

CHAPTER 1

FAMILY-BASED IMMIGRATION: IMMEDIATE RELATIVES AND THE PREFERENCE SYSTEM

Family reunification has been the principal policy underlying U.S. immigration law since at least 1965. Family-based immigration allows close relatives of U.S. citizens and lawful permanent residents (LPRs) (also referred to as legal immigrants) to immigrate to the United States.¹ Family members immigrate either as “immediate relatives” of U.S. citizens or through the family preference system as relatives of U.S. citizens or LPRs.

Immigrating as Immediate Relatives

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

Immigrating Under the Family Preference System

The family preference system allows the following persons to immigrate:

- Adult children (unmarried and married) of U.S. citizens;
- Brothers and sisters of U.S. citizens age 21 or older; and
- Spouses and unmarried children (both minor and adult) of LPRs.³

A limited number of visas are 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 legal immigrant (permanent resident) visas distributed per country, per year.⁴ Backlogs develop because there are more applicants in some countries and categories than there are visas. There are also the non-quota immigrants, such as immediate relatives, who are exempted from the yearly limitations.

U.S. consulates abroad issue immigrant visas.⁵ In addition, U.S. Citizenship and Immigration Services (USCIS) (successor to the Immigration and Naturalization Ser-

¹ A legal immigrant is a foreign-born individual who has been admitted to reside in the United States as a lawful permanent resident. Immigration and Nationality Act (INA) §101(a)(20).

² INA §201(b)(2)(A)(i).

³ INA §203(a).

⁴ INA §201(c).

⁵ INA §§221, 222.

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

All citizens or LPRs who wish to petition for a family member must have an income of at least 125 percent of the federal poverty level and must execute a legally enforceable affidavit in which they agree to support their family member. If this is not feasible, they will have to secure the assistance of a joint sponsor.⁸

Requirements for Family Relationships

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

- *Petitioner*—the family member who is either a U.S. citizen or an LPR.⁹ Proof of LPR status is possession of a Form I-551, the Permanent Resident Card, commonly called a “green card.” Some family members may self-petition, such as widows/widowers, battered spouses and children of U.S. citizens and LPRs, certain Amerasian children, and special immigrant juveniles.¹⁰
- *Beneficiary*—the alien seeking permanent resident status who is related to the U.S. citizen or LPR petitioner.¹¹ The beneficiary could be a principal (on whose behalf the alien relative petition is filed) or a derivative (spouse or unmarried child of the principal beneficiary in the preference categories).
- *Spouse*—the spousal relationship must be legally valid and recognized in the place where the relationship was created.¹² It must not be a sham marriage, *i.e.*, one 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 the marriage is valid in the foreign country, it must not violate federal or state public policy. Polygamous, incestuous, and proxy marriages (unless later consummated) are not recognized

⁶ INA §245.

⁷ INA §§245(a), (i).

⁸ INA §213A.

⁹ INA §204(a).

¹⁰ 8 Code of Federal Regulations (CFR) §§204.1(a)(1)–(5).

¹¹ 8 CFR §204.1(a).

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

for immigration purposes.¹³ Some states recognize common-law marriages. The marriage must be in existence—*i.e.*, not legally terminated—at the time the permanent residency application is adjudicated, although the marriage need not be “viable.”¹⁴ If the parties are separated, more proof will be required to demonstrate that the marriage was valid at the time it was entered. If the parties married while the beneficiary was in immigration proceedings, they will have to establish through clear and convincing evidence that the marriage is bona fide.¹⁵

- **Parent**—must meet the definition in the statute, Immigration and Nationality Act (INA) §101(b)(2), and may include a stepparent, an adoptive parent, and a parent of a child born out of wedlock (though the applicant may have to establish the “parent-child relationship” by blood tests, evidence of cohabitation, support, and communication).¹⁶
- **Brother or sister**—each sibling must show that he or she is the “child” of at least one common parent.¹⁷
- **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.
 - **Legitimacy**—a child who was born in wedlock¹⁸ or was legitimized before age 18 while in the father’s custody is a “child” for immigration purposes.¹⁹ Marriage of the natural parents is the most common form of legitimation. Children born out of wedlock may obtain immigration benefits from the natural mother.²⁰ Or they may obtain it from the natural father, so long as they have established a “bona fide parent-child relationship,” *i.e.*, cohabitation and provision of support, before age 21.²¹
 - **Stepchildren**—eligible to immigrate through stepparent if child was under 18 at the time of the marriage creating the relationship.²² It is irrelevant whether the stepchild was born in wedlock or out of wedlock. The stepchild relationship may continue even after the natural parent dies or divorces the

¹³ INA §101(a)(35).

¹⁴ See *Matter of McKee*, 17 I&N Dec. 332 (BIA 1980).

¹⁵ INA §245(e)(3).

¹⁶ 8 CFR §204.2(c).

¹⁷ See *Matter of Mahal*, 12 I&N Dec. 409 (BIA 1967).

¹⁸ INA §101(b)(1)(A).

¹⁹ INA §101(b)(1)(C).

²⁰ INA §101(b)(1)(D).

²¹ See *Matter of Vizcaino*, 19 I&N Dec. 644 (BIA 1988).

²² INA §101(b)(1)(B).

stepparent, provided the stepparent has maintained active parental interest.²³ Stepchildren also may serve as petitioners and help their stepparents immigrate to the United States.

- *Adopted children*—eligible to immigrate if adopted before age 16 and have been in the legal custody of, and resided with, the adoptive parent for at least two years.²⁴ The two years can be counted in the aggregate. The adoption must be legally valid in the jurisdiction where it took place.²⁵ Natural siblings of the adopted child also are eligible to immigrate if adopted while under 18 by the same adoptive parent.²⁶ Adoptions are available under the Intercountry Adoption Act of 2000,²⁷ which the United States enacted to comply with its obligations under the Hague Convention.²⁸ U.S. citizens seeking to adopt and emigrate a child from one of the convention member countries must satisfy certain requirements.²⁹ The immigration procedure for an adopted child pursuant to the Hague Convention is covered in chapter 2.
- *Orphans*—a U.S. citizen can sponsor an orphan under age 16 if legal requirements are met under INA §101(b)(1)(F). 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.³⁰ The child must be under 16 and unmarried at the time the petition is filed on his or her behalf to qualify as an immediate relative. The petitioner must be a U.S. citizen. Natural siblings of the orphan also are eligible to immigrate if adopted abroad while under 18 by the same adoptive parent.
- *Unmarried*—not married at the time the Form I-130, Petition for Alien Relative, was filed, at the time the application for the immigrant visa was filed, and at the time of admission to the United States as the unmarried son or daughter of a U.S. citizen or LPR, whether or not previously married. If immigrating as the beneficiary of a second-preference petition, the person must be unmarried

²³ See *Matter of Mowrer*, 17 I&N Dec. 613 (BIA 1981).

²⁴ INA §101(b)(1)(E).

²⁵ 8 CFR §204.2(d)(2)(vii)(C).

²⁶ INA §101(b)(1)(E).

²⁷ Pub. L. No. 106-279, 114 Stat. 825 (Oct. 6, 2000).

²⁸ Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, May 29, 1993, S. Treaty Doc. 105-51 (1998), 32 I.L.M. 1139. For in-depth guidance on international adoption issues, see *The International Adoption Sourcebook* (AILA 2008); visit <http://agora.aila.org> and search “adoption.”

²⁹ INA §101(b)(1)(G); 22 CFR §42.24.

³⁰ 8 CFR §204.3(d)(1)(iii).

from the filing of the petition until admission as an LPR. If the beneficiary marries at any time during that period, the petition is automatically revoked.³¹

Immediate Relatives and the Preference System

Immediate Relatives

The term “immediate relative” includes the following family relationships: spouse, child (unmarried, under 21), and parent of a U.S. citizen.³² In the case of a parent, the U.S. citizen petitioner must be at least 21 years of age. The definition also includes widows or widowers of U.S. citizens who were not legally separated at the time of the spouse’s death, filed an application within two years of the death, and did not remarry before acquiring the immigrant visa or status.³³ Immediate relatives immigrate outside the numerical restrictions and thus are not subject to the long waiting period that exists in many of the preference categories. Nevertheless, there is often a backlog at the USCIS service centers that adjudicate the relative petitions and at some USCIS district offices that schedule adjustment interviews. This means that even immediate relatives can expect to wait six months or more to receive their immigrant status.

Preference System

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

- First: unmarried son or daughter (age 21 or over) of U.S. citizen parent;³⁴
- Second:
 - F-2A: spouses or unmarried children (under 21) of LPR;³⁵
 - F-2B: unmarried sons or daughters age 21 and over of LPR;³⁶
- Third: married sons and daughters of U.S. citizens;³⁷
- Fourth: brothers and sisters of U.S. citizens, where citizen is at least 21.³⁸

³¹ 8 CFR §§205.1(a)(3)(i)(H) and (I).

³² INA §201(b)(2)(A)(i).

³³ INA §204.2(b)(2)(A)(i), as amended by FY2010 Department of Homeland Security Appropriations Act, Pub. L. No. 111-83, 123 Stat. 2142, §568(c)(1) (Oct. 28, 2009).

³⁴ INA §203(a)(1).

³⁵ INA §203(a)(2)(A).

³⁶ INA §203(a)(2)(B).

³⁷ INA §203(a)(3).

³⁸ INA §203(a)(4).

Quota System

Congress has placed a limit on the number of foreign-born individuals who are admitted to the United States annually as family-based immigrants: 480,000 persons per year.³⁹ 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), governs family-based immigration. 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 preference categories.⁴⁰

There is no numerical cap on the number of immediate relatives admitted annually to the United States as immigrants.⁴¹ 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.⁴² But no fewer than 226,000 visas are available each year.⁴³

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

- First preference (unmarried sons and daughters of U.S. citizen)—23,400 visas per year, plus any visas left over from the fourth preference;⁴⁴
- Second preference (F-2A) (spouses and minor children of LPR)—87,900 visas per year, plus any visas left over from the first preference;⁴⁵
- Second preference (F-2B) (unmarried adult children of LPR)—26,300 visas per year, plus any visas left over from the first preference;
- Third preference (married adult children of U.S. citizen)—23,400 visas per year, plus any visas left over from the first and second preferences;⁴⁶

³⁹ INA §201(c)(1)(A)(i).

⁴⁰ INA §202(e).

⁴¹ INA §201(b).

⁴² INA §201(c)(1)(A).

⁴³ INA §201(c)(1)(B)(ii).

⁴⁴ INA §203(a)(1).

⁴⁵ INA §203(a)(2)(B).

⁴⁶ INA §203(a)(3).

- Fourth preference (brothers and sisters of U.S. citizen over 21)—65,000 visas/year, plus any visas left over from the previous preferences.⁴⁷

The primary source of information on visa availability is the *Visa Bulletin*, available from the U.S. Department of State, Bureau of Consular Affairs, Visa Services, found at <https://travel.state.gov/content/visas/en/law-and-policy/bulletin.html>. A copy of visa availability information from the *Visa Bulletin* for March 2018 is included as Appendix 1A.⁴⁸

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

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

The priority date may or may not be “current,” *i.e.*, a visa is available. If the priority date is not current, it is often risky to estimate how long it will be before the priority date becomes current and a visa becomes available. Compare the priority date against the date indicated in the section, Application Final Action Dates, in the most recent monthly *Visa Bulletin*, taking into consideration the particular preference category and the foreign national’s country of origin. The priority date must be *before* the date listed under Application Final Action Dates to be considered current. For example, a Mexican LPR who is immigrating his spouse in the F-2A visa category will look at the most recent *Visa Bulletin* for that preference category under the column for Mexico. In March 2018, the date on the *Visa Bulletin* for that category and nationality was March 1, 2016. Only applicants whose I-130s were filed before that date are considered current.

Beginning in October 2015, the Department of State began publishing a separate chart called Application Dates for Filing Family-Sponsored Visa Applications that indicates when a person may file an application for adjustment of sta-

⁴⁷ INA §203(a)(4).

⁴⁸ You can request to be sent the *Visa Bulletin* by e-mail; send your request to listserv@calist.state.gov. In the body of the message type “subscribe Visa Office Bulletin,” followed by your first name and last name. Alternatively, you may call the State Department for a recording on the status of priority dates, (202) 663-1541, or visit its website at http://travel.state.gov/visa/bulletin/bulletin_1360.html. *Visa Bulletins* are also posted to AILA’s InfoNet, www.aila.org.

⁴⁹ 8 CFR §204.1(c).

⁵⁰ 8 CFR §204.1(d).

tus or when the National Visa Center (NVC) can start consular processing. For example, the same spouse of the Mexican LPR could file for adjustment of status beginning on March 1, 2018, if the priority date was before May 1, 2017 and USCIS permitted use of the Dates for Filing Family-Sponsored Visa Applications for filing purposes.

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

Derivative Beneficiaries

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

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

⁵¹ INA §202(b).

⁵² 22 CFR §42.12.

⁵³ INA §203(d).

⁵⁴ 9 *Foreign Affairs Manual* (FAM) 502.2-3(C), previously located at 42.31 N2.

⁵⁵ 8 CFR §204.2(a)(4).

Derivative family members are accorded the same preference status as the principal beneficiary. These derivatives may either accompany the principal beneficiary or “follow-to-join,” which means immigrating more than six months after the principal beneficiary.⁵⁶

Retention of Priority Dates

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

General Principles. The basic principle is that one can retain an earlier priority date if the same petitioner is filing for the same beneficiary in the same preference category and the prior I-130 petition was not terminated or revoked.⁵⁷ If the Form I-130 was lost by the agency and the petitioner needs to re-file, he or she should be able to retain the priority date from the original petition.

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

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

Divorce. Divorce tends to work the opposite way from marriage. The third-preference beneficiary moves into the immediate-relative category (if under 21) or

⁵⁶ 22 CFR §40.1(a)(1).

⁵⁷ 8 CFR §204.2(h)(2).

⁵⁸ 8 CFR §204.2(i)(1)(ii).

⁵⁹ 8 CFR §204.2(i)(1)(i).

⁶⁰ 8 CFR §§204.2(i)(1)(i), (ii).

⁶¹ 8 CFR §205.1(a)(3)(i)(I).

the first preference (if 21 or over).⁶² Again, there is no need to file a new Form I-130, and the priority date remains the same. Inform the appropriate service center, the NVC, or the consulate of the automatic conversion from third preference to first preference or immediate-relative status and enclose proof of termination of the marriage.

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

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

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

The F-2B category is sometimes more favorable than the first preference category, particularly for Mexico and the Philippines. Fortunately, the Child Status Protection Act (CSPA)⁶⁶ neutralizes the negative effect that the petitioner's naturalizing might have on these F-2B sons and daughters by allowing them to opt out of the automatic conversion to the first preference. The effect of naturalization on the beneficiary is covered in greater detail in the section below on CSPA.

⁶² 8 CFR §204.2(i)(1)(iii).

⁶³ 8 CFR §205.1(a)(3)(i)(D).

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

⁶⁵ 8 CFR §204.2(i)(3).

⁶⁶ Child Status Protection Act (CSPA), Pub. L. No. 107-208, 116 Stat. 927 (2002). For in-depth guidance on the CSPA, see *AILA's Focus on the Child Status Protection Act* (2014); visit <http://agora.aila.org> and search "CSPA."

Beneficiaries with children, however, will not be able to count them as derivatives if they convert to the immediate-relative category when the petitioner naturalizes.⁶⁷ These beneficiaries are not allowed to opt out of this conversion to the immediate relative category.

Derivative beneficiaries in the F-2A category are also affected, because when the petitioner naturalizes, they will lose derivative status and will be required to have a separate I-130 petition filed on their behalf. When the newly naturalized U.S. citizen petitioner files this separate I-130 petition for the unmarried child, the beneficiary retains the original priority date.⁶⁸ This is usually irrelevant because, as an immediate relative, the beneficiary is not subject to any annual quotas and the CSPA freezes the beneficiary's age.⁶⁹ But if the beneficiary marries before obtaining LPR status, the earlier priority date might prove helpful. State in the cover letter for the second Form I-130 should state that petitioner is requesting the original priority date, cite the regulatory authority, and include proof of filing the original Form I-130.

Death of the Petitioner. Death of the petitioner automatically revokes the Form I-130, but there is possible relief for widows and widowers of U.S. citizens who have not remarried and who file a Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, within two years of the citizen's death.⁷⁰ The widow or widower adjusts or immigrates as an immediate relative, and unmarried children under 21 are classified as derivative beneficiaries. The process for self-petitioning as a widow or widower is covered in more detail in chapter 5.

In addition to the spouses of U.S. citizens, other surviving family members may continue to receive immigration benefits from a pending or approved Form I-130 after the petitioner has died.⁷¹ If INA §204(l) applies, it acts to nullify the petitioner's or the principal beneficiary's death. The main requirements are that the beneficiary must have been residing in the United States at the time of the petitioner's death and continue to be residing here. The other requirement is that he or she must obtain a substitute sponsor who can file an affidavit of support. This is covered in greater detail in chapter 8.

According to USCIS, there are two ways to request §204(l) relief. If the petitioner died while the petition or application was pending, the beneficiary will simply notify USCIS and request that the agency proceed with adjudication of the petition or appli-

⁶⁷ 9 FAM 502.2-3(C), *previously located at* 42.31 N2.2.

⁶⁸ 8 CFR §204.2(i)(3).

⁶⁹ INA §201(f).

⁷⁰ INA §201(b)(2)(A)(i), as amended by FY2010 Department of Homeland Security Appropriations Act, Pub. L. No. 111-83, 123 Stat. 2142, §568(c)(1), (Oct. 28, 2009).

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

cation. This presumes that the petition or application was filed on or after October 28, 2009, or was pending on that date. If it was filed and adjudicated before that date, and the agency has formally revoked the approved petition based on the petitioner's death, USCIS will allow the affected beneficiary to file an untimely motion to reopen if he or she would otherwise be protected by the provisions of §204(l).⁷² The second manner of requesting relief applies to beneficiaries whose petitioner died after the petition or application was approved. Assuming the beneficiary satisfies the residency requirements, he or she can request reinstatement of the approved petition or application.

Reinstatement under §204(l) should not be confused with humanitarian reinstatement. Beneficiaries who do not satisfy the residency requirement of §204(l) but whose petitioner died after the I-130 petition was approved may file to reinstate the revoked Form I-130 based on humanitarian factors.⁷³ This procedure is described in chapter 2. A sample request to reinstate an I-130 petition based on §204(l), with a list of supporting documents, is attached as Appendix 1C.

Beneficiaries who can benefit from this 2009 statutory amendment include immediate-relative children and parents of a U.S. citizen and all preference-category principal and derivative beneficiaries in the family-based categories. If the principal beneficiary meets the residence requirements, but the derivatives do not, they may still qualify for relief. It is not necessary that all of the derivative beneficiaries meet the residence requirements. According to USCIS, if “any one beneficiary of a covered petition meets the residence requirements of section 204(l) of the Act, then the petition may be approved...”⁷⁴ This interpretation helps in cases where the principal beneficiary satisfies the residence requirements but the spouse and/or children have been residing abroad.

Section 204(l) also provides relief in situations where the principal beneficiary—not the petitioner—has died. In the past, when the principal beneficiary had died, either the derivatives were left without a basis for immigrating (*e.g.*, derivative children in first preference cases or derivative spouses and children in third or fourth preference cases), or the petitioner had to file a new petition for the child (second preference cases). The statute now allows these derivatives “of the qualifying relative” in

⁷² U.S. Citizenship and Immigration Services (USCIS) Policy Memorandum PM-602-0017, “Approval of Petitions and Applications after the Death of the Qualifying Relative under New Section 204(l) of the Immigration and Nationality Act” (Dec. 16, 2010), *published on* AILA InfoNet at Doc. No. 11011061 (*posted* Jan. 10, 2011).

⁷³ 8 CFR §205.1(a)(3)(i)(C).

⁷⁴ USCIS Policy Memorandum PM-602-0017, “Approval of Petitions and Applications after the Death of the Qualifying Relative under New Section 204(l) of the Immigration and Nationality Act” (Dec. 16, 2010), *published on* AILA InfoNet at Doc. No. 11011061 (*posted* Jan. 10, 2011).

all the family-based preference categories to proceed unaffected by the principal beneficiary's death.

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

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

The affidavit of support requirements are not waived for family-based cases involving a deceased petitioner—other than a widow or widower—though the beneficiary may submit one from a substitute sponsor. Substitute sponsors may include a close relative of the beneficiary (spouse, parent, mother-in-law, father-in-law, sibling, child at least 18 years of age, son, daughter, daughter-in-law, son-in-law, sister-in-law, brother-in-law, grandparent, or grandchild) or a legal guardian. A substitute sponsor must be either a U.S. citizen or LPR and be domiciled in the United States. If the sponsor has insufficient income to satisfy the 125 percent of poverty requirement for their household size, he or she may obtain a joint sponsor who does meet it. Beneficiaries residing in the United States whose petitioning family member has died will need to file a substitute affidavit of support as part of the adjustment of status or consular processing procedure. Those who are residing abroad and will be moving to reinstate the petition will need to include a substitute affidavit of support with the motion. Beneficiaries residing inside the United States who cannot secure a substitute sponsor will be unable to proceed with their application for adjustment of status or an

⁷⁵ *Id.*

⁷⁶ *Id.*

immigrant visa; those residing outside the country will be unable to proceed with their motion to reinstate.

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

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

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

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

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

Derivatives in other preference categories also lost their derivative status when they turned 21. Unlike the children of LPRs, who converted automatically from the F-2A to the F-2B category, these sons and daughters did not automatically convert to

⁷⁷ 8 CFR §204.2(i)(2).

⁷⁸ *Id.*

⁷⁹ 9 FAM 503.3-3(B)(2), *previously located at* 42.53 N2.4-2(c).

⁸⁰ 8 CFR §204.2(a)(4).

another category upon turning 21. They had to start over again after their parent immigrated or adjusted status. The LPR parent then filed a new I-130 petition on their behalf. Prior to the CSPA—and even according to current USCIS interpretation after implementation of the law—these former derivative beneficiaries did not retain the original priority date.

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

The Child Status Protection Act

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

Children of U.S. Citizens

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

⁸¹ Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, 90 Stat. 2703; 9 FAM 503.3-4(A), *previously located at* 42.53 N4.1.

⁸² INA §201(f)(1).

they marry before immigrating. In that case, the son or daughter still converts to the third-preference category.⁸³

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

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

Children of LPRs and Derivatives

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

For example, take the case of an LPR who files a Form I-130 for his son. If USCIS took one year to approve the I-130 petition, subtract that period from the son's biological age (or add that period to the son's date of birth) to arrive at his "ad-

⁸³ 8 CFR §204.2(i)(1)(ii).

⁸⁴ INA §201(f)(2).

⁸⁵ 8 CFR §204.2(a)(4).

⁸⁶ INA §201(f)(3).

⁸⁷ INA §203(h)(1).

justed age.” Use the son’s adjusted age on the date the second-preference F-2A category becomes current to determine if he is under 21. If he is, he will be considered in the F-2A category (even though his biological age is over 21) and he will retain that status, assuming he does not marry.

Such children will preserve their F-2A status provided they seek to acquire lawful permanent resident status within one year of visa availability.⁸⁸ USCIS has defined that to mean filing for adjustment of status.⁸⁹ DOS has defined it to include (1) submitting a completed Form DS-260, Application for Immigrant Visa and Alien Registration; (2) paying the immigrant visa fee; (3) paying the affidavit of support fee; or (4) filing a Form I-824, Application for Action on an Approved Application or Petition.⁹⁰ This latter form is most commonly used by principal beneficiaries who adjusted status but have derivative family members who will be consular processing. In a published decision, the Board of Immigration Appeals (BIA) has found that an alien may satisfy the “sought to acquire” requirement by filing one of the forms, paying the filing fees, or by establishing “extraordinary circumstances” that prevented filing within the one-year window. Such circumstances might include retaining an immigration attorney and completing the application within the one-year period, but then having the attorney unnecessarily delay the filing.⁹¹

USCIS issued a memo on the issue of what might constitute “extraordinary circumstances” for failing to satisfy the one-year filing requirement.⁹² The memo, which amended *Adjudicators Field Manual* chapter 21.2(e), states the general rule that the child must demonstrate: (1) that the circumstances were not created by him or her through his or her actions; (2) the circumstances were directly related to the child’s failure to make a timely filing; and (3) the delay was reasonable under the circumstances. The memo then lists examples of “extraordinary circumstances” during the one-year period that may warrant a favorable exercise of discretion: serious illness or mental or physical disability; legal disability (mental impairment); ineffective assistance of counsel; timely filing that was rejected by the USCIS, corrected, and re-

⁸⁸ INA §203(h)(1)(A).

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

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

⁹¹ *Matter of O. Vasquez*, 25 I&N Dec. 817 (BIA 2012).

⁹² USCIS Memorandum, “Guidance on Evaluating Claims of ‘Extraordinary Circumstances’ for Late Filings When the Applicant Must Have Sought to Acquire Lawful Permanent Residence Within One Year of Visa Availability Pursuant to the Child Status Protection Act” (June 6, 2014), *published on AILA InfoNet at Doc. No. 14063040 (posted June 30, 2014)*.

turned within reasonable time; and death or serious illness/incapacity of the applicant's representative or a member of the applicant's immediate family.

The same age-adjusting principle applies for derivative beneficiaries.⁹³ Look at the date that the principal beneficiary's priority date becomes current. If the derivative beneficiary is under 21 using his or her adjusted age, then he or she retains derivative status, even if he or she subsequently turns 21.

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

To determine the adjusted age, it will be necessary to know the priority date and the date on the Form I-797 approval notice. It also will be necessary to know when the F-2A category—or other family— or employment-preference category for derivatives—first became current for the specific priority date. The date that a visa number becomes available is the first day of the month in which the *Visa Bulletin* indicates availability of a visa for that preference category.⁹⁴

The CSPA codifies prior policy when a beneficiary ages out from the F-2A into the F-2B category. It now formally states that “the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.”⁹⁵ The USCIS interpretation, which was upheld by the BIA⁹⁶ and the U.S. Supreme Court,⁹⁷ is that this provision applies only to second-preference F-2A derivatives who age out and thus convert automatically to the F-2B category. Other derivatives who age out, for example in the third or fourth preference, would need to be petitioned for by one of their parents once the parent has obtained LPR status. That petition would be in the F-2B category and the son or daughter would not retain the earlier priority date for the petition filed on behalf of their parent.

The agency has issued instructions clarifying that when a derivative beneficiary in the F-2A category ages out, he or she automatically converts to the F-2B category

⁹³ INA §203(h)(2)(B).

⁹⁴ *Visa Bulletins* dating back to February 1995 can be accessed at http://travel.state.gov/visa/bulletin/bulletin_1770.html.

⁹⁵ INA §203(h)(3).

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

⁹⁷ *Scialabba v. Osorio*, 34 S. Ct. 2191 (2014), 573 U.S. ___ (2014).

and no second petition needs to be filed.⁹⁸ When the priority date in the F-2B category becomes current, the beneficiary can proceed to file for adjustment of status or an immigrant visa. Should the LPR petitioner elect to file a second I-130 petition for the son or daughter in the F-2B category, he or she will retain the original priority date for the first petition.⁹⁹ This is true even if the petitioner has naturalized and the second petition is being filed in the F-1 category.

Relief for F-2B Beneficiaries When the Petitioner Naturalizes

The first-preference category is often backlogged further than the second-preference F-2B category. Therefore, when the petitioning parents naturalize, and the sons and daughters over 21 converted from F-2B to first preference, they actually extend the time they need to wait for their visa to become current. The CSPA eliminates this disparity and penalty by allowing these beneficiaries to elect whether they want to convert automatically to the first preference or opt out and stay in the F-2B category.¹⁰⁰ Applicants for adjustment of status should write a simple letter attached to their application serving as notice of this election.¹⁰¹

For those who are consular processing, the DOS allows immigrant visa applicants to request opt out of automatic conversion to the F-1 category through its website. Applicants should complete the public inquiry form <https://secureforms.travel.state.gov/ask-nvc.php>. The last item on the form asks the requester to select from several questions in a drop box. The applicant should choose “Opt out request: I want to stay in the F2B visa category rather than change to the F1.” Once the inquiry form is submitted, the NVC will contact USCIS and get approval of the opt-out request. The approval from USCIS will be put in the applicant’s file so the information will be available to NVC and consular officers.

Relief for Some F-2A Beneficiaries Over 21 When the Petitioner Naturalizes

The Ninth Circuit held that children who were over 21 using their biological age but under 21 using their adjusted age could still convert to the immediate relative category when their petitioning parent naturalizes.¹⁰² The case turned on the interpreta-

⁹⁸ “Updated Guidance to USCIS Offices on Handling Certain Family-Based Automatic Conversion and Priority Date Retention Requests Following the Supreme Court Ruling in *Scialabba I v. Cuellar de Osorio*,” published on AILA InfoNet at Doc. No. 15063009 (posted June 25, 2015); “Guidance to USCIS Offices on Handling Certain Family-Based Automatic Conversion and Priority Date Retention Requests Pending a Supreme Court Ruling on *Mayorkas v. Cuellar de Osorio*,” published on AILA InfoNet at Doc. No. 13112251 (posted Nov. 22, 2013).

⁹⁹ *Id.*, 8 CFR §204.2(a)(4).

¹⁰⁰ INA §204(k).

¹⁰¹ INA §204(k)(2).

¹⁰² *Tovar v. Sessions*, No. 14-73376 (9th Cir. Feb. 14, 2018).

tion of INA §201(f)(2), which states that the child's eligibility for immediate relative status is determined by "the age of the alien on the date of the parent's naturalization." The Ninth Circuit applied traditional rules of statutory construction and found that "age" does not mean biological age but rather "statutory age," which is the adjusted age after applying the CSPA formula for those in the F-2A category.

This holding conflicts with a prior decision from the BIA, *Matter of Zamora-Molina*, 25 I&N Dec. 606 (BIA 2011), which held that children in those situations could not convert to the immediate relative category, even if they were under 21 using their CSPA age. The BIA based that on CSPA §2, INA §201(f)(2), which only allows conversion to the immediate relative category if the child was under 21 using his or her biological age.

The question before the BIA in the *Zamora-Molina* was not whether children in that situation could convert to the immediate relative category when the petitioner naturalizes. It was whether they would be able to opt out of automatic conversion to the F-1 category and remain in the F-2A category, given that the F-2 category is preferable to the F-1 for all nationalities. The BIA held that while CSPA §6 allows children in the F-2B category to opt out of conversion to the F-1 category, this same protection is not extended to children over 21 but still in the F-2A category.

Effective Date

At the time of passage, the CSPA potentially affected thousands of cases pending before USCIS and DOS. Section 8 of the CSPA states unequivocally that the new law applies to I-130 petitions, adjustment of status applications, and immigrant visa applications pending before the agencies on August 6, 2002. It also applies to I-130 petitions approved before August 6, 2002, provided no final determination had been made on the subsequent adjustment or immigrant visa application. USCIS and DOS originally took the position that the CSPA required the filing of an application for adjustment of status or an immigrant visa prior to August 6, 2002, for those children who had approved I-130 petitions but who turned 21 before August 6, 2002. In other words, the agencies' position was that if such children did not have an application or petition pending on that date, the CSPA did not apply. But after a precedent BIA decision held that the CSPA applied retroactively,¹⁰³ the agencies reversed their prior positions.¹⁰⁴ Now, according to the agencies, as long as the child had not received a final denial on an application by August 6, 2002, the CSPA principles will apply.

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

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

Authority

Statutes

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

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

Regulations

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

- 8 Code of Federal Regulations (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; and
- 22 CFR Part 42—documentary requirements.

Agency Guidelines

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

- *USCIS Adjudicator’s Field Manual (AFM)*—a comprehensive “how to” manual detailing policies and procedures for all aspects of the adjudications program. USCIS employees follow these detailed procedures and the agency’s interpretation of the law when adjudicating petitions and applications. The AFM is available at www.uscis.gov (Laws tab, link to Handbooks and guides). See also AILALink to access relevant portions of the AFM (visit www.ailalink.org for more information on how to subscribe to this service). Note that portions of the AFM have been superseded by the *USCIS Policy Manual*, also accessible on the USCIS website.
- *Foreign Affairs Manual (FAM)*—provides guidance and interpretation of regulations for DOS officials. The FAM defines qualifying relationships, provides

guidelines regarding immigrant visas, and availability of foreign documents. The portions relating to immigrant visas are located in volume 9.¹⁰⁵

¹⁰⁵ Portions of the FAM, volume 9, are available at <https://fam.state.gov/Fam/FAM.aspx?ID=09FAM>. See also AILALink to access FAM volumes 7 and 9 (visit <http://agora.aila.org/ailalink> for more information on how to subscribe to this service).