caps that often result in significant waiting periods to obtain LPR status.

II. Nonimmigrant Employment-Based Visas

There are many different types of nonimmigrant employment-based visa classifications defined in INA § 101(a)(15). Most of the employment-based nonimmigrant visa categories do not have fixed numerical limits on the number of visas that may be granted -- with the exception of H-1B and H-2B visas. Depending on the visa classification, and in some cases, the nationality of the intended employee, the employer may be required to file a petition for a nonimmigrant worker with USCIS. Following the approval of the petition, the noncitizen worker must request the visa at his or her appropriate United States consulate or embassy. Once the visa has been issued, the noncitizen worker may travel to the United States to assume employment for the employer who filed the petition. The period of authorized stay is determined by the date established at entry by CBP. Unless the period of stay is extended by USCIS, the worker must depart the United States when the period of stay ends.

Common temporary nonimmigrant employment visas include:

- **H-1B visas** - available to highly educated noncitizens in "specialty occupations" that require at least a bachelor's degree or the equivalent. Currently 65,000 visas are available each year, plus 20,000 more for professionals with a masters or doctoral degree from a U.S. university. Entry is limited to three years with a renewal for up to six years total.
  - Examples of H-1B visa positions are jobs in the engineers, financial analysts, teachers, graphic designers.

- **H-2A visas** - available to temporary agricultural workers. Visas are not numerically limited. Employers must demonstrate that there are not sufficient U.S. workers who are able, willing, qualified, and available to do the temporary work. Approximately 40 to 50,000 workers per year obtain H-2A visas, about 2-3 percent of the overall agricultural workforce. Visas are granted for up to one year and can
be renewed for up to three years. Most H-2A visas are granted for work in the Southeast. In fiscal year (FY) 2011, a total of 55,384 H-2A visas were issued.
  - Examples of H-2A visa positions are jobs in agricultural jobs planting watermelon, corn detasseling, etc.

- **H-2B visas** - available to "seasonal" non-agricultural workers. There are 66,000 visas available per year. Visas are granted for up to one year and can be renewed up to a maximum of three years.
  - Examples of H-2B visa positions are jobs in industries such as seafood processing, hospitality, construction, landscaping, and forestry.

- **L-1A and L-1B visas** - available to noncitizens working for a multinational corporation abroad for at least one year in the past three years who are to be transferred to the corporation's U.S. office. L-1A visas are for managers and L-1B visas are for workers with "specialized knowledge." There is no limit to the number of visas per year. Visas are granted for three years, unless the employer is establishing a new office, in which case the visa is granted for one year. Two-year extensions are available for up to seven years for L-1A visas and five years for L-1B visas.
  - Examples of L-1A positions are operations manager, executive vice president; and examples of L-1B positions are Inside Sales Engineer.

- **O visas** - available to individuals who have extraordinary ability in the sciences, arts, education, business or athletics, or have an extensively documented record of extraordinary achievement in movies or television. There is no limitation to the number of visas that may be issued per year. Visas are valid for the duration of the event or up to three years, and can be extended in one-year increments with no limitations on the number of extensions.
  - Examples of O visa positions are researchers in solid organ transplant pathology and internationally known artists.

- **P visas** - available to internationally recognized entertainment groups and athletes, artists and entertainers coming to the United States under reciprocal exchange programs, and artists in culturally unique programs. There is no limitation on the number of visas needed to complete a particular event, tour, or season, up to a maximum of one year with one year extensions permitted. P visa athletes may be admitted for a period of up to five years with one extension of another five years.
  - Examples of P visa positions are circus personnel, ballet dancers.

- **R visas** - available to religious workers who have been a member of the religious denomination with nonprofit status in the U.S for at least two years. There is no limitation on the number of visas that may be granted. Visas are granted initially for up to 30 months, with extensions permitted up to a maximum total of five years.
  - Examples of R visa positions are priests, nuns, and ministers.
- **TN visas** - available to citizens of Canada and Mexico (NAFTA trade countries) to individuals employed in a professional job classification specified by the statute. There is no limitation on the number of visas that may be granted. Visas granted for one-year periods that can be renewed for one year. There is no maximum period to stay.
- Examples of TN visa positions are architects, disaster relief insurance claims adjusters and economists.

All visa categories described above permit the applicant to bring his or her spouse and unmarried children under the age of 21 with them as derivative beneficiaries of the nonimmigrant visa.

**III. Permanent Employment-Based Visas**

A permanent employment-based visa allows a noncitizen to work and live lawfully in the United States and obtain LPR status. After the petition for the visa is approved, the noncitizen must apply for legal permanent resident status either by submitting an application for adjustment of status or completing consular processing abroad. The employment-based visa categories described below, like the family-based visa petition process, are the first step or precondition to obtaining LPR status. Following the approval of the employment-based visa petition, the noncitizen must complete the second step of the process, and demonstrate that he or she is not subject to the grounds of inadmissibility.

Employment-based immigration is limited by statute to 140,000 visas per year. This number includes both the immigrants and their eligible spouses and minor, unmarried children. In addition, each country is limited to seven percent of the worldwide level of U.S. immigrant admissions. The Department of State Visa Bulletin monitors the waiting periods that result from the per country limitations. The priority date for the visa is established by the filing of the I-140, labor certification, I-360, or I-526.

Employment-based immigrant visas are divided into five categories. These categories are called the employment-based preference system. For unskilled workers in the third preference, where only 5,000 visas are available each year, the demand far exceeds the number of visas available. In most of the five classifications, the noncitizen's employer must file a petition with USCIS. Where the employer is filing a petition, the employer must include evidence of the ability to pay the wage offered.

Several, but not all, of the classifications require that the employer first obtain a "labor certification" from the U.S. Department of Labor confirming that there are no U.S. workers able, qualified and willing to perform the work for which the noncitizen is being hired. The Department of Labor also must confirm that employment of the noncitizen will not adversely affect the wages and working conditions of U.S. workers.

The five preference categories include:

- **EB-1** - available to individuals of "extraordinary ability" in the arts, science, education, business, or athletics, and outstanding professors and researchers, multinational managers and executives. This visa is available to persons who have
risen to the very top of their field of endeavor and have a demonstrated sustained national or international acclaim. No job offer or labor certification is required for this category. Outstanding professors and researchers must have a minimum of three years of experience in teaching or research. The application requires the Form I-140 to be filed with documentation of the applicant's extraordinary ability.

- **EB-2** - available to members of the professions holding advanced degrees and to individuals with exceptional abilities in the arts, science or business. Generally, this visa requires an approved labor certification. One of the exceptions to the labor certification requirement is for individuals holding advanced degrees or individuals of exceptional ability whose work is in the national interest. The application requires a Form I-140 to be filed with documentation of the applicant's exceptional ability. Where the EB-2 visa petition is filed based on the national interest, evidence regarding the reason that the job satisfies the national interest requirements must be submitted.

- **EB-3** - available to skilled workers with at least two years of training or experience, professionals with college degrees, or "other" workers for unskilled labor that is not temporary or seasonal. Skilled workers are those in positions that require a minimum of two years of training or experience. Professionals must possess a bachelor's degree or foreign degree equivalent. A labor certification and a permanent, full-time job offer are required for all EB-3 visas. The application requires a Form I-140 to be filled. The application must also include evidence that the individual meets all the requirements for the job.

- **EB-4** - available to certain "special immigrants" including religious workers, special immigrant juveniles, employees of U.S. foreign service posts, translators, former U.S. government employees and other noncitizens.
  - Religious workers must demonstrate two years of membership in a religious denomination having a nonprofit status in the United States immediately before the filing of the visa petition. The noncitizen religious workers must be coming to work full time in a compensated position.
  - Special Immigrant Juveniles must have been declared a dependent by a U.S. juvenile court and not be able to reunite with their parents due to abuse, neglect, or abandonment.
  - Translators with the U.S. Armed Forces must have worked directly with U.S. Armed Forces or Chief of Mission as a translator or interpreter for a period of at least 12 months, and have obtained a favorable recommendation.

- Form I-360 must be submitted with evidence of the noncitizen's eligibility for the specific preference category.

- **EB-5** - available to noncitizens who will invest $500,000 to $1 million in a job-creating enterprise that employs at least 10 full-time U.S. workers. Form I-526 must be filled with supporting documents. The visa allows for conditional residency and the removal of conditional residency 90 days before the second anniversary of conditional residency.
All visas categories described above permit the immigration of the applicant's spouse and unmarried children under the age of 21 with the applicant.

IV. **DIVERSITY VISAS**

The Diversity Immigrant Visa Program, commonly known as the visa lottery, makes available each year by random selection 55,000 immigrant visas to people from countries with low rates of immigration to the U.S. Low admission regions include Africa, Europe, North America. Countries of high admission include Mexico, India, the Philippines and China. The natives of these countries are not eligible for the diversity visa.

The registration period takes place each fall online and the noncitizen may only file one application. The winners of the diversity visa lottery are selected from among millions of applications. If selected as a lottery winner, the applicant must obtain the visa within the fiscal year within which the application occurs.

Eligibility for the diversity visa lottery requires that the applicant have a high school diploma or its equivalent. Alternatively, within five years of applying, the applicant must have at least two years of work experience in an occupation requiring at least two years of training or experience. In addition, eligibility to apply for the diversity visa is determined by a person's place of birth, not citizenship.

The spouse and minor, unmarried children of the noncitizen granted the diversity visa are derivative beneficiaries and also eligible for LPR status.

After the noncitizen is granted a diversity visa, he or she must demonstrate that admissibility and apply for adjustment of status or consular processing in order to obtain LPR status.
CHAPTER NINE

CITIZENSHIP THROUGH ACQUISITION,
NATURALIZATION AND DERIVATION

III. OVERVIEW

U.S. citizenship status may be conferred in several ways:

• By birth in the U.S.;
• By birth abroad to a U.S. citizen parent or parents (acquisition);
• By naturalization;
• By derivation, where a lawful permanent resident child under 18 resides in the U.S. with at least one citizen parent

In this chapter we will review the basic requirements for establishing citizenship through acquisition, naturalization and derivation.

II. ACQUISITION OF CITIZENSHIP

Children can acquire citizenship at birth when they are born outside of the United States to a U.S. citizen parent or parents. The laws for acquiring citizenship at birth have changed over the years; much depends on the date of birth and what laws for acquisition of citizenship were in effect at that time. A State Department memo summarizing the rules of acquisition of citizenship is found in the appendix to this chapter. Current requirements, applying to children born after November 14, 1986, are listed below.

A. Child with Two Citizen Parents (INA § 301(c))

One parent must have lived in the United States or possessions at any time before the child’s birth.

B. Child with One Citizen Parent and One National Parent (INA § 301(d))

The citizen parent must have lived in the United States or possessions for at least one continuous year before the child was born. (Note: non-citizen nationals are citizens of certain U.S. territories).

C. Child with One Citizen Parent and One Alien Parent (INA § 301(g))

The child is a citizen if the citizen parent lived in the United States for five years before the child’s birth. At least two of the five years must be after the citizen parent was 14 years old. However, if the child was born in a possession, the citizen parent must have lived in the United States or its territories for at least one continuous year before the child was born.
D. Child Born Out of Wedlock to United States Citizen Mother (INA § 309(c))

The citizen mother must have lived in the United States or its possessions for one continuous year before the child’s birth.

*Example:* Antonio, age 12, was born in Mexico to a USC mother and a Mexican father. His parents never married. When Antonio was ten, his mother returned to the U.S. Antonio and his father have entered the U.S. without inspection to reunite with Antonio’s mother. Even though Antonio may think he is in the U.S. illegally, he is a USC as long as he can prove that his mother lived in the U.S. for at least one year before his birth.

E. Child Born Out of Wedlock to United States Citizen Father (INA § 309(a), (b))

The child is a citizen if all of the following conditions are met:

- The father meets the United States residency requirements outlined on the previous page for the appropriate situation: Two citizen parents, one citizen parent and one national parent, or one citizen parent.
- There is clear evidence identifying the child’s father.
- The father was a citizen at the time of the child’s birth.
- The father has agreed in writing to provide financial support for the child until age 18.
- Before the child is age 18, the child is legitimated; or the father states in writing that he is the father of the child under oath; or the paternity of the child is established by a competent court.

III. NATURALIZATION

A. Overview

Naturalization is the way for immigrants to become US citizens through fulfilling certain substantive and procedural requirements. Unlike acquisition, discussed above, naturalization requires USCIS to specifically determine eligibility and approve an application. Benefits of naturalization include protection against deportation, the right to vote, freedom to travel and remain abroad without abandonment of status, and greater ability to immigrate family members.

B. General Requirements (INA § 316)

**LPR Status:** An applicant for naturalization must be a lawful permanent resident. The one exception to this requirement is for persons who performed active duty military service during a period of declared war.
Age: You must be at least 18 years of age to file an application for citizenship.

Continuous Residence: Most permanent residents must establish that they have continuously resided in the U.S. as an LPR for at least five years prior to applying for naturalization. LPRs who have been married to and living with a USC for three years, where the spouse has been a USC for that 3 year period, need only show 3 years of continuous residence as an LPR. Other continuous residence exceptions exist for certain LPRs including persons serving in the military, spouses of military personnel and other government employees. In general, continuous residence is broken by absences of one year or more, and there is a presumption that absences of six months or more disrupt continuous residence unless the applicant can prove otherwise. Persons with very lengthy absences from the U.S. also need to consider whether their time outside the U.S. may constitute abandonment of residency, which could lead to removal proceedings and loss of LPR status.

Example: Kevin, from Panama, became an LPR in 2005. In 2006, Kevin travelled to Brazil to study gymnastics; he obtained a re-entry permit before he left because he knew his course of study would last more than one year. With the prior permission he obtained, Kevin will not be seen as having abandoned his residency status. However, he did break his continuous residence for citizenship purposes. He will need to re-accrue the required continuous residence if he wants to apply to naturalize.

Example: Lucia, from Mexico, has been an LPR for 15 years. Eight years ago, when she was 30, Lucia returned to Mexico to live with her family after a bitter divorce from her husband. Lucia sold her belongings before she left, and she then found a place to live in her hometown in Mexico. She lived and worked there for 3 years before returning to the U.S. five years ago. Although Lucia has been continuously residing in the U.S. for the past 5 years, she will have to disclose her 3 year absence on her naturalization application. This may expose Lucia to removal proceedings based on abandonment of residency.

Physical Presence: An applicant for citizenship must show that s/he has been present in the U.S. for half the required period of continuous residence. Some groups of applicants, including persons who served in the military, may count time abroad as time in the U.S. for the physical presence requirement.

Example: Kurt, an LPR from Germany, has been married to his USC wife Nina for 4 years. Kurt became an LPR in April 2008. To be eligible for naturalization in April 2011, Kurt will need to show that he has been physically present in the U.S. for 18 of the last 36 months, i.e. half of the required 3 year period of continuous residence for spouses of U.S. citizens.

Difference Between Continuous Residence and Physical Presence Requirements: The continuous residence requirement focuses on the amount of time an applicant was outside the U.S. on a single trip. The physical presence requirement involves looking at the total number of days a naturalization applicant was outside the U.S. on all of his or her trips.
Example: In the hypothetical above, Kevin had the required physical presence to qualify for citizenship because he was in the U.S. for more than half of the past five years. However, Kevin’s one-year absence interrupted his continuous residence, so that he needs to wait four years and one day after his return to meet the five-year continuous residence requirement and be eligible for citizenship.

Good Moral Character: Naturalization requires that the applicant be a person of good moral character for the period of required continuous residence. By statute and regulation, certain persons are precluded from establishing good moral character; this includes many individuals with criminal convictions. In certain situations, a criminal record may only bar an applicant from qualifying for citizenship until 5 years after the offense. In other situations, a conviction may constitute a permanent bar to establishing good moral character, and the application for citizenship listing the conviction may expose the applicant to removal proceedings. Other good moral character bars include smuggling and willful failure to support dependents. The regulations relating to good moral character for naturalization purposes are found at 8 CFR Section 316.10 and are included in the appendix to this chapter.

Oath of Allegiance (INA § 337): Naturalization applicants must take an oath of allegiance to the U.S., declaring their willingness to support and defend the U.S.. Persons who have religious or moral objections to military service may take a modified oath. The oath requirement is waived for persons who cannot understand the meaning of the oath because of a physical or developmental disability or a mental impairment.

Literacy and Knowledge of History and Government (INA § 312): All adult applicants, with one exception, must pass an exam showing basic knowledge of U.S. civics, and with a few exceptions, all adult applicants must show some ability to read, write, speak and understand phrases in English. Only the disabled are exempt from this requirement.

LPRs who have resided in U.S. for 20 years and are over age 50, or have resided in the U.S. for 15 years and are over 55 are exempt from the literacy requirement; they must still pass a civics test, but may do it in their own language.

Applicants who are over 65 and have been LPRs for 20 years are not required to read, write or speak English. They may take a simpler version of the civics test in the language of their choice.

Under the Hmong Naturalization Act, certain Laotian war veterans and their spouses or widows are exempt from the English language requirements and may take the simpler civics test available to LPRs over 65 who have had residency status for 20 years. This testing exception applies to soldiers and their spouses who applied for citizenship by November 26, 2001, and to widows who apply by May 1, 2002.

Disability Exception: Physically or developmentally disabled applicants are exempted from both the English and civics requirement. This exemption was created by the Immigration and Nationality Technical Corrections of 1994. Applicants must submit a “Medical Certification for Disability Exceptions” (Form N-648) to establish eligibility for a disability exception to the testing requirements.
A. Procedure

An application for citizenship is filed on Form N-400 (September 2013 Edition). The application should be mailed to the USCIS Service Center covering the state of residence of the applicant; interviews are scheduled by mailed appointment letters, and in many parts of the country there are considerable backlogs in scheduled interviews and swearing-in ceremonies. An application may be submitted up to 90 days before fulfilling the continuous residence requirement for naturalization.

B. New Form N-400 (Dated September 13, 2013)

In February 2014, USCIS released a revised Form N-400. The new form consists of 21 pages, which is significantly longer than the old 10-page form. The new form contains about 40 additional questions related to the following: good moral character, military service, group membership, and past involvement in terrorism, persecution, torture, and genocide. The new N-400 also includes some useful features that help identify eligibility for the English languages exemption and simplified civics test, and for derivative and acquired citizenship. Note that while the form has changed, the eligibility guidelines for naturalization did not change. Old forms are being accepted through May 2, 2014. After this date, only the new form dated September 13, 2013 will be accepted.

Practice Pointer: It is important to realize that an applicant for citizenship may expose information to USCIS in the application process that will cause DHS to institute removal proceedings. This will happen when USCIS discovers facts which may support a charge of deportability. For this reason, it is very important to refer an applicant for further legal counseling from an experienced immigration attorney or accredited representative if there is any concern that the application process may reveal problems about the applicant’s residency status.

IV. Derivation of Citizenship (INA § 320)

A. Overview and Requirements

Derivation of citizenship is when a child automatically becomes a citizen on the basis of one parent’s citizenship. The parent may be a citizen by birth or by naturalization. As with acquisition of citizenship, the laws have changed over time. Much depends on when the person was born and what law was in effect before the child turned 18 years old. With the passage of the Child Citizenship Act of 2000, a child automatically becomes a citizen when all of the following conditions are met:

- At least one parent is a citizen, either by birth or by naturalization;
- The child is under age 18;
- The child is not married;
- The child is a lawful permanent resident; and
- The child is in the legal and physical custody of the citizen parent.
Note: Derivation of citizenship does not apply where the USC parent is a stepparent.

Example: Ibrahim, age 10, is an LPR from Somalia who lives with his parents in Atlanta. They came to the United States as refugees in 2005. Ibrahim’s father recently became a U.S. citizen, but his mother is still an LPR. Ibrahim automatically derived citizenship from his father. Ibrahim’s sister Aminata, age 19, is also an LPR but she did not acquire citizenship because she was over age 18 when her father naturalized.

Example: Tuan, age 15, lives in Vietnam. His parents are divorced, and his father lives in the United States. When Tuan’s father became a U.S. citizen, he filed an I-130 to bring Tuan to the United States to live with him. When Tuan enters the United States in March of 2011 at the age of 16, joins his father (father has physical and legal custody), and receives LPR status, he will automatically become a U.S. citizen by derivation.

Example: Tricia, a 14 year-old from Ireland, immigrated to the U.S. with her mother Mary, through petitions filed by her mother’s USC spouse George. Even though Tricia is an LPR, under age 18, unmarried, and residing in the custody of her mother and stepfather George, she will not derive citizenship because her USC parent is a stepparent.

The effective date of the Child Citizenship Act was February 27, 2001. LPRs who turned 18 before this date may still have derived citizenship but only where both parents became citizens before their LPR child turned 18 or one parent with custody, in the case of death or divorce.

A. Documenting Derivation of Citizenship

Derivation of citizenship can be documented by applying for a U.S. passport or a certificate of citizenship. In general, it is easier, faster, and cheaper to apply for a U.S. passport than a certificate of citizenship. To get either of these documents, the derivative citizen will need to prove that s/he met the legal requirements that were in effect before reaching age 18.

Note: There is no deadline when applying for documentation of derivative citizenship. Derivation happens automatically, by operation of law.

Example: Maria is 30 years old, but she has lived in the United States as an LPR since the age of 5. When Maria was 10, both of her parents became U.S. citizens, and she automatically derived citizenship from them. She has been a citizen since the age of 10, even if she never applied for proof of citizenship nor was aware of her citizenship status.

C. NATURALIZATION OF CHILDREN

When a child of a U.S. citizen does not qualify for automatic citizenship by acquisition or derivation, a citizen parent may apply to naturalize the child. The parent applies for naturalization on the child’s behalf using Form N-600K. The process may only apply where the following requirements are met:
• At least one parent is a citizen, either by birth or by naturalization;
• The citizen parent must have lived in the United States for a total of five years, at least two of which were after age 14, or the U.S. citizen parent of the citizen parent (child's grandparent) must have lived in the United States for a total of five years, two of which were after age 14;
• The child is under age 18, and remains under age 18 until the naturalization process is completed;
• The child is not married;
• The child is residing outside of the United States in the legal and physical custody of the citizen parent; and
• The child is temporarily present in the United States under a lawful admission, and remains in lawful status until the naturalization process is completed.

The child does not become a citizen until the USCIS approves the application.

Example: Erika, an orphan from Thailand, was adopted by two U.S. citizen parents who went overseas after college as Peace Corps volunteers. After finishing in the Peace Corps, they decided to remain overseas and find permanent jobs there. Erika has never lived in the United States, so she is not an LPR. Therefore, she does not qualify for derivative citizenship. Erika’s parents first apply to naturalize her using Form N-600K, then apply for Erika’s lawful entry into the United States to attend the naturalization interview. They travel with her to the United States, then return with her to their home overseas. Later, Erika’s mother becomes pregnant and has a child, a boy named Adrian. Adrian acquires U.S. citizenship at birth through his parents.
CHAPTER TEN

BIA RECOGNITION OF NONPROFIT AGENCY OFFICES AND ACCREDITATION OF STAFF AT THOSE OFFICES

I. ORGANIZATIONAL RECOGNITION BY THE BIA UNDER 8 CFR § 292.2(B)

A. REQUIREMENTS

The requirements for agency recognition are the following:

- The organization must be a nonprofit religious, charitable, social service or similar organization
- The organization may charge nominal fees. Note, the definition of nominal is in the process of being revised but is now defined as very low amount.
- The organization must not charge excessive membership dues to persons receiving services
- The organization must have adequate immigration knowledge, information, and resources at its disposal
- The organization must have an independent existence apart from its proposed representative, i.e., the organization must be a legitimate nonprofit, charitable organization and not merely established to provide a means through which a non-lawyer can practice law. *Matter of Baptist Educational Services Center*, Int. Dec. 3210 (BIA, 1993).

B. PREPARING THE RECOGNITION APPLICATION FOR THE AGENCY OFFICE

The application packet should include the following:

- Completed form EOIR 31, request for recognition;
- Copies of the organization’s charter, articles, bylaws;
- Copies of a fee schedule;
- Statement and listing of the organization’s sources of funding;
- Statement of the knowledge and experience of the organization in immigration; and
- Helpful documentation includes: proof of tax-exempt status, a list of library resources of the organization, a description of staff structure, experience and supervisory system. Staff
resumes and letters of recommendation are also advisable. Note that applications should include copies of any training agendas for training sessions which staff have attended.

File the application at the BIA with a Certificate of Service showing that a copy has been sent to the district director.

II. INDIVIDUAL STAFF ACCREDITATION TO REPRESENT UNDER 8 CFR § 292.2(D)

A. ELIGIBILITY

The following are the requirements for staff accreditation:

- Must be applied for by a recognized organization or an organization which is applying for recognition at the same time;

- Must have experience and knowledge of immigration law, including attendance at one formal training providing an overview of immigration law. See Matter of Central California Legal Services, 26 I&N Dec. 105 (BIA 2013) (holding that CLINIC's 2-day training, "Introduction to Immigration Law Practice: A Course for New Practitioners" satisfied the BIA requirement that the applicant have completed at least one formal training course that was designed to give new practitioners a solid overview of the fundamentals of immigration law and procedure.)

- Must be of good moral character

B. TYPES OF ACCREDITATION

There are two levels of accreditation: (1) partial accreditation, where the staff member may represent people at USCIS interviews and examinations; and (2) full accreditation, where the staff member may represent people at USCIS, in Immigration Court, and before BIA.

C. PREPARING THE APPLICATION FOR INDIVIDUAL AGENCY STAFF ACCREDITATION

Assemble the following documents or take the following steps:

- Letter from agency director requesting partial or full accreditation of the staff member including statement that staff person has adequate experience and knowledge of immigration law and is of good moral character.

- Resume specifically documenting experience and knowledge in immigration law.

- Proof of participation in a formal training providing an overview of immigration law

- Letters of support are helpful.
• File the application at the BIA with a Certificate of Service showing that a copy has been sent to the local District Director.
CHAPTER ELEVEN

INITIAL INTERVIEWS

by Stephen Yale-Loehr*

I. INTRODUCTION

By the time an immigration attorney has practiced for six months, he or she has already spent countless hours interviewing clients. However, most attorneys, including those who have practiced law for decades, have little or no training in interviewing techniques. Often the typical interview is unstructured, reactive, largely intuitive, and rather ineffective. A well-structured, initial interview can save the new as well as the seasoned attorney many hours of time and lay the foundation for an effective client-attorney relationship.

II. PURPOSE OF THE INITIAL INTERVIEW

The initial interview is essentially a mutual evaluation of the attorney and the prospective client. At this consultation, potential clients decide whether legal services will be of use to them, whether they want to retain the services of the particular lawyer or firm, and whether the proposed terms and fees are satisfactory. The attorney gathers sufficient information to: (1) determine the goals of the client; (2) identify options for action in the case that correspond to the client’s goals; (3) establish the attorney-client relationship and the scope of the representation; (4) determine fees; and (5) set a short- and long-range agenda for the case.2

Some preparation can significantly increase the effectiveness of the initial interview. It is often helpful to spend a few minutes discussing the client’s situation over the telephone when setting the office appointment. This brief exchange has several benefits. First, it puts the potential client at ease and provides assurance that the attorney cares about the case. Second, it provides the attorney with sufficient information to instruct the potential client to bring necessary documents. For example, when the attorney determines that a client’s case may involve criminal issues, the client should bring copies of the criminal dispositions to the initial interview. If the client’s case will require documentation such as university degrees or other credentials, it is helpful to have at least some of the documents available at the initial interview.

* Updated from an article by Mr. Yale-Loehr appearing at 1 Immigration & Nationality Law Handbook 25 (2001-02 ed.).

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102
After the attorney speaks to the potential client on the telephone, he or she may decide to conduct some preparatory research about an obvious issue in the case. Even a limited amount of preparatory research suggests to the potential client that the attorney is knowledgeable and allows the attorney to identify the core facts and issues in the case more quickly.

III. MANNER AND METHOD OF THE INITIAL INTERVIEW

A. Establish Rapport

The first step in a successful initial interview is to establish rapport with the client. Rapport is the comfortable and unconstrained mutual trust and confidence that exists between two or more persons. An attorney can develop rapport with a potential client by acknowledging the client’s feelings and expectations, regardless of how inappropriate or unhelpful those feelings and expectations may be. The client’s expectations will be an important factor in the case in the long term, and identifying those expectations provides both a basis for initial rapport as well as important information for evaluation of the case. Establishing rapport assists the attorney in factually developing the case, increases the effectiveness of the attorney’s legal advice, and, on a broader scale, enhances the image of the legal profession.

B. Clarify the Attorney-Client Relationship

It is important that the attorney communicate the ethical obligations and the limits on the scope of the representation to the potential client.

1. Confidentiality—First, the attorney is more likely to obtain essential information if he or she advises the client that the information is confidential. An attorney is required to maintain confidentiality from the initial interview, throughout the representation, and after termination of the representation. The client may want the attorney to share information about his or her case with one or more family members or acquaintances. In immigration practice, this issue arises frequently where language barriers exist and the client communicates to the attorney with the assistance of third parties. The attorney must ask the client to identify the third parties to whom the attorney may communicate information about the client’s case.

2. Exception: Future Crimes—Attorney-client communication may not be covered by the confidentiality rule if the client informs the attorney that he or she intends to commit a crime. This situation may force the attorney to consider whether he or she has an ethical obligation to withdraw from representation. As confidentiality rules vary among jurisdictions, attorneys should check the rules of individual states for definitive guidance.

3. Fraud Issues—In some cases, the attorney may suspect that the client is not telling the truth or is seeking to procure a benefit by fraud. An attorney may develop suspicion based on statements, inconsistencies in the client’s story, or nonverbal cues. A suspicion of fraud may also arise where the client appears to block communication between the attorney and the other

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5 Cross-Cultural Counseling, supra note 2, at 1481.
6 See generally Professional Responsibility Issues in Initial Interviews, supra note 1.
parties in a multiple-party case, such as the spouse in an adjustment case based on marriage, or the employer in a labor certification case. Attorneys should advise the client of the consequences of fraud, including possible withdrawal of representation. Some attorneys advise their clients in writing of the potential consequences of intentional misrepresentation.

4. **Scope of Representation**—When representing clients from other countries, it is important for attorneys to anticipate that a client may hold misperceptions of the role or power of an attorney in the U.S. legal system. For example, potential clients may expect that attorneys are willing and able to commit acts such as exerting undue influence over Immigration and Naturalization Service (INS) officials or immigration judges. At times, a potential client may ask a lawyer to commit illegal acts such as bribery or fraud. Conversely, in some societies attorneys are viewed as part of a repressive legal system rather than as the advocate of the client. It is important that the attorney explain the limits of legal representation to establish trust and to avert the possibility of misunderstandings.

C. **Gather Facts**

1. **General Techniques**—The substance of the initial interview is the fact-gathering component where the attorney prompts the client to talk while at the same time focusing the interview to elicit the most relevant facts. The attorney should be in control of the interview but also allow the client to “tell his or her story” before establishing all of the essential facts. The technique of empathetic listening is a critical tool for a lawyer. For example, if the attorney feels that a prospective client is digressing, he or she might say, “That might be important for later, but right now we need to address….” In this way, the attorney is able to reassume control of the interview while at the same time indicating to the client that he or she is committed to ensuring the successful outcome of the case.

During the course of establishing rapport with the client, the attorney should observe the demeanor of the client and decide whether to conduct a client-directed or attorney-directed interview. In the client-directed interview, the client tells the entire story and then the attorney follows up with questions. This method is effective with clients who are sophisticated and well-organized, and also with clients who are emotional or very nervous. In the attorney-directed interview, the attorney questions the client. This method may be preferred where the client is reticent or inarticulate. Often, the ideal interview technique is a combination of these two styles, where the client begins to provide information and the attorney steers the direction of the discussion.

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12 Id.

Regardless of the technique, attorneys should be careful not to prejudge the legal theory of the case and thereby cut off important lines of factual inquiry. After the client has disclosed sufficient facts to establish a legal theory of the case, the attorney should follow up with further relevant questions.

2. Immigration-Specific Issues—Under the current immigration system of restrictive laws and strict enforcement, several factors are critical in every immigration case. Practitioners should make every effort to determine any past criminal history of all clients. Under the U.S. immigration law, a number of crimes that may seem minor to clients, such as domestic violence, driving under the influence, or shoplifting, may have significant immigration consequences.14

Similarly, due to the bars to admissibility based on past immigration violations, it is important that the attorney determine the presence of any previous immigration history and periods of unauthorized presence in the client’s case.

D. Retain the Information

It is essential that the attorney note all of the client’s important information. There are a number of techniques for effective retention of information for a client’s file. One is the client intake sheet that the client completes before the interview. Another is note-taking on paper or computer. Many attorneys find it helpful to develop customized standard intake questionnaires or checklists to record basic information and then ask clients to sign the document at the end of the interview.

E. Barriers to Communication in Initial Interviews

Immigration practitioners often experience barriers to effective client communication that are unique to the practice.

1. Language—Clearly an interview is more difficult to conduct where the attorney and the client do not speak the same language. There are several ways to overcome the language barrier. One is to ask the potential client to bring a family member or other interpreter to the initial interview. If many of an attorney’s clients speak a certain language, he or she may choose to employ someone who speaks that language to interpret in client interviews.15

Even if the attorney and the client speak the same language, there still may be communication difficulties. For example, the client may not understand complex concepts inherent in immigration law. The attorney may use words that are unfamiliar to the client due to the client’s geographic area of origin, age, or socioeconomic status. Conversely, the client may use terminology that the attorney does not understand. The attorney can reduce the impact of these misunderstandings if he or she is attentive to nonverbal cues that indicate that the client may have misunderstood.16 For example, a client may appear restless, bored, confused, or lost if he or she is having trouble understanding what the attorney is saying. To help alleviate this feeling of discomfort and facilitate the client’s understanding of the case, the attorney might

16 Guide to Better Client Interviews, supra note 8, at 3.
ask, “Does this make sense to you?” periodically to make sure the client understands and to reduce the client’s feeling of being confused, intimidated or threatened.

2. **Cultural Barriers**—Immigration practice often pairs attorneys and clients of different cultures. The differences between the two parties may lead to cultural barriers other than language that inhibit effective attorney-client communication. Value conflicts can impede communication where the client or the attorney does not understand the reason that the other adheres to certain value constructs. Stereotyping can occur where the client or attorney applies a rigid preconception based on membership in a racial or nationality group to the other party regardless of individual variation. Bias occurs where one of the parties has a prejudice or tendency toward a particular matter based on personal experience. Not recognizing one’s own prejudices is ethnocentrism, i.e., viewing the world only through one’s own eyes with one’s beliefs, values, and attitudes and not acknowledging that others may not see the world in the same way. In general, the attorney should examine his or her own prejudices and work to minimize their clouding effects.

3. **Trauma**—Any legal client may require emotional support at some time, but in some immigration cases, fear and trauma may become a significant factor in the attorney-client relationship. First, many clients undergoing removal proceedings and other types of immigration proceedings experience tremendous stress. In some cases, past or present experiences can lead to trauma, a condition where an individual experiences intensely unpleasant feelings associated with crisis experiences. Trauma may pose a barrier to effective communication, particularly in cases where the client has symptoms of disorders such as post-traumatic stress disorder or concentration camp syndrome, resulting from torture or extended detention. These types of conditions may lead to failing memory, inability to concentrate, intense fear, helplessness, and emotional instability. It is often helpful both for the client’s mental health as well as for attorney-client communication to refer such clients to a psychologist or psychiatrist for further evaluation.

An issue of concern when dealing with a person experiencing the results of trauma is that the potential client may see the legal counselor as therapist or emotional confidant. For attorneys, it is vital to recognize the fine line between caring legal advice and therapy. Legal counseling is geared toward the resolution of specific and immediate problems, not long-term therapy. In these types of situations, it is advisable for the attorney to express sympathy for the client’s situation but not attempt to deal with complex, emotional issues that require professional

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assistance. In some cases, the attorney should recommend a mental health professional to help alleviate emotional problems. Many communities have referral lists of professionals and peer support groups that address these types of issues. A referral to a mental health professional for an emotionally troubled client will help to clarify the attorney-client relationship, take some pressure off the attorney, and potentially result in long-term benefits to the client.\(^{24}\)

4. **Special Barriers: Children, Elderly, and the Mentally Ill**—Certain clients, including those who are children,\(^{25}\) elderly, or mentally ill or disabled, present additional barriers to effective communication. It may be more difficult for the attorney to explain the case to the client. There may be legal issues with respect to the client’s ability to give consent. There are a number of techniques that can assist the attorney in overcoming these particular barriers. In certain situations it may be necessary to consider the appointment of a third party to represent the client’s interests, such as a guardian ad litem or a conservator. Attorneys should consult with the rules of the appropriate state to be advised of ethical restrictions governing such appointments.

F. Evaluate the Case

1. **Review Relevant Facts**—After the attorney and the client have had the opportunity to discuss the situation, it is time for the attorney to do a preliminary evaluation of the case. A preliminary evaluation begins with a review of the relevant facts. A review of the facts allows the attorney to double check the accuracy of the facts and elicit any final necessary details.

2. **Explain the Law**—Next, the attorney should explain the relevant law to the client. A well-educated and informed client is the attorney’s most valuable asset in developing relevant facts and documentation. An understanding of the case will allow the client to be an active participant in the process and to provide informed consent.\(^{26}\) A client who has a grasp of the legal theory of his or her case will best be able to assist the attorney in identifying important facts in the case and is likely to be a more effective witness. Of course, it is necessary to explain the legal parameters in language and concepts that are comprehensible to the client.\(^{27}\) It is often helpful to use real-life metaphors or analogies to the client’s line of work. The attorney should encourage the client to ask questions.

3. **Identify and Rank Goals**—After explaining the law the attorney should establish the preferred goals of the client. In immigration cases, it is critical that the attorney identify what

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\(^{27}\) See generally T. Shaffer, Legal Interviewing and Counseling in a Nutshell 46–49 (2d ed. 1987).
the client really wants from the case. For example, in a removal case, some clients wish to remain in the United States as long as possible with permission to work, regardless of the long-term legal consequences. Other clients may wish to return to the country of origin with minimum expense and legal complications.

In the business immigration context, some clients may wish to work in the United States for only a few years without worrying about future visas or permanent immigration. Other clients may have a high priority to leave open all possible routes to future permanent residence.

In some cases, the initial interview is also the only meeting, and the interview serves as an informational consultation where the parties decide that the client will gain no significant benefit in retaining an attorney. In each case, the final decision must reflect the goals of the client. A letter indicating that the attorney no longer represents the client may be useful to avoid any misunderstandings.

4. **Create Realistic Expectations and Identify Risks**—Along with understanding the specific needs of each individual client, the attorney should explain the risks involved in the proposed course of action and create realistic expectations. For example, it is to the attorney’s benefit to forewarn the client about possible delays in the labor certification process or the risks associated with failing to disclose material information. In addition, the attorney must avoid making promises that he or she cannot or will not keep.

5. **Choose Strategy Toward the Solution**—Based on the analysis of the facts within the legal framework, the assessment of the client’s goals, and the discussion of potential risks, the attorney and the client need to determine the best solution to the problem. It is important that the attorney does not make personal or legal decisions for the client. For example, it is not appropriate for the attorney to advise a foreign student to marry his U.S. citizen or permanent resident girlfriend, although the lawyer can advise the client on the legal consequences of the decision.

There is debate in the legal community regarding whether the attorney or the client should be the primary decision-maker. A concept that has gained some popularity is “client-centered counseling,” which emphasizes client-centered decision-making. 28 While a client-centered approach deprives the attorney of some autonomy and authority, its proponents argue that it significantly increases client participation and satisfaction. In any case, the direction the case ultimately takes must reflect the client’s priorities.

6. **Outline the Course of Action**—After the attorney and client have made the preliminary assessment and set the direction for the case, the final step at the initial interview is to identify the responsibilities of the attorney and client to further the case. The attorney will likely need to conduct further analysis and research. In most cases, the attorney should provide the client with a list of documentation and other evidence that the client needs to obtain. The attorney and client should agree on a realistic time frame to which the attorney should adhere.

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IV. FEES AND RETAINER AGREEMENT

Whether or not the client articulates it, one of the most important factors to every potential client is the cost of legal services. It benefits both attorney and client to establish a clear understanding of fees for the case at the first interview. Many attorneys choose to use written retainer agreements to provide clarity regarding the scope of the legal services and the fees for those services. However, some clients may be intimidated by the complexity of a retainer agreement, particularly if the client is not proficient in the language of the agreement. In this type of situation, the attorney should review the contents of the document with the client before signature.

Some states require written retainer agreements and regulate the contents. Attorneys should consult with the local bar association regarding specific rules.

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29 See Professional Responsibility Issues in Initial Interviews, supra note 1, at 1467.
CHAPTER TWELVE

LEGAL AUTHORITY, LEGAL RESEARCH, AND CITATION TO AUTHORITY

I. AUTHORITY IN IMMIGRATION PRACTICE

Trang Nguyen, a Vietnamese woman who is a lawful permanent resident (LPR), comes to you for help. She has tried to file an immigrant visa petition for her adopted daughter, Mai. The U.S. Citizenship and Immigration Services (USCIS) denied the petition because Mai was not legally adopted here in the U.S. Trang brings you proof that the adoption was considered legal in Vietnam. How do you find some law to support Trang’s position, and how do you present this argument to the USCIS?

A. What is Legal Authority?

One word that frequently pops up when doing legal work is the word “authority.” This concept is very important, as authority can be a strong ally and can also help you clear up questions about the law. You should know what authority is and not be afraid to use it to support you in your cases.

After you have gathered the facts from the client about his or her legal problem, the next step is to search for the law that might apply to that set of facts. This may sound easier and more straightforward than it actually is, because there are a number of sources for “the law” for immigration problems.

The law can be written down in laws called “statutes” or “acts.” It can be found in rules called “regulations” written by the agency involved (such as the USCIS, the Department of State, or the Department of Labor), or even in the agencies’ own internal operating instructions. The law can also be found in written opinions of courts and agencies, known as “cases” or “decisions.”

Any of these sources of the law is “legal authority.” That means that these sources can be used (“cited”) by you in support of your position in a legal argument. What makes a legal argument different from any other type of disagreement is that to win, one must persuade a decision-maker that your idea of what the law says is correct. To persuade him or her, you must not only tell him or her what you think the law is, but also what legal authorities back up your argument.

Example: Using the example of Trang’s problem with the adoption, the argument is over whether Mai was adopted in a manner that USCIS will recognize as legal. You

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1 These materials are excerpted from Units 8 and 9 of A Guide for Immigration Advocates, by the Immigrant Legal Resource Center. CLINIC thanks the ILRC for allowing us to use these excellent materials.
position in the argument would be that USCIS should recognize it as a legal adoption. The next step is to locate some legal authority that supports this position. You search the statute and the regulations and find nothing that applies. But you find a case decided by the Board of Immigration Appeals that says that the adoption must conform to the laws of the place where the adoption occurred to be recognized by USCIS. You see that this supports Trang’s position because she can prove that the adoption, which took place in Vietnam, was legal in that country. Your authority in support of this argument is the case decided by the Board of Immigration Appeals.

B. Distinguishing Primary Law Sources from Secondary Research Sources

The only sources that can be considered legal authority in support of arguments are those sources of law which have been created in some manner that our legal system has approved. This would include the Constitution, statutes, regulations, and cases published by the courts in order to be cited as law.

It does not include other books that may be very helpful for research, such as the Immigration Law Sourcebook, by Ira J. Kurzban, Gordon & Mailman’s Immigration Law and Procedure, and books written by other authors or publishers. These other books that analyze or index statutes, regulations, and cases are considered “secondary” materials, which means that they are only the author’s opinion about the law. These secondary materials are very helpful for researching the law, because they can tell you where to find the primary sources of law. So use secondary sources for your research, but do not cite to them in a legal argument.

C. Hierarchy in Legal Authority.

Among the different sources of law, there are some sources that are more powerful than other sources. You could think of it like a pyramid with the more powerful authorities on top. This is true in both the written rules and in cases. This hierarchy is most important where there are contradictory statements of law from different sources. Then you must decide which is the more powerful source.

In written rules, you have the following levels of authority, starting with the highest level:

- The Constitution of the United States
- Immigration Laws
- Regulations of the USCIS, DOS, and DOL
- Internal operating instructions (for example, the USCIS’s Internal Operations Instructions and the Department of State’s Foreign Affairs Manual).

D. Sources of Legal Authority - the Constitution

The Constitution is the “supreme law of the land.” All the laws in the United States must conform to the Constitution. If a law goes against the Constitution, a court can strike down the
law as “unconstitutional.” The Constitution is a higher level of authority than statutes or regulations.

The Constitution gives virtually unlimited power to Congress to decide who is allowed to immigrate and who should be deported, and it is very difficult to get a court to declare that type of immigration law unconstitutional. As a consequence, any exception, classification, or arbitrary cut-off made in an immigration law, such as a law that makes citizens of one country wait longer for immigrant visas than other countries, will most probably not be found unconstitutional.

The Constitution does protect people from unfair procedures in immigration law. For this reason, removal proceedings must be fair. You can often trust your own reaction to a particular regulation or procedure. If it seems unfair or wrong to you, you should contact an immigrants’ rights resource center, such as CLINIC, to investigate its legality.

E. Sources of Legal Authority - Statutes (The INA)

The next level down of authority after the Constitution are the laws or statutes passed by Congress that control immigration. Almost all of the laws controlling immigration and naturalization are collected in one place in the Immigration and Nationality Act (or “INA”). The same laws are also indexed in Title 8 of the United States Code.

All advocates should have an up-to-date copy of the Immigration and Nationality Act and get into the habit of checking it regularly.

Other federal laws that are somewhat related to immigration are found in other locations in the United States Code.

F. Sources of Legal Authority - Regulations

Regulations are rules devised by the government agency involved to interpret the laws. Their purpose is to clarify the laws and set the procedures. While the INA tells you what the law is, the regulations fill in details and tell you how the USCIS is going to apply the laws.

We spend most of our time working with the regulations issued by USCIS and the EOIR (both are parts of the Department of Justice) that deal with applying and enforcing the INA. These regulations are found at Title 8 of the Code of Federal Regulations. We also consult regulations issued by the Department of State (which issues visas abroad) and the Department of Labor (which issues labor certifications and labor attestations for employment-related visas).

At times, a regulation may conflict with the statute or the Constitution. In this case, a court can strike down the regulation since statutes and the Constitution are higher authority than a regulation.
Advocates should have a current copy of Title 8 of the Code of Federal Regulations.

G. Sources of Legal Authority - Internal Agency Operating Instructions

At the bottom of the authority levels are the operating instructions of the various agencies that deal with immigrants (the USCIS, the Department of State, and the Department of Labor). These are internal instructions to the employees of the agency. Their purpose is to instruct the employees on agency protocol and practice. Some are numbered and put out in a collection in books, for example, the Foreign Affairs Manual of the Department of State and the Adjudicator’s Field Manual of the USCIS. They may also be issued in policy memoranda by the government agency.

As with the regulations, internal operating instructions must conform to the law. However, they have not always been held by courts to be enforceable in court on the government agency.

H. Sources of Legal Authority - Cases

The basic outline of our immigration law is written up in the form of statutes and regulations. But, in addition to these rules, the law is also found in a system of case decisions written by various courts, from the Board of Immigration Appeals to the United States Supreme Court. To be able to advise clients, even if you never write a legal “brief,” you need to know how and why case decisions (also known as “case law”) become part of the law.

The law in our court system is to a large extent based on similar cases that were brought before. That is, ideally the judges want all decisions with similar facts to have the same outcome. To keep track of how similar cases were decided, the judges publish certain decisions which legal workers can research. In theory, only the decisions that raise new issues will be published. These decisions then become “precedent,” which means decisions that other judges must follow in a similar case. Thus, although many cases end with a written decision, not all of these decisions get published and become the law.

Example: The Board of Immigration Appeals decides thousands of cases per year. They choose only about thirty per year to publish as precedent decisions. You have a case on appeal to the Board. One of the Board’s decisions that was not published has almost exactly the same facts as your case and was decided in favor of the appellant. Can you use the unpublished BIA case in your argument? Can you make the Board follow the decision in the case?

The rule is that you cannot cite unpublished cases because only published decisions are the ones that must be followed. You may still attach a copy of the unpublished decision, telling the Board that you realize it is not precedent, but that the Board should refer to it as “guidance.”
Case decisions are often used to interpret the statutes and regulations. For example, the INA states that a person must demonstrate that his or her removal would cause “exceptional and extremely unusual hardship” to qualify for cancellation of removal. INA § 240A(b)(1). But what facts might be considered “extremely unusual hardship”? To determine this, one looks at published case decisions that found that a person with similar facts did show extremely unusual hardship. With each case they decide, the courts further define the meaning of the statute or the regulations.

II. THE COURTS SYSTEM

In this part of this chapter, we will discuss the different types of courts that make decisions on cases involving immigration; the difference between judicial and administrative courts, and how some courts can overrule others. This is critical information for understanding how decisions in case affect immigration law as well as how to appeal negative decisions made against our clients. When we appeal a decision, we ask a higher court or body to review a decision that we think was incorrect.

Example: USCIS denied the visa petition that Trang Nguyen filed on behalf of her daughter Mai. You are convinced that USCIS made the wrong decision. In this type of case, you would file an appeal to the Board of Immigration Appeals (BIA). The BIA is a higher authority than the USCIS. You are asking the BIA to reverse (eliminate) USCIS’ decision and grant the visa petition.

There are actually two systems of courts, a state court system that handles most cases based on state laws and the federal system that handles cases involving national (federal) laws. Immigration cases are almost always in the federal court system because the immigration laws are federal laws.

A. Overview of Administrative and Judicial Review

Within the federal courts system, there are two types of courts: administrative courts or administrative review bodies, and judicial courts.

Administrative courts are courts set up by an administrative agency, like the Department of Justice or Department of Labor. Administrative courts are not as formal as judicial courts. They have their own rules and procedures, and most administrative courts permit accredited representatives to practice before them.

The Immigration Courts are administrative courts that are part of the Department of Justice, under the supervision of the Attorney General. The “Executive Office for Immigration Review,” or EOIR, includes the immigration courts, which hear the cases, and the Board of Immigration Appeals, which decides cases that have been appealed.

Administrative review bodies are offices within an administrative agency that decided appeals from decisions of the front-line agency staff. The administrative review body within the USCIS is called the AAU (Administrative Appeals Unit). 8 CFR §§ 103.3(a)(1)(iv), 103.3(a)(2).
The administrative review body within the Department of State dealing with visa decisions is the Visa Office, which can review some decisions to deny visas made by the U.S. consulates. 22 CFR Part 41.121(c) and 42.81(c).

The federal judicial courts consist of the United States District Courts, which are the local trial courts in the federal system, the United States Circuit Courts of Appeals, which hear appeals from the District courts and some administrative agencies, and the United States Supreme Court. The decisions of the Supreme Court apply to the entire United States, but the decisions of the District Courts and Courts of Appeals usually apply only in their own geographic district.

The judicial courts are more formal than the administrative courts. Only attorneys who have been admitted to practice before those courts may represent clients in those courts.

**ADMINISTRATIVE COURTS AND JUDICIAL COURTS REVIEW BODIES**

<table>
<thead>
<tr>
<th>Immigration Court</th>
<th>U.S. District Courts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Board of Immigration Appeals</td>
<td>U.S. Circuit Courts of Appeals</td>
</tr>
<tr>
<td>USCIS Administrative Appeals Unit</td>
<td>U.S. Supreme Court</td>
</tr>
</tbody>
</table>

**B. Administrative Appeals of Immigration Cases**

It used to be that almost all decisions to deny immigration benefits could be reviewed at both an administrative level and in the federal judicial court system. In the past few years, and especially with the passage of IIRAIRA in 1996, Congress has eliminated review entirely for some types of cases and limited review for others. Most of the serious limits to immigrants’ rights to review of their cases came in the area of judicial review, but the area of administrative review has also been affected.

It appears that one group not provided any administrative appeal and extremely limited judicial review are persons who are removed under the expedited removal proceedings permitted in INA Section 235(b). The statute states that an USCIS officer can remove these persons without further hearing or review, except for persons applying for asylum who demonstrate a credible fear of persecution. Even these persons are provided only limited review.

Administrative decisions by the Immigration Courts, outside the area of expedited removal, are appealed to the Board of Immigration Appeals. Some administrative decisions by the USCIS are appealed to the Board of Immigration Appeals, while others are appealed to the USCIS’ Administrative Appeals Unit.

**C. Types of cases reviewed by Administrative Bodies.**

*Board of Immigration Appeals.* The BIA has appellate jurisdiction for the following types of cases:

- Immigration Judge decisions in removal proceedings;
• Relative visa petition (I-130) denials and revocations of approval;
• District Director decisions on nonimmigrant visa waivers under INA § 212(d)(3);
• Bond, parole, or detention decisions by the Immigration Judge;
• District Director decisions on fines and penalties to transportation lines;
• Immigration Judge decisions on rescission of adjustment of status;
• Immigration Judge decisions on asylum applications filed by certain persons not entitled to full removal proceedings;
• Decisions of Immigration Judges relating to temporary protected status;
• Decisions on applications from organizations or attorneys requesting to be included on a list of free legal services providers and decisions on removals from the list; and
• Decisions of the Immigration Judge on applications for NACARA Section 202 or HRIFA adjustment of status.

8 CFR § 3.1(b)(1-12).

USCIS Administrative Appeals Unit. The AAU has jurisdiction over appeals for 38 types of applications. 8 CFR 103.1(f)(3)(iii). Among the most common types are:

• Bond breach;
• Adjustment of status of Indochinese refugees;
• Permission to reapply for admission after removal;
• Waivers under INA § 212(h) or (i);
• Applications for reentry permits;
• Applications for refugee travel documents;
• Applications for certificates of citizenship, naturalization, or repatriation;
• Applications by organizations to be listed on the free legal services list;
• Orphan petitions and advance precessing of orphan petitions;
• Applications for temporary and permanent status under the legalization programs of the Immigration Reform and Control Act.

III. CASE CITATION

A. Understanding the Code - the Case Citation System

The decisions in cases constitute an important source of the law in immigration. Citation to cases in legal argument must conform to a certain pattern or “code.” This code is actually very easy to learn.

Example: An immigration case decided by the Board of Immigration Appeals is cited as: Matter of Frentescu, 18 I & N Dec. 244 (BIA 1982).

Every case citation starts with the name of the person or persons involved in the lawsuit.
In administrative immigration cases such as the example above, only the respondent or applicant’s name is used. The cases are usually referred to as “Matter of [the person’s name].” Most cases in judicial courts include the names of both parties, such as “Smith v. Wright.” This part of the case citation is underlined.

The first set of numbers in a citation refers you to the number of the volume in the set of books, or “reporters,” in which you will find the decision. In the Frentescu example above, 18" is the number of the volume of BIA decisions that contains the decision.

The abbreviated letters that appear after the first number tell you which set of books you should look in to find the case. There are a number of agreed-upon abbreviations for different sets of decisions, some of which are listed below.

For example, the abbreviation in the Frentescu example above is “I & N Dec.” This is an abbreviation of Immigration and Nationality Decisions,” an official set of books containing the precedent decisions of the BIA, the AAU, and the USCIS Regional Commissioner (forerunner to the AAU).

Following the abbreviation that tells you the set of books is another number. This number is the page number in the volume where the decision starts. In our example, you would turn to page 244 of volume 18 of the Immigration and Nationality Decisions to find the Frentescu decision.

Finally, you will find in parentheses an abbreviation which tells you what body issued the decision you are reading and in what year the decision was issued. In our example, “(BIA 1982)” tells you that the Frentescu decision was issued by the Board of Immigration Appeals in 1982.

The same basic information appears in a citation of a federal court case.

[name of party/parties]
National Center for Immigrants’ Rights v. INS

[set of books] [page number] [who decided case] [year decided] 743 F.2d 1365 (9th Cir. 1984)

B. Guide to Citations in Administrative Decisions

The major source of administrative decisions is the I & N Decision, discussed above. While we concentrate on decisions by the Board of Immigration Appeals (BIA), the I & N Decisions include decisions made by several administrative bodies. The citations may say, for example, “(Reg. Commr. 1964)” or “(LAU 1988),” meaning that those decisions were made by the Regional Commissioner and the Legalization Appeals Unit.

New volumes of the I & N Decisions come out only once every few years. Therefore, there must be a method for citing the cases decided before the appear in a new volume. All
precedent decisions, before a new volume appears, are known as “Interim Decisions” and they are each given a number. This does not mean that they are not final decisions. Interim Decisions have the same legal weight as all other decisions in the I & N Decisions.


Once an Interim Decision is published in a new volume of the I & N Decisions, you cite it by its volume and page number in the I & N Decisions and not by its former Interim Decision number.

The system of interim decisions for the BIA will change in the near future, because the Board of Immigration Appeals has announced that it will soon begin issuing all decisions, even ones that are not yet included in an I & N Decisions volume, with the final I & N Decision volume and page number.

C. Guide to Citations in Judicial Decisions

The citation form for cases decided by the federal courts is similar to that for BIA decisions.

1. U.S. District Courts

The decisions of these local federal trial courts are collected in a set of books called the Federal Supplement. It is abbreviated F. Supp. in a citation. Because it includes decisions from U.S. District Courts all across the United States, it is necessary to include in the citation the abbreviated name of the court that decided the case. For example, in Varga v. Rosenberg, 237 F. Supp. 282 (S.D. Cal. 1964), the “S.D. Cal.” tells you that the case was issued by the United States District Court for the Southern District of California.

2. U.S. Circuit Courts of Appeals

The decisions of these appellate courts are collected in a set of books called the Federal 2nd or Federal 3rd. It is abbreviated F.2d or F.3d in a citation. The set of books called “F.2d” or “F.3d” includes cases from all the Circuit Courts of Appeals in the United States. To designate which of those decided the case, the citation includes an abbreviation for the number of the Circuit Court that issued the decision. For example, in Mashi v. INS, 585 F.2d 1309 (5th Cir. 1978), the “5th Cir.” tells you that the case was decided by the United States Court of Appeals for the Fifth Circuit.

3. United States Supreme Court

The official set of books for decisions of the Supreme Court are called United States Reports. It is abbreviated U.S. in a citation. If a case is cited as being in the “U.S.,” you know that the Supreme Court decided the case. For example, Taylor v. Alabama, 335 U.S. 252 (1947). While the official citation for the Supreme Court decisions if the “U.S.” one, there are two other sets of books which also publish Supreme Court decisions. These are the Supreme Court
IV. CITATION TO STATUTORY AND REGULATORY AUTHORITY

8 CFR § 245.5(b)(2) - If this is just a lot of numbers and letters to you, the next part can help unravel the mystery of finding and citing the law.

A. Citing the Immigration and Nationality Act

The Immigration and Nationality Act (INA) contains all the basic laws on immigration. It can be located either in a booklet that contains only the Act or in a volume called Title 8 of the United States Code (U.S.C.). The United States Code is a compilation of all the laws, and most of the immigration-related provisions are covered in Title 8.

The citations for the INA and Title 8 are different. For example, the citation for the section on adjustment of status would be cited “INA § 235,” but “8 U.S.C. § 1255.” Most copies of the INA will also give you the parallel cite to Title 8.

Most work done by accredited representatives is in the administrative courts, where the INA citation is used more commonly than the USC citation. For cases in the federal courts, the USC citation must be used. When you cite to a section of the statute in written legal argument, you must specify whether you are using the INA or the USC cite.

In the citation “8 USC § 1255,” the first number (“8”) is the number of the volume, the next part - “USC” - tells you what book it is (here, the United States Code), and the last number (“1255”) is the section number of the title.

B. Citing the Code of Federal Regulations

The immigration-related regulations are found in various “titles,” or books, of the Code of Federal Regulations (“CFR”). Most of the immigration regulations are found in Title 8 of the Code of Federal Regulations, but regulations governing the Department of Labor are found in Title 20, and regulations relating to the Department of State are found in Title 22.

The citation form for the regulations is similar to that used for Title 8 of the USC. For example, the citation to the regulation governing who is authorized to represent people before USCIS and the EOIR is “8 CFR § 292.4.” The first number is again the “title,” or volume; the “CFR” is the abbreviation for Code of Federal Regulations; and the “292.4” is the section number.

When an agency wishes to change its regulations, it is first required to publish the proposed change in a government publication called the “Federal Register.” Usually before a proposed regulation becomes law, the agency must allow a certain amount of time to pass for the public to comment on the proposed regulation. It must then consider any comments received,
and then can publish the regulation again in the Federal Register as a “final rule.” Copies of the Federal Register are available in most county or law school libraries, and the Federal Registers from 1995 to current are on the Internet at www.access.gpo.gov.

WARNING! The regulations change much more frequently than the Act, so be sure that you get a new book of regulations every year and subscribe to a service that updates your regulations more frequently. A listserv distributed by Charles Wheeler of CLINIC advises its recipients of updates to the CFR.

C. Other Primary Sources - Internal Operating Instructions

The internal instructions to USCIS personnel are contained in the “Operations Instructions.” They are cited as, for example, O.I. § 241.2b. The Operations Instructions can be downloaded from the USCIS website. That address is included in the attached list of internet resources, at Appendix A to this chapter. The O.I.s are also found in the Appendix to the treatise Immigration Law and Procedure, by Gordon and Mailman, which is found in some law libraries and many private immigration law offices.

The internal rules for granting visas for the U.S. consulates abroad are contained in the “Foreign Affairs Manual.” An example of the citation form for it is: F.A.M. § 41.31, N9. You can download the Foreign Affairs Manual from the USCIS website, at the address in Appendix A. The appendices to the Immigration Law and Procedure treatise also contain a copy.

V. LEGAL RESEARCH

Subject indexes are one useful way to start your legal research. The Immigration and Nationality Act and the Code of Federal Regulations published by the Government Printing Office do not contain subject indexes. This makes it very difficult to find the section of the law or regulations on a specific subject. Commercially published editions of the Act and regulations, such as the pamphlets published by Bender’s, do contain subject indexes and are easy to use. The entire United States Code also has a volume containing a subject index for the entire set of books.

A much easier research method is to first use secondary authority to find the correct section number. These secondary source books are often the fastest way to find where an issue is covered in the primary sources - statutes, regulations, cases, and internal operating instructions. They can also give you a summary of the law on any point that is sometimes easier to understand than just reading the statute or regulations. An excellent book for this purpose is the Immigration Law Sourcebook, by Ira J. Kurzban, which gives an overview of immigration law, including citations to cases, statutes, regulations, and agency policy and also contains a good subject index. Using secondary research books with a good index is much more efficient than searching through regulations and statutes without an index.

Almost all good secondary research materials have a subject index. The index is usually found in the back of the book, but may be in the front or even in a separate volume. Some research books will also contain an index listing all the references to sections of a statute or regulation. This is useful if you know the section of the regulation or statute and you want more
information on what it means or names of cases that have interpreted it. Some books also have a Case Index that lists all the cases referred to in the book.

The EOIR maintains a “Virtual Law Library” on its website. This “library” contains the BIA precedent decisions, including a subject index. It also contains new legislation regulations.

The USCIS website contains the entire Code of Federal Regulations and the entire Immigration and Nationality Act. The addresses for these websites are included in Appendix A to this chapter.

Computer-based materials, whether on-line like Lexis and Westlaw or on CD-Rom, have the distinct advantage of enabling you to do quick and thorough searches using key words. The on-line services may be priced prohibitively for many advocates, but the CD-Rom versions of statutes and regulations, often with other secondary source books thrown into the bargain, are more affordable.

Many books will also have a system for updating when changes in the law occur. You should always check the date of the materials that you are using. If the book is out of date and it does not contain an update, you should either use another book or be sure to double-check any information that you take from that source. Even books that are updated regularly cannot stay completely up to date because the updates are generally published once a year or every six months, but changes in the rules or practice can occur in the meantime. To keep current, every office should subscribe to Interpreter Releases, a weekly publication discussed below, and read and file the newsletter and any information sent out by organizations like the Catholic Legal Immigration Network, the National Immigration Law Center, or other legal centers.

Practical Tips for Legal Research

- Always check the backs of the books to see if there is an index.
- If there is no index, check the front for a table of contents.
- Learning the language used by legal workers will help you find what you need. For example, “immigrant visa,” “non-immigrant visa,” and “adjustment of status.”
- Learn how to find the most recent materials in the Update or Revision materials, if they are updated.
- Once you find the information that you seek, make notes of where you found it for later reference.

VI. GAINING ACCESS TO LIBRARY MATERIALS

Most nonprofit organizations are unable to afford a full library of legal materials. Accredited representatives should have current copies of the INA and Title 8 of the Code of Federal Regulations. There are several ways to gain access to other materials.

The first and often most convenient way to access immigration materials is through the Internet. Two particularly good websites are those maintained by the Executive Office for
Immigration Review and the USCIS. The EOIR website contains or has links to the BIA precedent decisions, information about new legislation, regulations, and programs, the INA, and the Department of State Country Reports on Human Rights Practices. The BIA precedent decision information on this website is particularly helpful, because it contains both a subject index and a list of those precedent decisions which have been affirmed, reversed, or remanded by federal courts. This last allows you to check to see whether a BIA precedent decision is still good law in the circuit in which your client’s case arises.

Second, most counties have a law library in the county courthouse, open to the public. Some contain a good deal of material on immigration, others may have just the federal statutes, codes, and regulations. You may also be able to get access to law school libraries. Often law librarians are friendly and willing to help you find materials in the library.

In addition, attorneys in private practice handling immigration cases might also have most of the materials that you need. It is useful for nonprofit organizations to locate immigration attorneys who are willing to assist you. Establishing good relations with these practitioners will prove helpful for other reasons as well, such as for general advice, financial support, and developing attorney referral lists to which to refer clients who se cases your office is unable to assist.
Additional Resources

BOOKS AND ONLINE RESOURCES
Immigration law continually changes. It is essential for practitioners to have a current copy of the Immigration and Nationality Act (INA) and the regulations, Volume 8 of the Code of Federal Regulations (8 CFR). Information about how to obtain these and other useful publications is listed below:

BOOKS
- Immigration and Nationality Act (INA)
- 8 Code of Federal Regulations (8 CFR)
  - There are a number of legal publishers that publish the INA and 8 CFR every year. Many of these are annotated. Several sources:
    - Bender’s, www.lexisnexis.com/store
    - The least expensive, most basic versions are available through the U.S. Government Printing Office, http://www.gpo.gov/
  - Both the INA and 8 CFR change every year; you must obtain new, up-to-date copies every year.

PERIODICALS
- Catholic Legal Immigration News, Catholic Legal Immigration Network, Inc. Free to CLINIC affiliate members. A monthly publication covering a wide range of issues related to immigration law and procedure.
ONLINE RESOURCES

- Immigration and Customs Enforcement: www.ice.gov
- Customs and Border Protection: www.cbp.gov
- Executive Office for Immigration Review: http://www.justice.gov/eoir/
  ○ (Includes Board of Immigration Appeals decisions)
- Department of State: http://www.state.gov/
- Catholic Legal Immigration Network, Inc. (CLINIC): http://www.cliniclegal.org
- Immigration Advocates Network (IAN): www.immigrationadvocates.org
- National Immigration Forum: http://www.immigrationforum.org/
- American Immigration Lawyers Association (AILA): http://www.aila.org/
- National Immigration Project of the National Lawyers Guild (NLG): http://www.immigrationproject.org
- United Nations High Commissioner for Refugees: http://www.unhcr.org
CONTACT INFORMATION FOR USCIS OFFICES, IMMIGRATION COURT, U.S. CONSULATES AND THE STATE DEPARTMENT

USCIS Headquarters

425 Eye St. N.W.
Washington D.C. 20536
(202) 514-2000

USCIS Service Centers

Vermont
P.O. Box 9589
St. Albans, VT 05479-9589
Physical Address:
75 Lower Weldon St.
Saint Albans, VT 05479-0001
(802) 527-3252

Nebraska
P.O. Box - Varies Based on Application
Physical Address:
850 “S” St.
Lincoln, NE 68501
(402) 323-7830

Texas
P.O. Box 851488
Mesquite, TX 75185-1488
Physical Address:
4141 St. Augustine Rd.
Dallas, TX 75227
(214) 381-1423

California
P.O. Box 30111
Laguna Niguel, CA 92607-0111
Physical Address:
24000 Avila Road
2nd. Floor, Room 2302
Laguna Niguel, CA 92607
(949) 831-8427

Missouri
National Benefits Center
P.O. Box 648005
Lee’s Summit, MO 64064
(816) 251-1824

Board of Immigration Appeals
5107 Leesburg Pike, Suite 2400
Falls Church, VA 22041
(703)305-1194

Immigration Court Information System
Automated information about case status of immigration court cases; need A number to use system. Call (800) 898-7180.

Department of State Visa Office
GLOSSARY OF IMMIGRATION LAW TERMS

**Accredited representatives** are non-attorneys who have been authorized by the Board of Immigration Appeals to represent persons before the U.S Department of Homeland Security, U.S. Citizenship and Immigration Services or before judges in immigration court.

**Adjustment of status** is the process whereby a non-citizen applies for permanent resident status in the United States. Most non-citizens who adjust status do so through the family- or employment-based immigration systems.

**Asylees** are persons who are granted asylum inside the United States based on their fear of persecution in their home countries. This persecution must be based on their race, religion, nationality, political opinion, or membership in a particular social group.

The **Board of Immigration Appeals** is an administrative court within the Department of Justice. It interprets immigration law and reviews certain decisions by the U.S. Citizenship and Immigration Services (USCIS).

**U.S. citizens**, or USCs, include persons born in the United States; persons born abroad who gain citizenship through a USC parent or parents; persons born abroad who gain citizenship after birth through a USC parent or parents; and persons born abroad who naturalize.

**Consular processing** is the process whereby a non-citizen applies for lawful permanent residence at a U.S. consulate abroad. Most non-citizens who consular process do so through the family- or employment-based immigration systems.

**Customs and Border Protection** (CBP) is the sub-agency within the Department of Homeland Security charged with protecting the U.S. border and determining whether a non-citizen is authorized to enter the United States.

**Deferred action** is a temporary immigration status granted to persons based on certain humanitarian factors. A program called **Deferred Action for Childhood Arrivals (DACA)** is available to non-citizens who entered the United States before they turned 16 and who satisfy educational, residence, and other requirements. Persons granted deferred action may work legally in the United States.

The **Department of State** is the agency that determines whether or not to grant visas to non-citizens who want to enter the United States. The Department of State operates through U.S. consulates located in most foreign countries.

The **diversity visa lottery**, or green card lottery, is a pathway to permanent resident status available each year to non-citizens from countries with low rates of immigration to the United States.

**An employment authorization document (EAD)** is a permit alloying a non-citizen to work legally in the United States.

**The employment-based immigration** system allows employers to sponsor skilled workers to enter the United States and perhaps obtain lawful permanent resident status. EWI stands for “entry without inspection” and refers to non-citizens entering the U.S. unlawfully, without inspection by an immigration officer. This is usually done by entering somewhere other than a port-of-entry.
The Executive Office for Immigration Review is the sub-agency within the Department of Justice that operates the immigration court system.

The family-based immigration system allows for certain close family members of U.S. citizens and lawful permanent residents to obtain lawful permanent resident status. The family-based system is by far the largest path to lawful permanent residence in the U.S.

A green card is another term used for a lawful permanent resident card.

Grounds of inadmissibility or deportability may prevent non-citizens from obtaining lawful permanent resident status, and may even result in their removal from the U.S.. Some of the major obstacles to obtaining LPR status include health-related factors, criminal conduct, fraud, smuggling, unlawful presence in the United States, and other immigration violations.

An I-94 is a form given by Customs and Border Protection to nonimmigrants upon their admission to the United States. The I-94 indicates their immigration classification and authorized period of stay.

Immigration courts, which are part of the Executive Office for Immigration Review, hold administrative hearings to determine if a non-citizen can remain in the United States or must be removed.

Immigration and Customs Enforcement (ICE) is the sub-agency within the Department of Homeland Security charged with enforcing immigration laws inside the United States.

The Immigration and Nationality Act contains almost all of the statutes passed by Congress that relate to immigration and nationality law.

Lawful permanent resident aliens, or LPRs, are allowed to reside in the United States indefinitely. They can also travel and work in most areas of employment, and can sponsor their spouses and unmarried children for lawful permanent residence. They are subject to immigration laws and may lose their LPR status.

Naturalization is the process whereby a lawful permanent resident becomes a U.S. citizen. To qualify, the LPR must be at least 18, have continuously resided in the United States for a certain number of years; speak, read, and write basic English; and demonstrate good moral character.

Non-citizens, also known as “aliens,” include everyone present in the U.S. who are not U.S. citizens.

Nonimmigrants are aliens who are admitted to the United States for a specific purpose and for a limited period of time. Examples of nonimmigrants include students, tourists, and religious workers.

Refugees are persons who were granted refugee status abroad based on their fear of persecution in their home countries. This persecution must be based on their race, religion, nationality, political opinion, or membership in a particular social group.

Registry is a pathway to permanent resident status for non-citizens who have been living in the United States since before 1972.

Regulations are written by federal agencies to interpret and implement federal laws. The Department of Homeland Security writes the regulations for immigration laws.
A relative petition is the form filed by a U.S. citizen or permanent resident to start the process of immigrating a close family member. This petition establishes that the petitioner is a citizen or LPR and the relationship with the family member is valid.

Temporary Protected Status (TPS) is an immigration status available to persons in the United States, who are from specially designated countries, and who cannot return home due to ongoing armed conflict or a natural disaster. Persons granted TPS are allowed to work legally and remain in the United States temporarily.

Undocumented aliens are non-citizens who either entered the country illegally or overstayed their authorized time period.

The United States Citizenship and Immigration Services (USCIS) is the sub-agency within the Department of Homeland Security charged with adjudicating applications for immigration benefits

A visa is a permit issued by the Department of State that allows a non-citizen to seek admission to the United States. Visas are issued to immigrants, or lawful permanent residents, and nonimmigrants.

A waiver is an application to forgive a ground of inadmissibility or deportability. Not all grounds of inadmissibility and deportability allow for waivers.
### COMMON ACRONYMS

Throughout this manual and training, the following acronyms and abbreviations refer to the following words:

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
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<tbody>
<tr>
<td>AEDPA:</td>
<td>Antiterrorism and Effective Death Penalty Act</td>
</tr>
<tr>
<td>AG:</td>
<td>Attorney General</td>
</tr>
<tr>
<td>BIA:</td>
<td>Board of Immigration Appeals</td>
</tr>
<tr>
<td>CAT:</td>
<td>Convention Against Torture</td>
</tr>
<tr>
<td>CBP:</td>
<td>Customs and Border Protection</td>
</tr>
<tr>
<td>CFR:</td>
<td>Code of Federal Regulations</td>
</tr>
<tr>
<td>DD:</td>
<td>District Director</td>
</tr>
<tr>
<td>DED:</td>
<td>Deferred Enforced Departure</td>
</tr>
<tr>
<td>DHS:</td>
<td>Department of Homeland Security</td>
</tr>
<tr>
<td>EAD:</td>
<td>Employment Authorization Document</td>
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<tr>
<td>EOIR:</td>
<td>Executive Office for Immigration Review</td>
</tr>
<tr>
<td>EWI:</td>
<td>Entry Without Inspection</td>
</tr>
<tr>
<td>ICE:</td>
<td>Immigration and Customs Enforcement</td>
</tr>
<tr>
<td>IIRIRA:</td>
<td>Illegal Immigration Reform and Immigrant Responsibility Act</td>
</tr>
<tr>
<td>IJ:</td>
<td>Immigration Judge</td>
</tr>
<tr>
<td>INA:</td>
<td>Immigration and Nationality Act</td>
</tr>
<tr>
<td>INS:</td>
<td>Immigration and Naturalization Service</td>
</tr>
<tr>
<td>LPR:</td>
<td>Lawful Permanent Resident</td>
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<tr>
<td>NACARA:</td>
<td>Nicaraguan and Central American Relief Act</td>
</tr>
<tr>
<td>NTA:</td>
<td>Notice to Appear</td>
</tr>
<tr>
<td>OSC:</td>
<td>Order to Show Cause</td>
</tr>
<tr>
<td>PRD:</td>
<td>Priority Date</td>
</tr>
<tr>
<td>TPS:</td>
<td>Temporary Protected Status</td>
</tr>
<tr>
<td>USC:</td>
<td>United States Citizen</td>
</tr>
<tr>
<td>USCIS:</td>
<td>United States Citizenship and Immigration Services</td>
</tr>
<tr>
<td>VAWA:</td>
<td>Violence Against Women Act</td>
</tr>
<tr>
<td>VD:</td>
<td>Voluntary Departure</td>
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