

Adjudicator's Field Manual

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Chapter 21 Family-based Petitions and Applications.

21.1 General Information About Relative Visa Petitions

21.2 Factors Common to the Adjudication of All Relative Petitions has been partially superseded by USCIS Policy Manual, Volume 1: General Policies and Procedures as of November 23, 2021.

21.3 Petition for a Spouse

21.4 Petition for a Child, Son, or Daughter has been partially superseded by the USCIS Policy Manual as of November 19, 2021.

21.5 Petition for an Orphan has been superseded by USCIS Policy Manual, Volume 5: Adoptions as of November 19, 2021.

21.6 Petition for Hague Convention Adoptee has been superseded by USCIS Policy Manual, Volume 5: Adoptions as of November 19, 2021.

21.7 Petition for an Amerasian has been superseded by USCIS Policy Manual, Volume 7: Adjustment of Status as of May 19, 2021.

21.8 Petition for a Parent

21.9 Petition for a Sibling

21.10 Refugee/Asylee Relative Petition

21.11 Petition for Spouse, Child, or Parent of Certain Deceased U.S. Armed Forces Members

21.12 Process for Responding to Requests by the Department of State (DOS) to Accept a Locally Filed Form I-130, Petition for Alien Relative has been superseded by USCIS Policy Manual, Volume 6: Immigrants as of February 1, 2020.

21.13 [Reserved]

21.14 Self-Petitions by Abused Spouses and Children has been superseded by USCIS Policy Manual, Volume 3: Humanitarian Protection and Parole as of February 10, 2022.

21.15 Self-Petitions by Abused Parents of U.S. Citizens has been superseded by USCIS Policy Manual, Volume 3: Humanitarian Protection and Parole as of February 10, 2022.

21.16 Adoption as a Basis for Immigration Benefits has been superseded by USCIS Policy Manual, Volume 5: Adoptions as of November 19, 2021.

21.1 General Information About Relative Visa Petitions.

(a) Historical Information Regarding Visa Petitions.

In the aftermath of World War I, Congress passed a number of laws restricting immigration to the U.S. by both numbers and qualifications. [Previously, there were restrictions barring certain types of individuals based on individual shortcomings (e.g., the Act of March 3, 1875 which barred convicts and prostitutes, and the Act of August 3, 1882, which barred criminals, paupers, and “mental and physical defectives”), and on race (i.e., the Chinese Exclusion Act of May 6, 1882).] In order to qualify for an immigrant visa (itself a new post-WWI innovation), the alien had to fall within one of the quota categories, or be exempt therefrom. The visa petition was then created as the vehicle for establishing that an alien fell into one of the higher quota categories, or was quota-exempt.

Over the years, the definitions of the various immigrant visa categories have changed with the passage of new legislation, and the requirements have been interpreted and reinterpreted through volumes of case law. However, the need for an approved immigrant visa petition to qualify for most visa classifications has remained a basic requirement of the system of legal immigration to the United States. It is no exaggeration to say that professional adjudication of immigrant visa petitions is one of the keystones to ensuring that the system works as intended.

(b) Organization of This Chapter.

Many of the basic visa petition adjudication procedures and issues are similar regardless of the form being filed or the classification being sought. Those basic procedures are discussed in **subchapter 21.2**. **Subchapters 21.3** through 21.10 are organized according to the relationship of the petitioner to the beneficiary and discuss those aspects of the adjudication procedures and issues which are unique to those particular relationships. Accordingly, it is intended that the users of this field manual review both subchapter 21.2 and the relevant individual relationship subchapter when seeking information.

(c) Special Parole and Deferred Action Considerations.

On November 15, 2013, USCIS, pursuant to the authority conferred upon the Secretary of Homeland Security by INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A), issued a Policy Memorandum guiding the exercise of discretion with respect to applications for parole by designated family members of U.S. military personnel and veterans. On November 20, 2014, the Secretary directed USCIS to issue new policies on the use of both parole in place and deferred action for certain family members of certain military personnel, veterans, and individuals who are seeking to enlist in the U.S. military. See Secretary of Homeland Security Memorandum, "Families of U.S. Armed Forces Members and Enlistees" (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_parole_in_place.pdf

These new policies support the Department of Defense (DoD) in several ways, including by:

- Elaborating on general USCIS deferred action policies by identifying factors that are of particular relevance to discretionary determinations involving military personnel, veterans, and their families;
- Building on existing USCIS and DoD initiatives and policies designed to assist military members, veterans, and their families in navigating our complex immigration system;
- Facilitating military morale and readiness and supporting DoD recruitment policies by considering temporarily deferring the removal of certain military family members;
- Furthering the goal of the Military Accessions Vital to the National Interest (MAVNI) program to recruit certain foreign nationals whose skills are considered vital to the national interest and critical to military services; and
- Ensuring consistent support for our military personnel and veterans, who have served and sacrificed for our nation, and their families.

For guidance on parole in place for certain family members of military personnel and veterans, see AFM Chapter 21.1(c)(1). For guidance on deferred action for certain enlistees and certain family members of military personnel and veterans, see AFM Chapter 21.1(c)(2).

(1) Special Parole Consideration for Spouses, Parents, Sons, and Daughters of Active Duty Members of the U.S. Armed Forces, Individuals in the Selected Reserve of the Ready Reserve, or Individuals Who (Whether Still Living or Deceased) Previously Served on Active Duty in the U.S. Armed Forces or the Selected Reserve of the Ready Reserve and Were Not Dishonorably Discharged.

The decision whether to grant parole under INA § 212(d)(5)(A) is discretionary. Generally, USCIS grants parole in place only sparingly. The fact that the individual is a spouse, parent, son, or daughter of an Active Duty member of the U.S. Armed Forces, an individual in the Selected Reserve of the Ready Reserve, or an individual who previously served on active duty in the U.S. Armed Forces or the Selected Reserve of the Ready Reserve (if the former service member was not dishonorably discharged and either is living or died while the family member was residing in the United States), however, ordinarily weighs heavily in favor of parole in place. Absent a criminal conviction or other serious adverse factors, parole in place would generally be an appropriate exercise of discretion for such an individual. If USCIS decides to grant parole in that situation, the parole should be authorized in one-year increments, with extensions of parole as appropriate. To request parole, the alien must submit to the director of the USCIS office with jurisdiction over the alien's place of residence:

- Completed Form I-131, Application for Travel Document (The USCIS Director has determined that in this situation the Form I-131 may be filed without fee, per 8 CFR 103.7(d));
- Evidence of the family relationship (this may include proof of filing a petition in certain cases – see AFM 21.1(c)(3) below);
- Evidence that the alien's family member is an Active Duty member of the U.S. Armed Forces, individual in the Selected Reserve of the Ready Reserve, or an individual who (whether still living or deceased) previously served on active duty in the U.S. Armed Forces or the Selected Reserve or the Ready Reserve such as a photocopy of both the front and back of the service member's military identification card (DD Form 1173) (in the case of family members of veterans (whether still

living or deceased), the service member must not have received a dishonorable discharge upon separation from the military)

- In the case of surviving family members, proof of residence in the United States at the time of the service member's death;
- Two identical, color, passport style photographs; and
- Evidence of any additional favorable discretionary factors that the requestor wishes considered.

Individuals who have obtained parole in place are eligible to apply for work authorization for the period of parole if they can demonstrate economic necessity. See 8 CFR 274a.12(c)(11), (14). See Form I-765, Application for Employment Authorization.

Parole in place may be granted only to individuals who are present without admission and are therefore applicants for admission. Individuals who were admitted to the United States but are currently present in the United States beyond their periods of authorized stay are not eligible for parole in place, as they are no longer applicants for admission.

(2) Deferred Action Consideration for Spouses, Parents, and Sons and Daughters of Active Duty Military Personnel, Individuals in the Selected Reserve of the Ready Reserve, and Individuals Who (Whether Still Living or Deceased) Previously Served on Active Duty in the U.S. Military or the Selected Reserve of the Ready Reserve and Were Not Dishonorably Discharged; and for MAVNI and other Enlistees in the Delayed Entry Program and their Spouses, Parents, and Sons and Daughters.

(A) Deferred Action for DoD Delayed Entry Program Enlistees (Including MAVNI Recruits) and Certain Family Members.

Individuals who have no previous military experience and are seeking to enlist in the U.S. Armed Forces must sign a contract by which they enter into the Delayed Entry Program (DEP) for a maximum of 365 days while awaiting Basic Training. While in the DEP, there can be delays in starting active duty for the Active Components or initial active duty for training for the Reserve Components.

Individuals who enlist in the military through the Military Accessions Vital to the National Interest (MAVNI) program may also enter the DEP. The MAVNI program allows certain foreign nationals to enlist in the military to fill positions where there are critical shortages in health care and foreign language skills. See the DoD MAVNI program fact sheet for further details: <http://www.defense.gov/news/mavni-fact-sheet.pdf>.

Most MAVNI recruits are in a lawful nonimmigrant status at the time that they enlist. For example, it is common for a J-1 foreign exchange visitor or F-1 foreign student to enlist in the U.S. military through MAVNI. Through no fault of their own, MAVNI recruits in the DEP may fall out of their lawful status while waiting to enter Basic Training. This may occur, for example, in cases where an F-1 foreign student completes his or her program of study while waiting to enter Basic Training in the DEP. In the same way, the family members of such recruits often lose their lawful statuses because their statuses depend on those of the recruits. In addition, family members might lack status either because they are present without being admitted or paroled, or because they were admitted or paroled but overstayed their authorized periods of stay even before their MAVNI or other DEP family member entered the DEP.

As in all deferred action determinations, USCIS will make case-by-case, discretionary judgments based on the totality of the evidence. In doing so, USCIS will weigh and balance all relevant considerations, both positive and negative. Certain factors, however, are of particular relevance to the exercise of that discretion when deferred action requests are submitted by individuals in DEP and their family members. Particularly strong positive factors specific to such requests include, but are not limited to:

- Being a DEP enlistee, including through the MAVNI program (even if the enlistee's authorized period of stay expires while in the DEP); and
- Being the spouse, parent, son, or daughter of a MAVNI recruit or other individual in the DEP (even if present in the United States without an authorized status).

The presence of one or more of the preceding factors does not guarantee a grant of deferred action but may be considered a strong positive factor weighing in favor of granting deferred action. The ultimate decision rests on whether, based on the totality of the facts of the individual case, USCIS finds that the positive factors outweigh any negative factors that may be present.

If an individual described in either of the two bullets above is granted deferred action in the exercise of discretion, the period of deferred action should be authorized in two-year increments; USCIS may consider requests for renewal of deferred action as appropriate. If the individual withdraws from the DEP or becomes disqualified from joining the military, any period of deferred action for the family member may be terminated. See AFM Chapter 21.1(c)(2)(C) for guidance on filing requests for deferred action. See AFM Chapter 21.1(c)(1) for guidance on parole in place.

(B) Deferred Action for Certain Family Members of Active Duty Members of the U.S. Military, Individuals in the Selected Reserve of the Ready Reserve, or Individuals Who (Whether Still Living or Deceased) Previously Served on Active Duty in the U.S. Military or in the Selected Reserve of the Ready Reserve and Were Not Dishonorably Discharged.

As in all deferred action determinations, USCIS will make case-by-case, discretionary judgments based on the totality of the evidence. In doing so, USCIS will weigh and balance all relevant considerations, both positive and negative. Certain factors, however, are of particular relevance to the exercise of that discretion when deferred action requests are submitted by the family members of military personnel and veterans. One particularly strong positive factor specific to such requests is that the person has been admitted and is the spouse, parent, son, or daughter of an individual who is serving, or has previously served on active duty in the U.S. military or in the Selected Reserve of the Ready Reserve (if the former service member was not dishonorably discharged and either is living or died while the family member was residing in the United States). Such an individual ordinarily fits the guidelines for parole under section 21.1(c)(1) above, except for being statutorily ineligible solely because of his or her prior admission. See INA §§ 212(d)(5)(A), 235(a)(1), 8 U.S.C. §§ 1182(d)(5)(A), 1225(a)(1). The presence of the preceding factor does not guarantee a grant of deferred action but may be considered a strong positive factor weighing in favor of granting deferred action. The ultimate decision rests on whether, based on the totality of the facts of the individual case, USCIS finds that the positive factors outweigh any negative factors that may be present. If USCIS grants deferred action in the exercise of discretion, the period of deferred action should be authorized in two-year increments; USCIS may consider requests for renewal of deferred action as appropriate.

(C) Filing Request for Deferred Action.

To request deferred action, one must submit the following to the director of the USCIS office with jurisdiction over the requestor's place of residence:

- Letter stating basis for the deferred action request [See AFM 21.1(c)(2)(A) and (c)(2)(B)];
- Evidence supporting a favorable exercise of discretion in the form of deferred action as elaborated in AFM 21.1(c)(2)(A) and (c)(2)(B) – (e.g., evidence of family member's current or previous military service, or alien's or family member's enlistment in the DEP; note that in the case of family members of veterans, whether still living or deceased, the service member must not have received a dishonorable discharge upon separation from the military);
- Proof of family relationship, if applying based on family relationship to military member, veteran, or enlistee (this may include proof of filing a petition in certain cases - see section below);
- In the case of surviving family members, proof of residence in the United States at the time of the service member's death;
- Proof of identity and nationality (including a birth certificate, a passport and/or identification card, driver's license, notarized affidavit(s), etc.);
- If applicable, any document the alien used to lawfully enter the United States (including, but not limited to, Form I-94, Arrival/Departure Record, passport with visa and/or admission stamp, and any other documents issued by other components of DHS or legacy INS);
- Form G-325A, Biographic Information (for Deferred Action);
- Two identical, color, passport style photographs; and
- Evidence of any additional discretionary factors that the requestor would like USCIS to consider.

Individuals who have obtained deferred action are eligible to apply for work authorization for the period of deferred action if they can demonstrate economic necessity. See 8 CFR 274a.12(c)(11), (14). See Form I-765, Application for Employment Authorization.

A requestor who has legal representation must submit a properly completed Form G-28, Notice of Entry as Attorney or Accredited Representative.

(3) Petition Filing Requirement for Certain Parole or Deferred Action Requests.

USCIS encourages applicants to continue on a path toward lawful permanent resident status whenever applicable. In cases where it is applicable, USCIS encourages the filing of a Form I-130, Petition for Alien Relative (or Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant) to allow USCIS to use an established process in evaluating the bona fides of the pertinent family relationship. In some cases where subsequent parole in place or renewal of deferred action is requested, such filing may be required (see AFM 21.1(c)(3)(A) below). USCIS checks the bona fides of the qualifying family relationship in all parole in place and deferred action requests regardless of whether the Form I-130 (or Form I-360) has been filed.

In all cases where a Form I-130 or Form I-360 has been filed, USCIS may grant either parole in place, as provided in AFM 21.1(c)(1), or deferred action, as provided in AFM 21.1(c)(2), as long as the applicant's Form I-130 (or Form I-360) is pending or approved (and still valid). Even in cases where the Form I-130 or Form I-360 is required, it does not need to be approved prior to a grant of either parole in place or

deferred action. Upon receiving the receipt notice for the Form I-130 or Form I-360, the alien may file the request for either parole in place or deferred action with the USCIS office with jurisdiction over the alien's place of residence. The request for either parole in place or deferred action must include documentation to establish an eligible family relationship. Such evidence may include a previously approved petition.

Note: Proof of filing the Form I-130 or Form I-360 is not required, even in applicable cases, for initial requests for parole in place or deferred action as provided under AFM 21.1(c)(1) and AFM 21.1(c)(2). See AFM 21.1(c)(3)(B).

(A) Petition Required for Request for Subsequent Parole in Place or Renewal of Deferred Action.

Active Duty military members, individuals in the Selected Reserve of the Ready Reserve, individuals who have previously served on active duty in the U.S. military or in the Selected Reserve of the Ready Reserve, and DEP enlistees, if eligible to file a Form I-130 on behalf of a family member requesting subsequent parole in place or renewal of deferred action as provided under AFM 21.1(c)(1) or (c)(2), must submit a completed Form I-130 for the family member, with fee and according to the instructions on the form, prior to filing the request for subsequent parole in place or renewal of deferred action, as applicable. (See Form I-130 instructions for more information on who may file.)

Surviving spouses, parents, sons, and daughters of deceased service members and veterans (described above) who were residing in the United States at the time of the service member's death and who are eligible to file Form I-360 on their own behalf must submit a completed Form I-360, with fee and according to the instructions on the form, prior to filing the request for subsequent parole in place or renewal of deferred action, as applicable. (See Form I-360 instructions for more information on who may file. See also the USCIS web site at: <http://www.uscis.gov/military/family-based-survivor-benefits/survivor-benefits-relatives-us-citizen-military-members>.)

The Form I-130 (or Form I-360) filing requirement for requests for subsequent parole in place or renewal of deferred action as provided under AFM 21.1(c)(1) and AFM 21.1(c)(2) applies only to requests that are submitted on or after November 23, 2017 (one year after publication of memorandum updating AFM 21.1).

(B) Cases where Petition is Not Required at Any Time.

Individuals who are ineligible to file a Form I-130 or a Form I-360 are not required to do so; they may still request parole in place or deferred action, as applicable. In particular, MAVNI recruits in the DEP are not eligible to file Form I-130 and therefore not required to do so. MAVNI recruits may, however, become eligible for naturalization under INA § 329(a) upon entering active duty. Recruits typically must wait until they naturalize before filing a Form I-130 for any eligible family members.

Proof of filing the Form I-130 (or Form I-360) also is not required, even in applicable cases, for initial requests for parole in place or deferred action as provided under AFM 21.1(c)(1) and AFM 21.1(c)(2).

21.2 Factors Common to the Adjudication of All Relative Visa Petitions.

(a) Filing and Receipting of Relative Petitions.

(1) Statutory Definitions of Relationships Covered.

USCIS has the responsibility of determining if the beneficiary of a relative visa petition is eligible for the classification sought. As the adjudicating officer, you will make that determination. Therefore, you must be completely familiar with the statutory definitions of relatives as well as the applicable regulations and precedent decisions. The classes of eligible alien relatives are enumerated in sections 201(b), 203(a), 207(c)(2), and 208(b)(3) of the Act and Public Law 97-359:

(A) **Section 201(b)** of the Act covers aliens exempt from numerical limitations and includes "immediate relatives" of United States citizens:

- **Spouse** , which is not really a defined term under the Act or regulations, although **section 101(a)(35)** of the Act does exclude spouses acquired through unconsummated proxy marriages. Also, section 7 of the Defense of Marriage Act (Pub. L. 104-199) clarifies the term (see Chapter 21.3 of this field manual).
- **Child** , as that term is defined in paragraphs (A) through (E) of **section 101(b)(1)** of the Act
- **Orphan** , as that term is defined in section **101(b)(1)(F)** of the Act, who has been, or will be, adopted abroad
- **Orphan** , as that term is defined in section **101(b)(1)(F)** of the Act, who will be coming to the U.S. to be adopted in legal proceedings in this country
- **Parent** , as that term is defined in **section 101(b)(2)** of the Act

(B) **Section 203(a)** covers aliens eligible for preferential consideration based on a familial relationship to a citizen or LPR of the U.S. Unlike the immediate relative petitions, the dependents (spouse and child(ren)) of a beneficiary of a preference petition receive derivative immigrant visa classification if they are accompanying or following to join the principal beneficiary. (“Accompanying” refers to a dependent who is immigrating concurrently with, or who has an immigrant visa issued within 6 months after, the principal alien’s admission or adjustment; “following to join” refers to an alien who is immigrating more than 6 months after the principal alien, but based on a relationship which existed at the time of the principal alien’s immigration, provided that relationship still exists at the time of the dependent’s application for admission to the United States.) The family-based preference classifications are:

- **First preference** under section 203(a)(1) includes the unmarried sons and daughters of United States citizens;

- **Second preference** under section 203(a)(2) includes the spouses, children, and unmarried sons and daughters of lawful permanent resident aliens;

Note 1

If a lawful permanent resident acquired a dependent prior to such LPR’s immigration or adjustment (the LPR had already married the spouse or the parent-child had been established), the dependent could qualify for a following to join visa classification and would not need a second preference petition or a second preference quota number.

Note 2

Frequently, the child of an LPR can qualify either as a principal beneficiary (child of LPR) based on a visa petition filed on behalf of the child; or as a derivative (child of the spouse of an LPR) through the petition filed by the LPR for the other parent. This is not always the case, since sometimes the child can only qualify as the child of the spouse, as with a stepchild of an LPR who is over 18 at the time the LPR married the child’s parent.

The derivative classification, of course, requires no separate visa petition. The decision on whether to file one visa petition (for the spouse only) or multiple visa petitions (one for spouse and one for each of the LPR’s children) is up to the petitioning LPR. Either approach has advantages:

- The advantage of filing one petition is that only one fee must be paid and only one set of supporting

documents has to be filed. This can result in considerable savings in time and money, especially if the LPR has a large, multi-child family. Furthermore, should situations change (e.g., if the principal beneficiary dies or the marriage ends in divorce) and individual petitions for the children become necessary, the new petitions will be accorded the same filing date as the original petition (see 8 CFR 204.2 (a)(4)).

– The advantage of filing multiple petitions is that each beneficiary can act independently. If one of the children needs to immigrate before the others are ready to travel (e.g., if a daughter wants to join her LPR mother in the U.S. to begin school in the U.S. while her father remains in the home country to care for a sibling who is finishing school there), that child may do so.

Note 3

In accordance with **Matter of Ah San**, 15 I&N Dec. 315 (BIA 1975), non-citizen nationals of the U.S. may also file petitions pursuant to section 203(a)(2) of the Act.

· **Third preference** under section 203(a)(3) includes the married sons and daughters of United States citizens;

· **Fourth preference** under section 203(a)(4) includes the brothers and sisters of United States citizens.

(C) **Section 207(c)(2)** of the Act covers the relatives of an alien admitted to the United States as a refugee and includes:

· The **spouse of a refugee**, provided the spousal relationship existed at the time the refugee was first admitted to the United States in that status; and

· The **child of a refugee**, provided the parent-child relationship between the refugee and the child existed at the time of the refugee's admission to the United States, or the child was in utero at the time of the father's admission as a refugee. **Note:** In refugee matters, to qualify as "accompanying" the derivative must be admitted within four months of the principal's admission (see **8 CFR 207.7(a)** and contrast with the six month timeframe for immigrant visa cases as discussed in paragraph 21.2(a)(1)(B) above).

(D) **Section 208(b)(3)** of the Act covers the relatives of an alien granted asylum status (an “asylee”) and includes:

- The **spouse of an asylee** , provided the spousal relationship existed at the time the asylee was granted such status in the United States; and

- The **child of an asylee** , provided the parent-child relationship between the refugee and the child existed at the time of the refugee’s admission to the United States, or the child was *in utero* at the time the father’s asylum application was granted.

Note

Nonimmigrant relative petitions for K and V nonimmigrants are discussed in **Chapter 37** of this field manual.

(2) Petition Form .

- Form I-130 (Petition for Alien Relative) is filed with USCIS by a United States citizen or lawful permanent resident on behalf of an alien relative to establish eligibility for the exemption or preference.

- Form I-360 is used to classify an alien as an Amerasian, Widow(er), or as a Special Immigrant. With regards to relatives, it includes those who are:

- The widow or widower of a U.S. citizen. The form allows such person to petition for himself or herself, and to petition for his or her child. The widow or widower of an LPR cannot self-petition. Likewise, the child of a deceased citizen cannot self-petition; the child must be included in his or her parent’s widow/widower self-petition.

- A battered spouse or child of a U.S. citizen or LPR. This category also includes certain persons who would have fallen within this category, except that the marriage to the citizen or LPR was bigamous, as well as certain former battered spouses and children of citizens or LPRs.

- An Amerasian under Publ. L. 97-359, as amended by subsequent legislation.

Note:

Form I-360 is also used for a number of other (non-relative) special immigrant classifications which are discussed in **Chapter 22** of this field manual.

- Form I-600 is used to petition for an orphan who has been identified.
- Form I-600A is used to petition for an orphan if the orphan is to be named later.
- Form I-730 is used by an alien who has been admitted as a refugee under section 207 of the Act, or granted asylee status under section 208 of the Act, to bring a spouse or child to the United States as a derivative refugee or asylee.

(3) Priority Dates.

Preference aliens need a priority date for visa issuance, and that date is generally established when the petition, filed on the alien's behalf, is properly signed by the petitioner and the fee has been collected by USCIS . The priority date is the chronological date which establishes the preference alien's place on a waiting list maintained by the Department of State for issuance of the immigrant visa. (See also **Chapter 21.1** of this field manual.)

(A) General.

The priority date, in most instances, is the date the visa petition was properly filed at a USCIS office. If the visa petition is filed at a consulate abroad, and the petitioner is under the jurisdiction of the consulate, the priority date or filing date is the date the petition was received at the consular office if the petition can be approved by the consular officer. For those cases not within the jurisdiction of the consular office, no filing date is accorded until such time as they are received by the appropriate USCIS office in the States. The filing

date should be recorded on the appropriate line on the front of the petition with an explanation for any priority date which is different from the date on which USCIS date-stamped the petition when it was originally filed by the petitioner.

(B) Petition Not Properly Filed.

If, during normal processing a delay results from deficiencies in the initial filing, the priority date will be established only when the petition is properly signed by the petitioner and the fee has been collected by USCIS . If questions arise concerning the filing of the petition which cannot be resolved through a check of the Fee Receiving System, (FARES), or other fee collection system, then the director may consider the date of receipt of the petition to be the priority date. Where a petition is returned to the petitioner because the fee has not been paid, or the petition has not been signed, the petitioner should be informed on the Form I-797 that the petition has not been properly filed and no priority date has been established. If you use a later date than the initial date-stamp on the petition as the filing date, you should indicate the reason for using the later date in the Remarks Block on the petition. An example of the format which you may use in the Remarks Block follows:

Priority date not established on date filed because...

a. Fee not paid until_____.

b. Petition not signed until_____.

(4) Chapter 21.2(a)(4) replaced with Memorandum - Additional Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and their Children (REVISED); Effect of FY 2010 DHS Appropriations Act on eligibility to immigrate after death of visa petitioner. See **Appendix 21-7** . [Replacement and addition 12-02-2009]

(b) Adjudicative Procedures.

(1) Review of the Petition.

The basic adjudication procedures and concerns discussed in chapters 10 through 17 of this field manual apply to relative petitions. Adjudicators who are not already familiar with these matters should review those chapters before adjudicating relative petitions.

(A) General.

You must carefully review the answer to each question on the petition and determine if the information is relevant and correct. People preparing petitions sometimes provide incorrect, inaccurate, or misleading information, and you must detect mistakes and misinformation in order to properly adjudicate the petition. Some errors are inadvertent; others are deliberate. Examples of common problems associated with the execution and filing of petitions are:

- Failure to include the requisite fee;

- Failure to sign the petition;

- Reversal of petitioner's and beneficiary's names (the terms “petitioner” and “beneficiary” sometimes confuse people);

- Failure to answer relevant questions;

- Use of “N/A” to answer relevant questions; and,

- Erroneously listing the current date as the birth date for the petitioner or the beneficiary.

Note

You should be aware that the use of the term "N/A" is a common ploy used to try to conceal relevant information (e.g., prior marriages, children, beneficiary's status in the United States) by implying the answer is "none" without actually stating it. Therefore, "N/A" should generally not be considered an acceptable answer.

(B) Item-by-Item Review.

Special attention should be paid to the following items:

- Name. The names of the petitioner and the beneficiary are basic in establishing identity and are extremely important when trying to locate any relating USCIS records. They also provide clues concerning marriages, illegitimacy, adoption, and other issues for which a name differentiation is normal. Any substantial variation in these names, when compared with USCIS or other records, must be satisfactorily explained by the submission of additional documents, affidavits, or other appropriate means.

- Date and Place of Birth. This information is essential as it relates to the identity of the individual and is often necessary to locate any relating USCIS records. Additionally, it may determine eligibility for the benefit sought. For example, a petition filed to accord immediate relative classification to a parent or fourth preference classification to a brother or sister requires a review of the petitioner's date of birth because the petitioner must be at least 21 years of age at the time of filing. A large difference in age between the petitioner and beneficiary on a spouse petition is often the first indication you will have that the marriage may have been contracted solely for the purpose of gaining an immigration benefit (with or without the knowledge and complicity of the petitioner). On petitions for parents, brothers, sisters, children, sons, or daughters, the petitioner's and the beneficiary's birth dates may have a definite bearing on the claimed relationship. Also, the law governing the place where and when the individual was born must be considered in determining eligibility for many benefits. Because of the variance in individual state law as well as in foreign laws, the adjudicator will, often times, have to rely on a report from the Library of Congress (see **Chapter 14.10** of this field manual), interim decisions, General Counsel Opinions, or other resources to determine eligibility.

- Previously-Filed Visa Petitions. The answer to this question may provide you with valuable information pertinent to your case. A previously-filed petition may contain the necessary evidence or information that was missing or may indicate a lack of eligibility for the benefit sought. If the petition or other record reflects that a previous petition has been filed by the petitioner, and it is believed that the prior petition may contain evidence or information pertinent to the adjudication of the present petition, then the prior petition should be obtained where possible.

· Addresses. The correct addresses for both the petitioner and the beneficiary are extremely important. The petitioner's address generally establishes which USCIS office has jurisdiction over the petition. The addresses are also important because the petitioner and the beneficiary may have to be contacted or interviewed. However, even if personal contact is not necessary, the petitioner will have to be notified of the decision on the petition, and the beneficiary will have to be contacted concerning the issuance of an immigrant visa or adjustment of status.

· Location of Consulate. The location of the United States Embassy/Consulate where the beneficiary will apply for a visa must be shown on the petition, particularly if the beneficiary will have to apply abroad. If the beneficiary will not seek adjustment in the United States or is ineligible for section 245 benefits, the approved petition is forwarded to the National Visa Center (NVC) at:

The Department of State,

National Visa Center,

32 Rochester Ave,

Portsmouth, NH 03801-2909.

The NVC, at the appropriate time, will forward the petition to the consulate designated by the petitioner on the approved petition. If the designation is omitted by the petitioner, you will have to obtain the consular location based on the beneficiary's country of birth or country of last residence. If the consulate designated does not issue immigrant visas, you must ascertain the proper consulate before you can complete the processing of the petition. You can verify whether a consular office issues immigrant visas from the list of visa issuing posts in the Department of State's Foreign Affairs Manual.

If the beneficiary is unable to return to the country of birth for visa issuance or if a U.S. consulate is not present in the beneficiary's country of birth, the petitioner may request that another U.S. consulate, which is designated as an immigrant visa processing post, accept jurisdiction on humanitarian grounds. This procedure is requested through the individual consulate or the Department of State. If jurisdiction is accepted by the consulate, the adjudicator should annotate the petition to that effect prior to forwarding the petition to the NVC. Under no circumstances is the adjudicator to designate or recommend that the petitioner designate a processing post other than one in the beneficiary's country of birth or country of last residence.

Note

The Form I-797 (Notice of Approval) will show the petition has been sent to the NVC. The consular block on the approval notice will be left blank.

· United States Citizenship of Petitioner . If the petitioner is a United States citizen, proof of citizenship must be submitted with the petition. In most cases, a birth certificate, Naturalization Certificate, Certificate of Citizenship, or U.S. passport will be submitted. **8 CFR 204.1(g)(1)(i - vi)** stipulates the acceptable documents to be presented as evidence of U.S. citizenship. USCIS does not post-audit citizenship claims and, therefore, evidence that the petitioner is a U.S. citizen must be submitted with the petition. If the petitioner was born outside the United States and derived citizenship, but has not applied for a Certificate of Citizenship, the case should be returned to the petitioner to resolve his/her citizenship status at a district office.

8 CFR 204.1(f)(2) allows for the submission of legible, true copies of original documents; however, USCIS reserves the right to require submission of original documents when deemed necessary.

If it appears the petitioner may have expatriated or lost U.S. citizenship, the petition should be referred to the district office having jurisdiction. The district office is able to interview and obtain a question and answer statement or affidavit from the petitioner. Then, the case will be referred to the Citizenship section with all the supporting evidence, and with a memorandum of the conclusion that the petitioner has lost citizenship. The Citizenship section will furnish an informal opinion as to whether the case would have been referred to Headquarters under outstanding instructions, had it arisen in the Citizenship section. If so, the case is referred to Headquarters, through the office of the regional director, and will attach its comments and recommendation. This referral is not a certification and the petitioner should not be informed of it.

· Lawful Residence Status of Petitioner . **8 CFR 204(g)(1)(vii)** gives the specific requirements for evidence of lawful permanent residence. Generally, the petitioner will submit a copy of his/her Form I-551. If the original is seen by the adjudicator, verify an alien's status by noting "I-551 seen" or "file seen" beside the petitioner's "A" number. Immediately return the Form I-551 to the petitioner unless the authenticity of the document is questionable.

If the petitioner does not submit Form I-551, conduct a record check in USCIS to verify status. If the relating file cannot be located or does not contain a record of admission for permanent residence, you should attempt to verify arrival pursuant to Chapter 7A of the Records Operations Handbook . If that is unsuccessful, request the alien to submit any document he or she may have which was issued or endorsed by USCIS which may bear on the claim to permanent resident status.

In doubtful cases, the petition should be sent to, and the petitioner referred to, the district office having jurisdiction. An interview should be conducted if there is a question that a document or a record relates to the petitioner.

You should accord the petitioner the benefit of any presumption of lawful admission under **8 CFR 101** to which he or she may be entitled (see **Chapter 23.4** of this field manual).

You should also determine if the petitioner's status as a lawful permanent resident has been lost. If the petitioner's file contains a signed Form I-407 (Record of Abandonment of Residence), but the petitioner contends that he or she had no intentions of abandoning U.S. residence and that the Form I-551 or other document was lifted in error, the case should be referred to the district office for interview.

In the case of a permanent resident who has not yet received Form I-551, the temporary stamp showing processing for Form I-551 is acceptable evidence of permanent residence. This stamp may be in the petitioner's passport or on Form I-181.

- Relationship. Mistakes are often made on this item. Generally, the mistake consists of reversing the relationship; for example, listing the relationship as "father" when a parent is petitioning for a child. Often the intent is obvious in which case you may correct the error (making sure to initial your correction). The relationship must be established by the supporting documents and any other available evidence.

- Prior Marriages of the Petitioner and Beneficiary. The response to this question is very important because it may have a definite bearing on eligibility for the benefit sought. For example, a "child" cannot be married; a "spouse" must have been legally free to marry when the current marriage was contracted; and a marriage is generally necessary for a child to be considered legitimate. The answer given on the petition may not be completely accurate; therefore, all evidence and information should be carefully reviewed to ascertain if a prior marriage, for which you have no evidence of termination, may have occurred. Birth certificates of the subject's children, prior INS or USCIS records, and marriage certificates are good sources of evidence of prior marriages. It is extremely important that this issue be completely resolved and documented for the record. All evidence that was necessary to establish termination of any prior marriages must be made a part of the record.

Note

A son or daughter who is unmarried and under age 21 is a child. Unmarried does not mean “never married” and a previously married son or daughter under age 21 is a “child.” This raises the distinct possibility that someone might engage in divorce fraud in order to qualify for an immigration benefit. As we do not recognize a marriage which is contracted solely to circumvent immigration law, we also do not recognize a divorce which is obtained solely to circumvent immigration law.

· Marital Status of Beneficiary . This question has a definite bearing on eligibility for the benefit sought. You should be careful to verify the answer from the evidence and information furnished. It is not uncommon for a petitioner filing on behalf of a son or daughter to claim the beneficiary has never been married when, in fact, the person is currently married. Some indications that a person may be married, even though the marriage is undeclared, are:

– Age . Some nationalities and cultures tend to marry at a fairly young age. If the beneficiary is abnormally old to be an unmarried person in a particular country, this may indicate an undeclared marriage.

– Children . If the beneficiary has children, there is a strong possibility a marriage exists or did exist. The children's birth certificates will help resolve this.

– Service Records , Records, such as a visa application, Form I-213, affidavit, and previously filed application or petition, may indicate the subject's marital status.

· Petition Submitted Concurrently for Other Relatives . If the petition indicates the petitioner is filing for other relatives at the same time, all the petitions should be considered simultaneously, if possible. However, remember that all petitions stand alone and each must be documented individually. Therefore, a clearly approvable petition should not be held in abeyance pending the adjudication of the other relative's questionable petition. Be aware that generally with "joint" petitions, documents pertaining to all or some of the petitions may be attached to only one of the petitions. In such a situation, check all the petitions for documentation, as this may save the needless return of a petition. Each petition must be accompanied by the necessary supporting documents, either originals or the acceptable copies, before being approved. The supporting documents must be made part of the Service record relating to that particular case.

(C) Discretionary Procedures for Petitioning Military Members and Their Dependents . [Chapter added on 09-22-2009]

When adjudicating a standalone Form I-130 filed by a military member on behalf of his or her alien spouse or child, Service Center ISOs must follow the steps below:

- Review every properly filed petition in chronological order by the receipt date;
- Determine whether the petition involves an active duty military member (by checking the file for military orders) before issuing a request for evidence (RFE); and

Note

The evidence necessary for the issuance of an RFE in this situation includes but is not limited to the list of documents listed in the memo entitled *Standalone Form I-130 and Jointly Filed Form I-751 : Discretionary Procedures for Petitioning Military Members and Their Dependents*, Sept. 22, 2009. See **Appendix 21-8** .

- Review the evidence submitted to determine the nature of the member's deployment; the claimed bona fides of the marriage and relationship to any children involved. See memo entitled *Standalone Form I-130 and Jointly Filed Form I-751: Discretionary Procedures for Petitioning Military Members and Their Dependents*, Sept. 22, 2009. See **Appendix 21-8**

The detailed steps that the ISO must follow are listed in **Appendix 21-9** .

(2) Types of Primary Documentation .

All petitions must be supported by primary evidence, if available. The standard sources of primary documents are:

(A) USCIS Records .

One of the most valuable, yet often overlooked, sources of information to verify a claimed relationship is the records of USCIS itself. When primary evidence such as birth certificates, marriage certificates or divorce decrees is not provided in support of a family-based petition, or where the authenticity of such documents is in question, USCIS records relating to the petitioner or other close relatives may verify or refute information claimed in the petition. Records showing acceptance in another USCIS proceeding of a claim to U.S. citizenship, marriage, birth of a child, etc. may serve to support such a claim in a later petition, or to refute a contradictory claim.

(B) Federal, State and Local Records.

In the United States, vital records are usually kept by State and local authorities. In some cases (e.g., where an event took place while the party in question was in the military), the vital records may be kept by a branch of the federal government.

(C) Foreign Documentation.

To determine if documentary evidence is available from another country, refer to the Department of State's Foreign Affairs Manual (FAM).

(3) Secondary Evidence.

One problem common to all categories of petitions is the unavailability or alleged unavailability of documents. You should always refer to the FAM any time a petitioner alleges that documents cannot be obtained. When the FAM shows that primary documents are generally available in the country at issue, but the petitioner claims that his or her document is unavailable, a letter from the appropriate registrar stating that the document is not available is required before USCIS will accept secondary evidence. If primary evidence is not available, and if this fact is certified by the issuing authority, secondary evidence (as described in **8 CFR 204.1** and on the I-130 instructions sheet) may be accepted. Furthermore, secondary evidence (e.g., school records, baptismal certificates, etc.) is also used in conjunction with primary evidence that carries little probative value like a delayed birth certificate.

(A) Documents should be examined critically for alterations, authenticity, validity, and proper certification. **8 CFR 204.1 (f)** (“Supporting Documentation”) reads, in pertinent part:

(1) Documentary evidence consists of those documents which establish the United States citizenship or lawful permanent resident status of the petitioner and the claimed relationship of the petitioner to the beneficiary.... When the FAM shows that primary documents are generally available in the country of issue but the petitioner claims that his or her document is unavailable, a letter from the appropriate registrar stating that the document is not available will be required before USCIS will accept secondary evidence.

(2) Original documents or legible, true copies of original documents are acceptable. USCIS reserves the right to require submission of original documents when deemed necessary.

(B) **8 CFR 204.1 (g)** lists, in detail, the requirements for primary and secondary evidence.

(4) Adequacy of Evidence.

(A) “Law of the Land”.

To evaluate the adequacy of evidence, you must be aware that the law of the state or country where the act (marriage, divorce, legitimation, or adoption) took place generally governs the validity of the relationship established or terminated. You should check the published precedent decisions if there is a question on this issue. If the precedent decisions and other available references do not resolve the issue, you should request an advisory opinion from the Library of Congress (see **Chapter 14.10** of this field manual). Your office may also have available copies of previous Library of Congress opinions for reference.

(B) Exceptions.

Although the law of the land generally governs the validity of a relationship, it does not follow that all legal relationships will confer benefits under the Act. For example, a marriage contracted solely for the purpose

of gaining immigration benefits and not intended to create a life together as man and wife, though valid in the place where contracted, is not valid for benefits under the Act, and a proxy marriage is not considered valid under the Act unless consummated. Furthermore, in some countries it may be possible to establish a same-sex relationship which is not in compliance with the provisions of section 7 of the Defense of Marriage Act (110 Stat 2419 amending 28 U.S.C. 115, prohibiting federal law recognition of same-sex marriages) and would therefore not be recognized for immigration purposes (see **Chapter 21.3**).

(5) Determining the Meaning of a Document.

You must ensure that the document accepted is, in fact, what it is purported to be. A marriage license is different from a marriage certificate (the former allows the couple in question to get married in a given jurisdiction and within a given time period, the latter is evidence that the marriage has been celebrated). Likewise, often you will find that what appears to be a divorce decree is in reality a petition for divorce or a separation decree, neither of which legally terminates a marriage. Some decrees may be granted with qualification, such as a prohibition against marriage within a specific period of time, and therefore are not valid unless the qualifications are met. Others may specify that the decree will not become final until some future date or is null if the woman becomes pregnant during a specified period of time.

Note

Even in countries where a condition is placed on a decree, that same country might not honor the condition. For example, in Mexico divorce decrees prohibiting remarriage within a certain amount of time do not invalidate a subsequent marriage performed before time limit. When in doubt, solicit an opinion from the Library of Congress (see **Chapter 14.10** of this *field manual*).

(6) Documentation Already in the USCIS File.

The petitioner is required to submit all required documentation with the petition. However, in some instances, the petitioner may advise USCIS that the required document can only be located in the petitioner's file. If so, USCIS should request the file to attempt to locate the document in question.

(7) Evidence in Undocumented Cases.

Primary evidence of birth, marriage, death, divorce, and adoption is sometimes unavailable. In these cases,

affidavits by the petitioner and other persons having personal knowledge of the events that created the relationship, and other evidence such as family photographs, blood tests, signature specimen forms, and evidence of transmittal of remittances to the petitioner's family may be considered. In many countries where the lack of primary evidence is known to be a fact, you need not require a certification of the non-existence of a record before you accept secondary evidence. Blood tests may be required in these cases. You should always refer to the FAM for primary document availability. The regulations at **8 CFR 204.1(g)(2)** give specifics as to what type of secondary evidence to request. See *Matter of Tanessa Amelia Pagan*, ID 3378 (BIA 1999).

Any information furnished should be carefully scrutinized for consistency with claims made in the visa petition and information contained in USCIS records, particularly with regard to names, relationships, dates and place of birth, and dates and places of marriages.

When a petitioner seeks to confer immediate relative or preference classification on the basis of an alleged relationship between an adoptive parent and an adopted child (or adopted son or daughter) and no formal adoption decree is available, or, if such a decree is submitted and its authenticity is considered suspect, the petitioner should be required to submit secondary evidence of the alleged relationship. Such secondary evidence may consist of copies of affidavits, photographs, remittances, or other evidence of support, or letters and other documents bearing upon the validity of the adoption. Such evidence should be made part of the record of proceeding.

In *Matter of Kwan*, 14 I&N Dec. 175 (BIA 1972), involving a visa petition on behalf of an adopted daughter, the BIA provided a useful guide to the kind of secondary evidence which should be required in an undocumented case. The following is an excerpt from that decision:

Inasmuch as most Chinese adoption cases must be decided without benefit of a recorded formal decree of adoption, it is permissible to resort to other forms of probative evidence in order to reach a decision as to the validity of the adoption.

For instance, it would be proper for the petitioner to submit affidavits executed by (1) both adoptive parents, (2) witnesses to the adoption ceremony, and (3) relatives and neighbors. The absence of such affidavits is a factor the petitioner must satisfactorily explain. Affidavits submitted should (1) state the nature of the affiant's relationship, if any, to the parties, (2) set forth the basis of the affiant's knowledge, and (3) contain a statement of the facts the affiant knows regarding the adoption, rather than mere conclusory statements as to the existence of the adoption.

Matter of Kwan describes and explains the necessity of good secondary evidence. You should require similar secondary evidence; make it a part of the record of proceeding when primary evidence of birth, marriage, death or divorce is not available to establish a claimed relationship between a petitioner and beneficiary. Attach the originals or copies of secondary evidence you considered in reaching a decision to any approved petition you forward to a National Visa Center (NVC) . You should not approve the petition unless you are satisfied from the evidence submitted that the petitioner has met the burden of proof.

(8) Affidavits .

When considering secondary evidence, you must usually evaluate sworn affidavits to determine the validity of the relationship. Be sure that the affidavits contain all the specified elements as required by the secondary evidence regulation. You should analyze the affidavits carefully and compare them with any available information to determine if inconsistencies exist. When all the affidavits are worded the same, it indicates that the words are not necessarily those of the affiant and may cast some doubt on the affidavits' validity. When that situation arises, it is often beneficial, if possible, to have the affiant appear for a personal interview to determine what he or she personally knows about the claimed relationship and how the knowledge was acquired.

You should always try to obtain some legal or official document to corroborate affidavits. In some cases it is not possible, but usually the case will indicate something else is available, such as school records, census records, military or draft records, income statements, or social security records. Though the corroborating evidence may be nothing more than information furnished to another agency by the petitioner or beneficiary, it may establish that the relationship was claimed prior to seeking immigration benefits and can be very helpful in verifying the claimed relationship.

(9) Evidence of Status in the United States .

(A) United States Citizenship of Petitioner .

When a USCIS employee has verified the petitioner's status, the notation "proof seen" will be placed beside the citizenship information on the petition and initialed. If a naturalization or citizenship certificate is presented in person, it shall be handed back to the petitioner. If a petition has been mailed in with the certificate attached, it shall be certified by the first employee reviewing the application. The certificate shall then be sent directly back to the petitioner by certified or registered mail. Form G-3 47 should be used to

obtain the naturalization file of any petitioner who is unable to furnish his certificate number and date and place of naturalization or where there is reason to suspect that the petitioner may have been expatriated.

Some petitioners who claim U.S. citizenship through birth in the U.S. are in fact aliens. The following may indicate an alien is making a false claim to U.S. citizenship:

- Delayed birth certificate;

- Delayed baptismal certificate;

- Unavailability of school records;

- No census records of the individual;

- Individual not in the military or registered for the draft;

- No baptismal certificate when of a faith normally baptized;

- No official documents (claim based solely on affidavits);

- Unable to speak English;

- Illiterate, when of an age group for which illiteracy is uncommon;

- No knowledge of area of predominant residence in the U.S.;

- No knowledge of mother, father, and/or brothers or sisters (check the number of prior births on the birth certificate);
- Siblings and/or parents born abroad;
- Claims raised abroad and only recently learned of U.S. citizenship; no satisfactory explanation for means of entry into U.S.;
- Social security card obtained late in life, or the number does not correspond to the claimed place of issuance;

This list is by no means complete, nor can each factor be applied to all cases. Many of the elements discussed can only be developed through personal interview. If the petitioner's citizenship is in question, an interview should be conducted.

(B) Lawful Residence Status of Petitioner .

Ideally, an LPR filing an I-130 petition will submit a photocopy of a currently valid Form I-551 to verify his or her LPR status. However, the instructions on the Form I-130 require an LPR petitioner to submit his or her original "Form I-151 or I-551" (and do not even specify that the Form I-551 must be a currently valid one). On the other hand, even in the absence of documentation, regulations at **8 CFR 103.2(b)(17)** allow for verification of claimed LPR status through USCIS records "at the discretion of the adjudicating officer." Furthermore, **section 264(e)** of the Act requires an LPR (18 years of age and over) to carry his or her Form I-551 at all times. Accordingly, the documentation submitted by the petitioner might range from an original valid Form I-551, to a photocopy of such Form I-551, to an obsolete document, to no document at all; and the action of the USCIS employee or contractor upon receiving a Form I-130 will vary according to the documentation submitted:

- If the petitioner submits an original valid Form I-551, depending on local office policy, either:

- Make a photocopy of the Form I-551 to accompany the petition and return the original to the petitioner, or

- Annotate the Form I-130 in block 14a “Original, valid Form I-551 seen and returned;” add the date and the appropriate identifier (e.g., your stamp number or your initials); and return the Form I-551 to the petitioner.

- If the petitioner submits a photocopy of a valid Form I-551, no verification or annotation action is required at this point.

- If the petitioner submits an original Form I-151, or an original but expired Form I-551, make a photocopy of the document and annotate that photocopy “Expired card seen and returned to petitioner with instructions to apply for replacement” adding the date and your identifier. Then return the card to the petitioner with a Form I-90 and an explanation that the petitioner must apply for a replacement card (see **Chapter 51** of this field manual).

- If the petitioner submits a photocopy of a Form I-151, or of an expired Form I-551, no verification or annotation action is required at this point.

- If the petitioner submits none of the above or no documentation at all, but claims in block 14a of the Form I-130 to be a lawful permanent resident, depending on local policy, either:
 - Annotate block 14a of the Form I-130 “No documentation submitted,” adding the date and your identifier (which will require verification from USCIS records in accordance with **8 CFR 103.2(b)(17)** , as discussed above), or

 - Return the Form I-130 to the petitioner with instructions to submit the required documentation.

Note

Regardless of the action taken at the point of receipt by the USCIS employee or contractor, the adjudicating officer has full responsibility for determining the petitioner's status and standing at the time of adjudication.

Even though the petitioner presents evidence of permanent residence and USCIS records verify the status, the adjudicating officer must determine if the petitioner is entitled to the status or is deportable. A visa petition should not be approved until questions concerning the petitioner's deportability are resolved.

One of the most frequent problems in this area concerns petitioners who gained entry into the United States as children or unmarried sons or daughters, and whose pending petitions establish that they were actually married before entering the United States. These particular cases should be transferred out to the operations branch for their disposition and most likely to a district or local office for full interview and adjudication. The results could lead to prosecution of the petitioner and the possible loss of his/her lawful permanent residence status.

Note

When admitting a "marriageable age" immigrant with a "child" or "unmarried son or daughter" visa (including the "accompanying to join" child classifications), or adjusting an alien in such category, it is always a good idea to verify that the person is still unmarried and to so annotate the visa or adjustment application. This will assist in establishing that the alien committed fraud if it is later determined that he or she was already married at the time. The same pertains to derivative refugees and asylees being admitted under the RE-3 classification or granted AS-3 classification.

(C) Status in the United States as a Non-citizen National .

An American Samoan (including a Swain's Islander), as a non-citizen national, may file a relative visa petition for a spouse, child or unmarried son or daughter under second preference (see **Matter of Ah San** , 15 I&N Dec. 315 (BIA 1975)). A non-citizen national will generally present a Certificate of Identity showing United States nationality, a United States passport, or a birth certificate as evidence of his or her status in this country. Chapter 12.8 of the Inspector's Field Manual contains additional information on non-citizen nationals.

(D) Status in the United States as a Refugee or Asylee .

A refugee or asylee will generally present a copy of his or her I-94 showing that he or she has been

admitted as a refugee or granted refugee status. He or she may also present a refugee travel document (Form I-571) as evidence of his or her status. Any doubts regarding the petitioner's status in the United States should be resolved through a review of his or her A-file, and, if necessary, a personal interview.

Note

Remember that under **8 CFR 207.7(d)** and **8 CFR 208.20** , a Form I-730 can only be filed within the first 2 years after the refugee's initial admission as a refugee or the asylee's grant of asylee status (a departure and return on a refugee travel document does not begin a new 2-year time period).

(10) Evidence of Relationship.

General information about documentation is contained in **Chapter 11** of this field manual. More specific information on the documentation required to establish a specific relationship is discussed in each of the subchapters (21.3 through 21.10) of this chapter.

(11) Insufficient Documentation.

If the documentation submitted by the petitioner does not adequately prove or disprove all issues involving the standing of the petitioner or the relationship between the petitioner and the beneficiary, you have 3 (or in some offices, 4) means of resolving the outstanding issues:

(A) Requests for Evidence.

When the USCIS determines that the evidence is not sufficient, an explanation of the deficiency will be provided and additional evidence will be requested. Service centers use Form I-797 and districts use Form I-72 to make such request. In accordance with 8 CFR 204.1(h), the petitioner will be given sixty (60) days to present additional evidence, withdraw the petition, request a decision based on the submitted evidence, or request additional time to respond. If the Director determines that the initial sixty (60) day period is insufficient to permit the presentation of additional documents, the Director may provide an additional sixty (60) days for the submission. The total time shall not exceed 120 days, unless unusual circumstances exist. Failure to respond to a request for additional evidence will result in a decision based on the evidence previously submitted. [**Note:** Compare and contrast 8 CFR 204.1(h) (which allows up to two 60-day periods for response) and 8 CFR 103.2(b)(8) (which allows a single 84-day period for response). Since

there is an apparent conflict between to these two regulatory provisions, we have to give the applicant or petitioner for a benefit under 8 CFR 204 the more generous provision. Also, because 204.1(h) is specific to section 204, it has more relevance to relative visa petitions]

When you request additional information, inform the petitioner what must be completed, corrected, or submitted. It is important that you inform the petitioner of ALL deficiencies, (remember to consider the allowable time for resubmission stipulated by **8 CFR 204.1(h)**), so the petition is 100% complete and ready for adjudication. Returning of a petition without stipulating all the deficiencies results in additional work for USCIS because of the unnecessary additional handling prior to final decision. This results in complaints from the petitioner concerning inefficiency and delays, in Congressional interest due to the petitioner's discontent with the Service's inordinate processing time for the petition, and in a bad public image of USCIS .

A petition should not be returned, or additional information requested, if there is sufficient documentation to allow a decision to be rendered. For example, if a permanent resident alien files a petition on behalf of a brother submitting both birth certificates indicating a common father and different mothers, but fails to submit other documentation, the petition should not be returned as deficient. The evidence submitted clearly establishes the petitioner's ineligibility to file (because a LPR cannot petition for a sibling), and additional evidence will not alter the situation; therefore, the petition would be properly denied on the evidence of record rather than returned requesting additional documentation. Any evidence requested must be necessary and pertinent to the decision in the case.

(B) Interview .

The Service Centers are not set up to conduct interviews; however situations will arise that occasion an interview. These occasions would require a petition referral to the local office having jurisdiction over the petitioner (and/or beneficiary if in the U.S.). (The referral must include a memorandum explaining the reason for the referral and the concerns or issues which must be explored at the interview.) The local office, according to its availability, would then schedule the interview. Each Service Center usually has a specified policy as to how to accomplish this referral. Once a case has been referred to a local office, that office becomes the adjudicating office and has full responsibility for the petition; the petition is not to be returned to the Service Center for post-interview adjudication.

Most petitions will be completed without the need of a personal interview; however, the facts of an individual case may indicate that a personal interview is appropriate. Most interviews concern the bona fides of a marriage in spouse petition proceedings or the petitioner's status in the United States.

Usually, a written or taped record of the interview(s) is made to document the proceedings and the interview is used to render a decision.

Interviews are time-consuming and should be requested only when absolutely necessary. If conducted properly, interviews can be very beneficial in helping one reach a decision on a case.

See **Chapter 15** of this field manual for a discussion of interview techniques and procedures.

Note

Upon completion of the interview, the adjudicating office should provide the Service Center with feedback regarding the results of the interview. This will both give the Service Center officer credit for a case well-referred and will enable the Service Center to refine its referral criteria.

(C) Investigation. See **Chapter 10.5(d)** of this field manual.

(D) Field Examination. See **Chapter 17** of this field manual.

(c) Adjudicative Issues.

The adjudication of a relative petition deals with two issues: whether the petitioner has standing to file the petition and whether the beneficiary has the requisite familial relationship to qualify for the classification being sought. These determinations require an understanding of not only the immigration and nationality laws and regulations of the United States, but also of the laws of other countries and states, prior laws, genetics, domestic abuse, fraud, psychology, and a myriad of other issues and sub-issues.

(1) Burden of Proof.

The adjudication of visa petitions is an administrative proceeding. In administrative proceedings, the

petitioner bears the burden of proof to establish eligibility for the benefit sought. **Matter of Brantigan** , 11 I & N Dec. 453 (BIA 1966) .

(2) Review and Rebuttal Rights .

The adjudicating officer must keep in mind the fact that the petitioner must be given the opportunity to inspect and rebut any adverse information used in arriving at the decision to deny or revoke a petition. The one exception pertains to material classified under E.O. 12356. In accordance with **8 CFR 103.2(b)(16)(iv)** , the petitioner must still be given a summary (authorized by a regional director) of the general nature of the information and the opportunity to rebut it if it can be done without jeopardizing the safety of the information and the source. (See **Matter of Tahsir** , 16 I&N Dec. 56 (BIA 1976) and Chapter 10.19 of this field manual.)

(3) Order of Processing .

Generally speaking, relative petitions should be adjudicated in the order in which they are received. However, the regulations and policies recognize that exceptions to this general rule may be made under certain circumstances (see **Chapter 10.11** of this field manual).

(4) Rules of Evidence .

Strict rules of evidence used in criminal proceedings do not apply in administrative proceedings. Usually, any oral or documentary evidence may be used in a visa petition proceeding.

Petitioners may submit photocopies of documents in support of the petition, but must be able to submit the original documents upon request. The original document which was photocopied must, of course, be a genuine document which was obtained from the authorized keeper of the records.

Copies of public documents, certified by the person having custody of the originals, are generally admissible. Official foreign documents should be certified by the lawful custodian and authenticated by U.S. consular officers, except in cases signatory to the Hague Convention of Legalizations. The absence of

an official record may be proved by a written statement signed by an appointed deputy that, after a diligent search, no record of entry of the event is found to exist in the records of the custodian's office.

A statement that a particular record does not exist is, of course, not evidence of the veracity of the claim being presented; it merely allows you to consider other evidence. Any such claims should be carefully reviewed. For example, someone who quit high school in the 9th grade might claim that he graduated from another high school in the same area whose records he knows to have been destroyed in a fire, so that anyone checking on the claim would be advised that the records (of the school which the person did not attend) are unavailable. The verifying inspector would not know that the records at a different school (the one the person briefly attended) exist and reveal that the person did not graduate.

(5) Derivative Beneficiaries .

Any alien classified as an immediate relative must be the direct beneficiary of an approved petition for that classification. Therefore the child of an alien approved for immediate relative spouse classification is not eligible for derivative classification and must have a petition filed on his or her behalf.

However, the children and, in some cases, the spouse of an alien approved for family preference classification, may be included in the principal alien's preference visa petition. The derivative beneficiary will be accorded the same family preference classification and the same priority date as the principal alien.

If the derivative child of a second preference beneficiary reaches the age of 21 years prior to the issuance of a visa to the principal alien parent, a separate petition will be required for that child. The petition must be filed by the same petitioner that filed for the principal alien parent, and, if approved, would retain the original priority date. Remember, this retention of the original priority date only applies when the derivative child's principal alien parent is accorded second preference classification.

When adjudicating a petition, it is important to determine if there are family members eligible to derive benefits from the petition.

If the family is in the United States and the principal alien is outside the United States, the derivative beneficiaries may be eligible for adjustment of status under section 245 of the Act once the principal alien has immigrated (provided they are not subject to the bars contained in sections 245(a) or 245(c) of the Act), and should be so notified.

(6) Special Concerns about Particular Nationalities .

(A) Chinese Visa Petitions .

Prior to 1931, the prevailing standards or guidelines for marriages, adoptions, and other civil proceedings which might be considered in connection with an I-130 were determined by Chinese Customary Rite. This was true also in Hong Kong, a British Crown Colony.

In 1931, the *Chinese Civil Code* was instituted in mainland China, codifying much of the Customary Rite and becoming the governing law of the land. Books IV and V of the Civil Code relate to family affairs and include all the regulations as to what constituted a valid marriage, divorce, or adoption.

The Chinese Civil Code remained in effect in mainland China until the Communist takeover, which started in early 1949, and was essentially completed by 1950. The Communist government evolved its own civil code, eliminating many of the discriminatory or "decadent" provisions of the Chinese Civil Code. For example, under the Communist government, adoption was permitted solely in the interest of the child, to provide the child with a home, education, and parental guidance, and was no longer permitted for the purpose of instituting an heir to continue a family name. The stigma of illegitimacy was removed, theoretically, by eliminating any distinctions made by the law between children whose parents were married and those whose parents were not. Once paternity was established, the child was considered legitimate.

Therefore, in order for a petition filed by a petitioner from mainland China on behalf of a beneficiary fitting this scenario to be considered for approval, paternity must be shown. The regulations with reference to primary and secondary evidence would apply here also. Once the relationship has been proven, the petition will be adjudicated as any other.

After diplomatic relations were reestablished in the early 1970s, the need for documentation to support relative petitions became more urgent, and the Communist government developed a certificate of family relationship or notarial certificate. Since there was and is no uniform nationwide system of registration, the information contained in the certificates must be obtained from interviews and local records and should carry no more weight than an affidavit prepared by a witness. The BIA corroborated this view in **Matter of Cheung** , 17 I&N Dec. 365 (BIA 1980) which was modified by **Matter of May** , 18 I&N Dec. 381 (BIA

1983) which states that notarial certificates are issued on the basis of primary documentation submitted by the applicant or as a result of investigation by notarial office staff and **while generally reliable, are best used in conjunction with other supporting evidence.**

(B) Petitions on Behalf of Aliens from Yemen .

Chapter 21.2(c)(6)(B), Petitions on Behalf of Aliens from Yemen, has been superseded by USCIS Policy Manual, Volume 1: General Policies and Procedures as of November 23, 2021.

(d) Anti-fraud Measures .

Some cases contain information which should alert you that there may be a problem with the case. You should be aware of the indications of fraud or ineligibility and try to detect and deny those cases. It is important to remember that a case may be bona fide notwithstanding the fact that, on the surface, it appears fraudulent. Each case must be decided individually based on the evidence of record.

Note:

Remember that the statute does not provide for the use of administrative discretion in the adjudication of a relative visa petition. Furthermore, the admissibility of the beneficiary is not at issue. If the beneficiary is eligible for the benefit sought, the petition must be approved, regardless of any and all unfavorable aspects of the alien's history and character. However, if during the course of the adjudication of the visa petition you encounter grounds of inadmissibility or unfavorable discretionary factors, you should make sure that such grounds or factors are properly documented and brought to the attention of the immigration officer considering the alien's application for adjustment of status or the consular officer considering the alien's application for an immigrant visa.

If fraud is suspected, there are a number of methods by which you can seek to resolve the concerns, including (but not limited to):

(1) Parentage Testing .

(A) General.

Parentage testing is used to establish a claimed relationship for benefits under the Immigration and Nationality Act. Such testing may be appropriate to establish a parental relationship in support of a petition for a child, son, or daughter (Form I-130). The procedures discussed herein may also apply to establishing the biological parent of a foreign-born adopted child to support an orphan petition (Form I-600) or to establishing a parental relationship for citizenship cases (Form N-600). In addition, these procedures may be used to establish a parental relationship for refugee and asylum relative petitions (Form I-730).

(B) Authority to Require Parentage Testing.

A petitioner must establish eligibility for a requested immigration benefit. An application or petition must be filed with any initial evidence required by regulation or by the form instructions. Any evidence submitted is considered part of the relating petition or application and may establish eligibility. 8 CFR 103.2(b)(1).

In the case of a petition for a child, son, or daughter, the petitioner must provide evidence of the claimed relationship. 8 CFR 204.2(d)(2). The initial evidence for a child, son, or daughter includes a birth certificate. When a birth certificate is unavailable, the petitioner must demonstrate that it is not available and submit secondary evidence, such as a baptismal certificate, or church or school records. If the petitioner demonstrates that both initial and secondary evidence is unavailable, two or more affidavits may be substituted. However, the unavailability of a birth certificate creates a presumption of ineligibility for the benefit, and any alternative evidence submitted must be evaluated for its authenticity and credibility. 8 CFR 103.2(b)(2)(i) and 204.2(d)(2)(v).

A director may also require that Blood Group Antigen or Human Leukocyte Antigen (HLA) blood parentage testing be conducted on the child, son, or daughter and putative mother and father to establish eligibility for a benefit. 8 CFR 204.2(d)(2)(vi). Statistical analysis of these tests provides a likelihood of parentage. These test results will often establish or disprove the claimed parental relationship. Since blood parentage testing can be a valuable tool to verify a relationship, it may generally be required when initial and secondary forms of evidence have proven insufficient to prove a claimed relationship. As a result of technological advances, field offices should be aware that Blood Group Antigen and HLA tests are no longer widely available for testing by laboratories, and are not considered to be as reliable as DNA tests.

Although a director may require blood parentage testing, he or she has no statutory or regulatory authority

to require DNA testing. However, when initial and secondary forms of evidence have proven inconclusive and blood parentage testing does not clearly establish the claimed parental relationship, field offices may have no alternative to suggesting DNA testing as a means of establishing the relationship. The petitioner has the burden of proof when the evidence submitted has not satisfied his evidentiary threshold and the USCIS would otherwise deny the petition without more conclusive evidence such as that which DNA testing could provide. In such cases, field offices should inform the petitioner that:

- DNA testing is absolutely voluntary;
- The costs of DNA testing and related expenses (such as doctor's fees and the cost of transmitting testing materials and blood samples) must be borne exclusively by the petitioner; and
- Submitting to DNA testing is in no way a guarantee of the approval of the petition.

Field offices should keep in mind that no parentage testing, including DNA testing, is 100 percent conclusive. **[(b)(2) or (b)(7)(E)]**

While blood testing is not and should not be a routine part of the adjudications process, it can be an extremely valuable tool in cases when it otherwise would be impossible to verify a relationship. Parentage blood tests involve laboratory procedures performed on blood samples or other genetic material obtained from the child and putative parent or parents. The statistical analysis of the blood test provides a likelihood of parentage if the putative parent is not excluded. The likelihood of parentage is greater with increased information. Increasing the number of genetic testing systems tested provides stronger results, while the absence of information diminishes the strength of results. Officers should be aware that parentage testing is an extremely fact-driven procedure. A laboratory may more accurately determine what tests to run based on specific facts. A more accurate answer will be provided by the laboratory if the Officer provides the laboratory with suspicions of fraud or other pertinent facts.

(C) Minimum Standards.

- Parties tested: The most accurate results are received when the alleged mother, father and child are available for testing. However, testing of only the mother and child or father and child are also acceptable.

- Statistical probability : All tests must produce a 99.5% statistical probability for the conclusion of results to establish parentage. Laboratories can continue with a battery of tests until a 99.5% conclusion of parentage is established. After testing the samples from all parties, laboratories will produce a conclusion of parentage which will inform field offices which tests were administered and the conclusion for the results they obtained.

- Preferred test : The preferred test is the Polymerase Chain Reaction (PCR) test drawn with a buccal swab or a PCR test based on a blood sample.

Please see below for a more detailed explanation of the parentage testing process and procedures.

(D) Blood Testing.

Blood consists of red and white blood cells, platelets and liquid plasma. Each component of the blood contains several antigens or "markers." The blood group antigens are structures on the surface of the blood cells that help to distinguish individuals within a population. The antigens, inherited from the parents, are controlled by genes on a pair of chromosomes. Each parent contributes one of each chromosome pair carrying the genes that determine the detectable properties of an offspring's blood. The presence of a specific antigen indicates a particular genetic composition or marker. Conclusions in parentage blood testing are based upon the principle that the child inherits genetic markers in his or her blood from each of his or her biological parents.

(E) Conventional Blood Tests.

There are four basic tests used in conventional blood testing:

- basic red cell antigens (ABO, MN, CcDEe);
- extended red cell antigens;

- white cell antigens (HLA); and
- red cell enzymes and serum proteins.

The laboratory begins by conducting the first test. If parentage cannot be ruled out based on the results of the first test, the laboratory will conduct the second test. The process continues until either the putative parent can be entirely excluded or a good statistical probability is established that the relationship is bona fide.

(F) DNA Testing.

DNA (deoxyribonucleic acid) parentage testing provides an alternative to more conventional parentage blood testing methods. DNA testing can be especially useful in countries with limited medical and transportation facilities because, unlike HLA testing, it does not require the use of live human blood cells, which must be tested within just a few days, and are sometimes difficult to obtain. DNA parentage testing can often provide conclusive results even when not all parties are available for testing.

Officers should be aware that parentage testing technology changes rapidly. Whereas HLA blood testing was widely used until 1994, it is now rarely used. Restriction Fragment Length Polymorphism (RFLP) tests which have been widely used since 1994 are now being phased out by laboratories in the U.S. The DNA test which is most recommended for use in parentage testing is the Polymerase Chain Reaction (PCR) test. Although DNA testing has traditionally been accomplished through blood testing, buccal (mouth or cheek cavity) swabs are an alternative to drawing blood for testing. Cells are drawn from the inside cheek using a long cotton swab. As opposed to blood testing, buccal swab testing does not require the assistance of a physician, and is non-invasive. Nevertheless, it is recommended that only a person specially trained to collect a tissue sampling perform the procedure in order to ensure the quantity is sufficient for testing.

(G) Parentage Testing Procedures. (Chapter 21.2(d)(1)(G) Revised 04/08/2005; AFM 05-10)

The American Association of Blood Banks (AABB) accredits parentage-testing laboratories for a two-year period. The current list of AABB accredited parentage testing laboratories is contained in **Appendix 21-3** of this field manual. To access this list, click on the web links listed in Appendix 21-3. Offices may accept parentage testing results only from laboratories on this list.

Note

The accreditation standards were developed by the committee on parentage testing of the AABB under a grant from the Federal Office of Child Support Enforcement of the U.S. Department of Health and Human Services and with assistance of special consultants and representatives from the American Bar Association, American Medical Association, American Society of Clinical Pathologists, American Society for Histocompatibility and Immunogenetics and the College of American Pathologists.

The burden of proof is on the petitioner to show that the laboratory chosen is accredited by the AABB.

When a field office requires blood testing or suggests DNA testing, it should provide the petitioner with the list of AABB accredited laboratories. Field offices should be aware that the state designations on the list are for laboratory headquarters. Many laboratories have collection sites in many different states and locations. The petitioner must select a laboratory, contact the laboratory directly, and make the necessary arrangements for conducting the tests. To ensure the integrity of the test results, all stages of parentage testing must be conducted under appropriate safeguards. These safeguards must include strict controls concerning:

- protection of the chain of custody of blood or tissue samples;
- identification of the parties to be tested, generally by photographing individuals being tested; and
- correct presentation of test results.

Communication should be directly between the laboratory and the civil surgeon or panel physician or the field office. Under no circumstances should a third party, including the individuals being tested, be permitted to carry or transport blood or tissue samples or test results. Since the applicant bears full financial responsibility for testing, USCIS has no objection to that person receiving a copy of the test results from the laboratory or panel physician. It is imperative that the same facility tests both the alleged child and the alleged parent(s). Where the petitioner is physically present in the U.S., a U.S.-based lab must conduct the tests and relay the results. Instructions usually require the participation of a witness, identification taken from all (adult) parties involved, and photographs taken of all parties.

(H) Analysis of Test Results .

In all cases of parentage testing, laboratories should provide the statistical probability for the conclusion for the results they obtain. Offices should use the following interpretations of the plausibility of parentage to analyze test results. In general, AABB standards mandate 99 percent to be the minimum requirement for the proof of parentage. However, this statement does not mean that all test results 99 percent and higher should be accepted as conclusive proof of parentage, or that all test results be low 99 percent exclude parentage. The type of parentage test performed, the genetic profile of the local population, and facts specific to the case will all affect the percentage that an office should require establishing a parental relationship. Field offices should provide laboratories with non-genetic evidence, which may affect the lab's assumptions in performing the testing, analysis of the results or the number of genetic markers tested.

Plausibility of Parentage (Percent)	Interpretation
99.80 - 99.90	Practically Proved
99.1 - 99.80	Extremely Likely
95 - 99	Very Likely
90 - 95	Likely
80 - 90	Undecided
Less than 80	Not Useful

Please note that in societies where intra-family marriage is common, close relatives will share many genetic markers and the test results of an aunt, uncle, or grandparent of a beneficiary may appear to establish the claimed parental relationship. The statistics used in paternity testing are designed for evaluating an alleged father as compared to unrelated men. Unlike the random population where persons may share genetic markers by chance, related men will share genetic markers by descent. First degree relatives, such as father, brother or son, will share 50% of their genetic material on average. Therefore, directors should consult with local physicians and parentage testing laboratories, and consider local fraud patterns, to determine the appropriate tests and particular test results to reliably establish the parental relationship in questionable cases. Officers should ask labs to calculate both a father-child and uncle-child or sibling relationship in these cases and should examine reports provided by the laboratory to ensure that sufficient testing was done to distinguish between family members. Officers should feel free to contact the laboratory for clarification if the lab's findings are inconclusive. Labs are able to conduct tests on additional genetic markers if necessary to resolve inconclusive cases.

(I) Questions .

Questions regarding the appropriate parentage test to use to establish a claimed relationship or analysis of the test results may be directed to the parentage-testing laboratory selected by the petitioner. Questions regarding this policy should be directed to the Residence and Status Branch, Adjudications Division at 202-514-4754.

(2) EPIC checks. See Chapter 32.6 of the Inspector's Field Manual.

(3) Interview. See **Chapter 15** of this field manual.

(4) Investigation. See **Chapter 10.5** of this field manual.

(5) Field Examination. See **Chapter 17** of this field manual.

(6) The Immigration Marriage Fraud Amendments of 1986 (IMFA).

In 1986, Congress amended the Immigration and Nationality Act to provide that if an alien obtains lawful permanent residence based on a marriage that is less than 2 years old at the time of the alien's admission or adjustment to permanent residence, the alien's permanent residence is on a conditional basis. The "condition" is that the alien and the spouse through whom the status was obtained must file an I-751 petition to remove the conditional basis of the residence two years after the immigration or adjustment (see **Chapter 21.3** and **Chapter 25.1** of this field manual). This requirement pertains only to those aliens who obtain status directly through the alien's marriage to the petitioner, or (in the case of a child) through the marriage of the alien's parent to the petitioner. It does not apply to other relationships, such as a derivative spouse or child of a beneficiary (e.g., a F3-2 or F3-3 immigrant). Properly used, IMFA is a powerful anti-fraud tool, since it enables USCIS to fully adjudicate a case both before the alien obtains LPR status and once again when he or she seeks removal of the conditions. The effectiveness of this second adjudication can be even further enhanced if officers adjudicating the I-130 petition or the I-485 adjustment application provide guidance (in the form of memorandum in the A-file or electronic notes once the automated support systems have such capacity) regarding items to be aware of when adjudicating the Form I-751.

However, if improperly used, IMFA can be very ineffective. Officers adjudicating the I-130 petition must guard against the temptation to "let the I-485 and I-751 adjudicators worry about the fraud." Likewise,

officers adjudicating the I-751 petitions must guard against the temptation to say, “Well, it looked good enough to the I-130 adjudicator and the I-485 adjudicator, so it must be OK.” The system only works if each officer adjudicating each step of the process takes full responsibility for detecting and deterring fraud in his or her stage of the process.

(e) The Child Status Protection Act of 2002 (CSPA). (Revised AD07-04; 04-11-08)

The CSPA amended the Immigration and Nationality Act (Act) to permit an applicant for certain immigration benefits to retain classification as a child under the Act, even if he or she has reached the age of 21. The CSPA added section 201(f) for applicants seeking to qualify as Immediate Relatives and section 203(h) for applicants seeking to benefit under a preference category, including derivative beneficiaries.

(1) CSPA Coverage

(i) Adjustment as an Immediate Relative (IR).

The CSPA amended section 201(f) of the Act to fix the age of an alien beneficiary on the occurrence of a specific event (e.g. filing a petition). If the alien beneficiary is under the age of 21 on the date of that event, the alien will not age out and continue to be eligible for permanent residence as an IR. It does not matter whether the alien reaches the age of 21 before or after the enactment date of the CSPA, when the petition was filed, or how long the alien took after petition approval to apply for permanent residence provided the alien did not have a final decision prior to August 6, 2002 on an application for permanent residence based on the immigrant visa petition upon which the alien claims to be a child.

(A) Petition Initially Filed as Immediate Relative (IR) Child.

Chapter 21.2(e)(1)(i)(A), Petition Initially Filed as Immediate Relative (IR) Child, has been superseded by USCIS Policy Manual, Volume 7: Adjustment of Status as of May 23, 2018.

(B) Petition Initially Filed as Child of a Lawful Permanent Resident (LPR).

If an alien is seeking to adjust status on the basis of being an immediate relative child, and the petition serving as the basis for the adjustment was first filed for classification as a family-sponsored immigrant based on the parent being a lawful permanent resident and the petition was later converted, due to the naturalization of the parent, to a petition to classify the alien as an IR, then the age of the alien on the date of the parent's naturalization is the alien's age for CSPA purposes. If the alien was under the age of 21 on the date of the petitioning parent's naturalization, the alien will not age out.

(C) Petition Initially Filed as Married Son or Daughter of a U.S. Citizen (USC).

If an alien is seeking to adjust as an immediate relative child, and the petition serving as the basis for such adjustment was first filed for classification as a married son or daughter of a U.S. citizen, but the petition was later converted, due to the legal termination of the alien's marriage, to a petition to classify the alien as an immediate relative, then the age of the alien on the date of the termination of the marriage is the alien's age for CSPA purposes. If the alien was under the age of 21 on the date of the termination of the marriage, the alien will not age out.

(ii) Adjustment Under a Preference Category.

The beneficiary's CSPA age is determined using the formula below. If the petition is approved and the priority date becomes current before the alien's CSPA age reaches 21, then a one-year period begins during which the alien must apply for permanent residence in order for CSPA coverage to continue.

It does not matter if the alien aged out before or after the enactment date of the CSPA, so long as the petition is filed before the child reaches the age of 21 provided the alien did not have a final decision prior to August 6, 2002 on an application for permanent residence based on the immigrant visa petition upon which the alien claims to be a child.

(A) CSPA Age Formula.

Chapter 21.2(e)(1)(ii)(A), CSPA Age Formula, has been superseded by USCIS Policy Manual, Volume 7: Adjustment of Status as of May 23, 2018.

(B) Direct Beneficiaries.

The number of days that a petition is pending is the number of days between the date that it is properly filed (receipt date) and the date an approval is issued on the petition, including any period of administrative review.

In the case of a petition where adjustment is sought as the child of an LPR (F2A) and it is determined that the age of the beneficiary is over the age of 21 for CSPA purposes, if the petitioner naturalizes then the petition is to be automatically converted to the appropriate first or third family preference category for that petitioner and beneficiary (so long as marriage occurred after the naturalization of the petitioner). The beneficiary will retain the priority date in this case.

(C) Derivative Beneficiaries – Family and Employment-Based.

Chapter 21.2(e)(1)(ii)(C), Derivative Beneficiaries – Family and Employment-Based, has been superseded by USCIS Policy Manual, Volume 7: Adjustment of Status as of May 23, 2018.

(D) Derivative Diversity Visa (DV) Applicants.

Chapter 21.2(e)(1)(ii)(D), Derivative Diversity Visa (DV) Applicants, has been superseded by USCIS Policy Manual, Volume 7: Adjustment of Status as of May 23, 2018.

(E) Sought to Acquire.

Chapter 21.2(e)(1)(ii)(E), Sought to Acquire, has been superseded by USCIS Policy Manual, Volume 7: Adjustment of Status as of May 23, 2018.

(2) CSPA Coverage for Specific Aliens Not Covered Under Previous Guidance

(i) Limited CSPA Coverage for K4 Aliens .

The CSPA does not apply to aliens obtaining K2 or K4 nonimmigrant visas or extensions. An alien in K4 status may utilize the CSPA upon seeking adjustment of status because a K4 alien seeks to adjust as an IR on the basis of an approved Form I-130, which is filed under section 204 of the Act. This is because the USC petitioner who filed the nonimmigrant visa petition on behalf of the K3 parent must file a Form I-130 on behalf of the K4 alien before the K4 seeks to adjust status pursuant to 8 CFR 245.1(i). This necessarily requires the existence of a parent-child relationship between the USC and the K4 alien. Accordingly, the CSPA should be applied to K4 applicants as described in paragraph 21.2(e)(1)(i).

(ii) Limited CSPA Coverage Option for K2 Aliens .

An alien in K2 status does not have a visa petition filed on his or her behalf under section 204. Consequently, a K2 alien cannot utilize the CSPA when seeking to adjust status. Although not required, USCIS may accept a Form I-130 filed by the USC petitioner based on a parent-child relationship between the USC petitioner and the K2 alien (e.g. where the USC petitioner has married the K1 and K2 is not yet 18 years old). This will allow an alien who once was a K2 to adjust on the basis of a petition filed under section 204 of the Act and will allow him/her to utilize the CSPA when seeking to adjust status in some cases.

Exercising this option requires: (1) an existing parent-child relationship between the USC petitioner and the K2 alien, and (2) paying the requisite fees associated with Forms I-130 and I-485, Application To Register Permanent Residence or Adjust Status. This guidance does not create a petitionable relationship for K2s or K4s where none exists.

(iii) CSPA coverage for preference aliens who did not have an application for permanent residence pending on August 6, 2002 and who subsequently filed an application for permanent residence that was denied solely because he or she aged out.

Chapter 21.2(e)(2)(iii), CSPA coverage for preference aliens who did not have an application for permanent residence pending on August 6, 2002 and who subsequently filed an application for permanent residence that was denied solely because he or she aged out, has been superseded by USCIS Policy Manual, Volume 7: Adjustment of Status as of May 23, 2018.

(iv) CSPA coverage for preference aliens who did not have an application for permanent residence pending on August 6, 2002 and did not subsequently apply for permanent residence.

Chapter 21.2(e)(2)(iv), CSPA coverage for preference aliens who did not have an application for permanent residence pending on August 6, 2002 and did not subsequently apply for permanent residence, has been superseded by USCIS Policy Manual, Volume 7: Adjustment of Status as of May 23, 2018.

(3) CSPA Section 6 Opting-Out Provisions.

Beneficiaries of 2nd preference I-130 petitions that were automatically converted to family first preference upon the petitioning parent's naturalization may exercise the "opt-out" provision of section 6 even if the petition in question was originally filed in the F2A category but has now converted to F2B. Aliens seeking to utilize this opt-out provision should file a request in writing with the District Office having jurisdiction over the beneficiary's residence. Adjudicators do not need to determine the age of the alien when a section 6 opt-out request is received.

(4) Visa Availability Date Regression.

Chapter 21.2(e)(4), Visa Availability Date Regression, has been superseded by USCIS Policy Manual, Volume 7: Adjustment of Status as of May 23, 2018.

(5) Inapplicability of the CSPA.

Chapter 21.2(e)(5), Inapplicability of the CSPA, has been superseded by USCIS Policy Manual, Volume 7: Adjustment of Status as of May 23, 2018.

Note:

There is an **Appendix** to this chapter showing how the guidance would be applied to some specific scenarios.

(6) Priority Date Retention Requests .

(A) Officers may encounter certain petitions that are eligible for assignment of an earlier priority date. The assignment of an earlier priority date is only permitted for those petitions filed by the same petitioner, on behalf of the same principal beneficiary. However, not every petition filed by the same petitioner on behalf of the same principal beneficiary will qualify. First and foremost, only approved petitions may qualify. Furthermore, those petitions which have been denied, revoked, or from which an immigrant visa has already been used do not qualify. See 8 CFR 204.2(h) .

(B) Officers may encounter adjustment of status cases involving applicants eligible to adjust status in the F2B category based on having automatically converted from a derivative in the F2A category to a principal in the F2B category (upon reaching the age of 21) whether or not the petitioner for the F2A petition filed a subsequent petition to classify the applicant as a principal under F2B. An assignment under the F2B category is permitted, and is considered to have happened automatically on the original petition, despite the fact that the applicant does not have a separate petition filed on his or her behalf to classify him or her in the F2B category. The original priority date available to the derivative beneficiary once classified pursuant to the F2A category is retained and applied to F2B classification - without need for a separate petition as previously indicated in the regulations. See 8 C.F.R. 204.2(a)(4) .

(C) If the principal beneficiary of an F2B petition (petition #2) was previously the derivative beneficiary of a petition filed pursuant to sections 203(a)(1) , (3) , (4) , or 203(b) , and the petitioner of petition #2 was not the petitioner on the previous petition (petition #1), then petition #2 is NOT entitled to the older priority date. See 8 CFR 204.1(b); 22 CFR 42.53(a). Instead, petition #2 should be assigned a priority date based on the date of filing. Send the standard notice of denial of priority date retention provided through the appropriate chain of command. Continue to otherwise adjudicate the petition on its merits in accordance with applicable law, regulations, and policies.

Example 1: Alice is an LPR. She files a petition for her husband, Barney, for F2A classification. Their son, Charlie, is listed as a derivative. Charlie ages out. Barney adjusts status.

Scenario 1: Barney files a petition on behalf of Charlie for classification as an F2B. This petition cannot retain the priority date from the petition filed by Alice because it was filed by a different petitioner.

Scenario 2: Alice files a petition on behalf of Charlie for classification as an F2B. This petition can retain the priority date from the petition filed by Alice for Barney because it is the same petitioner filing on behalf of the same beneficiary.

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Example 2: David is a USC. He files a petition on behalf of his brother, Eric. Eric's daughter, Fanny, is listed as a derivative. Fanny ages out. Eric adjusts status.

Scenario: Eric files a petition for Fanny for classification as an F2B. This petition cannot retain the priority date from the petition filed by David because it was filed by a different petitioner.

(D) If an individual files an application for adjustment of status in the F2B or F1 classification based on previous F2A derivative classification, but the petitioner did not file a new (subsequent) petition on behalf of the individual, the individual may be eligible for adjustment of status if:

(i) he or she was previously the derivative beneficiary of an approvable F2A petition;

(ii) he or she qualifies as the son or daughter of the original petitioner (take particular care that step-relationships were created before the applicant turned 18); and

(iii) all other eligibility requirements are met.

Example 3: Gregory is an LPR. He files a petition for his wife, Heather. Heather's son, Igor, is listed as a derivative beneficiary on the petition, but he ages out. Heather adjusts status.

Scenario 1: Igor was 17 years old when his mother married Gregory. He files an application for adjustment of status in the F2B category. Igor qualifies as Gregory's stepson and may use the priority date from the petition filed on behalf of his mother to adjust status.

Scenario 2: Igor was 19 years old when his mother married Gregory. He files an application for adjustment of status in the F2B category. Igor does not qualify as Gregory's stepson and is not eligible to

adjust status in the F2B category, so the application must be denied on the basis that there is no visa available to him because he is not eligible for an immigrant visa classification.

(E) If an application for adjustment of status is pending based on INA 245(a) or (i), and visa availability is solely contingent upon a request for priority date retention for which the applicant is not eligible, the officer must deny the application for adjustment of status. If, however, it appears that the applicant is prima facie eligible to adjust on a different visa petition or different section of law, and was so eligible at the time the applicant filed the application for adjustment of status, the officer should request additional evidence as needed, and adjudicate the application based on the alternative basis of eligibility. In such a case, if the application is ultimately denied, the adjudicator should address both the reasons for denial on the original basis, as well as the reasons for denial on the alternate basis. If the applicant was not prima facie eligible on another basis at the time the applicant filed the application for adjustment of status, the officer may not adjudicate the application on any other basis, and must deny the application based upon the original basis.

(F) Officers may encounter motions to reopen or motions to reconsider which are filed by applicants who were previously denied adjustment of status.

- If the motion is solely contingent on a request for priority date retention for which the applicant is not eligible, the officer must deny the motion.

- If the applicant demonstrates that they were, at the time of filing for adjustment of status, prima facie eligible on an alternative basis for adjustment that was not considered before denial, then the officer must reopen the application and adjudicate the application based on the alternative basis of eligibility.

Note

Eligibility pursuant to the alternative basis for adjustment of status must have existed at the time the underlying application for adjustment of status (not the motion) was filed.

(f) Adam Walsh Child Protection and Safety Act of 2006, (Adam Walsh Act), Pub. L. 109-248. [Section 21.2(f) replaced 04-28-2007; previous Sections 21.2(f)-(h) renumbered as 21.2(g)-(i)]

(1) Background.

Title IV of the Adam Walsh Act, “Immigration Law Reforms to Prevent Sex Offenders from Abusing Children” contains two provisions that amend the Immigration and Nationality Act (the Act).

· **Section 402(a) of the Adam Walsh Act** amends sections **204(a)(1)(A)(i)** and **204(a)(1)(B)(i)** of the Act to prohibit U.S. citizens and lawful permanent residents who have been convicted of any “specified offense against a minor” from filing a family-based immigrant petition on behalf of any beneficiary, unless the Secretary of Homeland Security (the Secretary) determines, in his sole and unreviewable discretion, that the petitioner “poses no risk to the beneficiary.”

Section 402(b) of the Adam Walsh Act amends section **101(a)(15)(K)** of the Act to bar U.S. citizens convicted of these offenses from filing nonimmigrant visa petitions to classify their fiancé(e)s, spouses, or minor children as eligible for “K” nonimmigrant status, unless the Secretary determines, in his sole and unreviewable discretion, that the petitioner poses no risk to the beneficiary.

A petitioner who has been convicted of a specified offense against a minor is not simply prohibited from filing on behalf of a minor child. The petitioner is prohibited from filing on behalf of “any” family-based beneficiary under sections 204(a)(1)(A)(i) and 204(a)(1)(B)(i) of the Act or in accordance with section 101(a)(15)(K) of the Act.

Section 401 of the Adam Walsh Act amends section **237(a)(2)(A)** of the Act by adding a new subparagraph (v). Under new section 237(a)(2)(A)(v), an alien who is convicted under new 18 USC 2250, for failing to register as a sex offender, is subject to removal as a deportable alien.

(2) Statutory Definitions .

(A) Beneficiary .

“Any beneficiary” includes a spouse, a fiancé(e), a parent, an unmarried child, an unmarried son or daughter over 21 years of age, an orphan, a married son or daughter, a brother or sister, and any derivative beneficiary permitted to apply for an immigrant visa on the basis of his or her relationship to the principal beneficiary of a family-based petition.

(B) Specified Offense Against a Minor .

The term “specified offense against a minor” means an offense against a minor (defined as an individual who has not attained the age of 18 years) that involves any of the following:

- An offense (unless committed by a parent or guardian) involving kidnapping;
- An offense (unless committed by a parent or guardian) involving false imprisonment;
- Solicitation to engage in sexual conduct;
- Use in a sexual performance;
- Solicitation to practice prostitution;
- Video voyeurism as described in 18 USC 1801;
- Possession, production, or distribution of child pornography;
- Criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct; or
- Any conduct that by its nature is a sex offense against a minor.

The statutory list of criminal activity in the Adam Walsh Act that may be considered a specified offense against a minor is stated in relatively broad terms and takes into account that these offenses may be named differently in a wide variety of Federal, State and foreign criminal statutes.

With one exception, the statutory list is not composed of specific statutory violations. As defined in the relevant criminal statute, for a conviction to be deemed a specified offense against a minor, the essential elements of the crime for which the petitioner was convicted must be substantially similar to an offense defined as such in the Adam Walsh Act.

(C) Poses No Risk to Beneficiary .

USCIS interprets the “poses no risk to the beneficiary” provision to mean that the petitioner must pose no risk to the safety or well-being of the beneficiary, which includes the principal beneficiary and any alien derivative beneficiary.

(3) Field Guidance .

(A) Applicability of the Adam Walsh Act .

Title IV of the Adam Walsh Act does not include a specific effective date. For this reason, it entered into force on July 27, 2006, the date of enactment. In general, an application for benefits under the Act is adjudicated according to the facts and law as they exist on the date of decision. See **Matter of Alarcon** , 20 I&N Dec. 557 (BIA 1992).

(B) Determining “Specified Offense Against a Minor .

(i) Operational Procedures .

On July 28, 2006, <http://www.uscis.gov/files/pressrelease/AdamWalshAct072806.pdf> USCIS field offices were directed to issue a Request for Evidence (RFE) for all police arrest records and court disposition documents and schedule the petitioner for fingerprints if the petitioner's IBIS check revealed a hit for any offense that is or potentially may be a "specified offense against a minor" as defined above.

If there is an IBIS hit or some other indication that a lawful permanent resident petitioner may have a conviction for a specified offense against a minor as defined in the Adam Walsh Act, the case must be handled in accordance with current IBIS procedures as it relates to an "egregious public safety threat."

Note

As defined by the Memorandum of Agreement between USCIS and United States Immigration and Customs Enforcement (ICE) on the Issuance of Notices to Appear to Aliens Encountered During an Adjudication, and accompanying policy memorandum entitled, "Disposition of Cases Involving Removable Aliens," July 11, 2006, ICE may decide to initiate removal proceedings against any lawful permanent resident who is deportable under section 237(a)(2)(A)(v) of the Act (conviction for having failed to register as a sex offender).

If the offense meets the definition of an egregious public safety threat, adjudication of the petition must be suspended and an appropriate referral to ICE must be completed in accordance with current "egregious public safety threat" procedures.

Otherwise, if the petition has already been approved or is currently being adjudicated and there is an IBIS hit or some other indication that the petitioner may have a conviction of a specified offense against a minor as defined in the Adam Walsh Act, the adjudicator must issue an RFE or Notice of Intent to Revoke (NOIR) for all police arrest records and court disposition documents.

If the petitioner was an "Ident" based on previous fingerprinting, the adjudicator must obtain a current rap sheet per local procedures instead of scheduling the petitioner for fingerprinting. Otherwise, the adjudicator must schedule the petitioner for fingerprinting in accordance with service center or field office procedures, which will be processed without fee.

(ii) Adjudicative Review of Evidence.

If the petitioner fails to respond to the RFE or NOIR, the petition should be denied or revoked accordingly.

If the fingerprint results and the evidence submitted in response to an RFE or NOIR indicate that the petitioner was not convicted of a specified offense against a minor as defined by the Adam Walsh Act, the adjudicator should proceed with the adjudication of the petition in accordance with **8 CFR 204** and other pertinent regulations.

If, after review of the fingerprint results and the evidence submitted in response to the RFE or NOIR, the adjudicator determines that either of the following two instances exists, the adjudicator should forward the file, through appropriate supervisory channels, to local USCIS counsel for review and opinion:

- The adjudicator is unsure whether the petitioner's conviction may be considered a specified offense against a minor, or

- The criminal case against the petitioner is still pending or the disposition of the case is still unknown.

If, after review of the fingerprint results the evidence submitted in response to the RFE or NOIR, the adjudicator finds that the petitioner has been convicted of a specified offense against a minor as defined by the Adam Walsh Act, the adjudicator must determine whether the petitioner poses a risk to the beneficiary, as described below.

(C) Determining "Poses No Risk to Beneficiary."

(i) Adjudicative Review of Evidence.

The critical purpose of **section 402 of the Adam Walsh Act** is to ensure that an intended alien beneficiary is not placed at risk of harm from the person seeking to facilitate the alien's immigration to the United States. USCIS, therefore, may not approve a family-based petition (Form I-130 or I-129F) if the petitioner has a conviction for a specified offense against a minor unless USCIS first determines that the petitioner poses no risk to the beneficiary with respect to whom a petition was filed. Under section 402 of the Adam

Walsh Act, this determination is entrusted to the discretion of the Secretary, who has the “sole and unreviewable” authority to decide whether a petitioner poses any risk to the intended beneficiary.

To avoid denial of a petition or the revocation of a prior approval, a petitioner who has been convicted of a specified offense against a minor must submit evidence of rehabilitation and any other relevant evidence that clearly demonstrates, beyond any reasonable doubt, that he or she poses no risk to the safety and well-being of his or her intended beneficiary(ies). The initially filed petition or response to an RFE or NOIR must include whatever evidence and legal argument the petitioner wants USCIS to consider in making its risk determination. Examples of such evidence include, but are not limited to:

- Certified records indicating successful completion of counseling or rehabilitation programs;

- Certified evaluations conducted by licensed professionals, such as psychiatrists, clinical psychologists, or clinical social workers, which attest to the degree of a petitioner’s rehabilitation or behavior modification;

- Evidence demonstrating intervening good and exemplary service to the community or in the uniformed services;

- Certified copies of police reports and court records relating to the offense (the court records must include the original indictment or other charging document, any superseding charging document, any presentencing report, and the conviction judgment); and

- News accounts and trial transcripts describing the nature and circumstances surrounding the petitioner’s specified offense(s) against a minor and any other criminal, violent, or abusive behavior incidents, arrests, and convictions.

The determination of whether a petitioner’s evidence is credible, and the weight and probative value to be given that evidence, shall be within the sole and unreviewable discretion of USCIS.

(ii) Decision.

In determining whether a petitioner poses any risk to his or her intended beneficiary, the adjudicator must consider all known factors that are relevant to determining whether the petitioner poses any risk to the safety and well-being of the beneficiary. Factors that should be considered include, but are not limited to, the following:

- The nature and severity of the petitioner's specified offense(s) against a minor, including all facts and circumstances underlying the offense(s);

- The petitioner's criminal history;

- The nature, severity, and mitigating circumstances of any arrest(s), conviction(s), or history of alcohol or substance abuse, sexual or child abuse, domestic violence, or other violent or criminal behavior that may pose a risk to the safety or well-being of the principal beneficiary or any derivative beneficiary;

- The relationship of the petitioner to the principal beneficiary and any derivative beneficiary;

- The age and, if relevant, the gender of the beneficiary;

- Whether the petitioner and beneficiary will be residing either in the same household or within close proximity to one another; and

- The degree of rehabilitation or behavior modification that may alleviate any risk posed by the petitioner to the beneficiary, evidenced by the successful completion of appropriate counseling or rehabilitation programs and the significant passage of time between incidence of violent, criminal, or abusive behavior and the submission of the petition.

Given the critical purpose of section 402 of the Adam Walsh Act, the adjudicator must automatically presume that risk exists in any case where the intended beneficiary is a child, irrespective of the nature and severity of the petitioner's specified offense and other past criminal acts and irrespective of whether the

petitioner and beneficiary will be residing either in the same household or within close proximity to one another.

The burden is upon the petitioner to rebut and overcome the presumption of risk by providing credible and persuasive evidence of rehabilitation and any other relevant evidence that proves, beyond any reasonable doubt, that he or she poses no risk to the intended child beneficiary.

In cases where none of the intended beneficiaries are children, the adjudicator must closely examine the petitioner's specified offense and other past criminal acts to determine whether the petitioner poses any risk to the safety or well-being of the adult beneficiary.

For example, past acts of spousal abuse or other acts of violence must certainly be considered. The fact that a petitioner's past criminal acts may have been perpetrated only against children or that the petitioner and beneficiary will not be residing either in the same household or within close proximity to one another may not, in and of themselves, be sufficient to convince USCIS that the petitioner poses no risk to the adult beneficiary.

The burden is upon the petitioner to prove, beyond any reasonable doubt, that he or she poses no risk to the intended adult beneficiary.

Unless the adjudicator can conclude, based on the evidence, that the petitioner poses no risk to the beneficiary, the adjudicator must deny the petition and clearly articulate the factual basis for the determination.

If the adjudicator is uncertain as to whether the petitioner poses no risk to the beneficiary, or if the adjudicator is finding it difficult to articulate the factual basis for the denial, the adjudicator should consult with his or her supervisor and/or USCIS counsel.

(iii) Headquarters Clearance of Approval Recommendations.

If the adjudicator finds that the petitioner poses no risk to the beneficiary, the adjudicator must seek the

guidance and direction of USCIS Headquarters, Regulations and Product Management Division, before approving the petition. Adjudicators are prohibited from exercising favorable discretion in such instances without the consent of USCIS Headquarters.

(D) Revocation of Approved Petitions .

If, at any time prior to adjustment of status or consular processing, USCIS becomes aware that the petitioner has a conviction for a specified offense against a minor, steps may be taken to revoke the approved family-based immigrant visa petition or reopen and reconsider the Form I-129F .

For immigrant visa petitions that have already been approved, **section 205** of the Act provides discretion to revoke approval for “good and sufficient cause.”

For a case in which a Form I-130 has been approved, revocation of the approval under **8 CFR 205.2** would be appropriate, if the petitioner has been convicted of a specified offense against a minor and the adjudicator finds that the petitioner poses any risk to the beneficiary.

Therefore, an IBIS check on the petitioner of the family-based immigrant petition must be valid at the time the beneficiary adjusts status. If the IBIS check on the petitioner is not valid at the time of adjustment, IBIS must be re-run and any resulting hits treated in accordance with current IBIS procedures.

For Form I-129F , **8 CFR 103.5(a)(5)(ii)** provides authority to reopen and reconsider the decision on the petition. Thus, in a case in which a Form I-129F has been approved, it would be appropriate to reopen the case and deny it if the petitioner has been convicted of a specified offense against a minor and the adjudicator finds that the petitioner poses any risk to the beneficiary.

(E) Administrative Appeals of Denied or Revoked Petitions .

Traditionally, the denial or revocation of Form I-130 and Form I-360 (in specified cases) has been subject to appeal to the Board of Immigration Appeals (BIA). See **8 CFR 1003.1(b)(5)** .

The denial or revocation of orphan (Forms I-600 and I-600A) and fiancé(e) cases (Form I-129F) may be appealed to the Administrative Appeals Office (AAO). As required in Chapter 10.7(b)(5) of this manual, a decision denying or revoking approval of a Form I 600 or Form I 600A must include information about appeal rights and the opportunity to file a motion to reopen or reconsider.

To aid in the proper presentation of the appealed denial or revocation, each field office must advise Headquarters of any notice of appeal filed with the BIA in any case denied or revoked under **section 402 of the Adam Walsh Act** . Section 402 of the Adam Walsh Act does not affect the AAO's jurisdiction in Form I-600, I-600A, and I-129F cases.

(F) Centralization of AWA-applicable Visa Petitions (Forms I-130 and I-129F) at the Vermont Service Center .

As of March 22, 2011, service center adjudication of all relative visa petitions subject to the Adam Walsh Act (AWA) is centralized at the VSC. Using the procedures set forth in this section, all other service centers will transfer Forms I-130 or I-129F in their possession to the VSC upon determining preliminarily that AWA applies.

(i) Sources of Information. An officer adjudicating a Form I-130 or Form I 129F may identify derogatory information on criminality through any of the following sources:

- Front-end search,
- Back-end referral from an adjudicator based on a hit in TECS or IBIS Manifest, or
- Non-IBIS referral from an adjudicator based on criminal documents in the file or other documents indicating criminality.

(ii) Sufficiency of Information. The following derogatory information s sufficient to determine preliminarily that AWA applies:

- An NCIC sexual offender registry hit, unless it can be conclusively demonstrated that the victim was an adult or that the charge was dismissed, withdrawn, or the prosecution entered "no prosecution [nolle prosequi]."
- A TECS hit revealing anything sexual in nature, unless it can be conclusively demonstrated that the victim was an adult or that the investigation has been closed (with no resulting arrest), dismissed, recorded as "no prosecution," or withdrawn.
- A review of NN16 / NN11 indicates any sexual offense, unless it can be conclusively demonstrated that the victim was an adult or that the charge was dismissed, recorded as "no prosecution," or withdrawn.

- A check of any system reveals derogatory information involving kidnapping or false imprisonment (unless the offense was committed by parent or guardian).

Note: All AWA-related files that are transferred to the VSC must contain a timely and unexpired AWA petitioner criminality-resolution memorandum. The resolution memorandum will detail all criminality issues related to the petition and indicate that a preliminary AWA determination has been made.

(iii) Cases with Scheduled Fingerprinting Appointments. Where the petitioner has a history of criminality, the petition has been transferred to the VSC after the originating service center issued a fingerprint-appointment notice, and the petitioner later fails to appear for (or seeks postponement of) the originally scheduled fingerprinting appointment, the VSC will do the following:

- (a) determine whether it is necessary to reschedule the fingerprinting appointment;
- (b) if so, apply its local fingerprint scheduling procedures; and
- (c) determine whether the petition should undergo AWA-related review and adjudication.

(iv) Post-adjudication Transfers to the VSC. Where an originating service center or the VSC has already adjudicated the underlying petition, but where new derogatory evidence is uncovered, or where a remand from the Board of Immigration Appeals (BIA) requires that a service center review the case for possible AWA determinations, the originating service center should forward the case to the VSC for reconsideration.

Note: If there is a concurrently filed Form I-485 associated with the underlying petition that was to be adjudicated by the originating service center, that Form I-485 will also be adjudicated by the VSC. Additionally, if an AWA-related case is remanded by the BIA to an originating service center, the originating service center should transfer the case to the VSC for AWA-related review and adjudication. In those cases, the originating service center must also provide the petitioner with written notice of the case transfer.

(v) File Transfer. The originating service center will package and send to the VSC all files where there has been a preliminary determination that the petition warrants review as an AWA-related case. The following procedure applies:

- Create a manifest for each box detailing the file receipt and box numbers.
- Record the number of files and list the corresponding barcodes on the manifest.
- Number each box (e.g., "1 of 4") for each shipment (a copy of the manifest should be maintained by the audit team of the sending service center).
- Place a copy of the manifest in the box.
- Send an electronic copy of each manifest via email to the VSC after every shipment, detailing the contents of each shipment.
- Relocate each file to VSC in CLAIMS using "Relocated to new jurisdiction (VSC)" and "batch transfer forward" in NFTS to the VSC shipping destination.

- Affix an AWA cover sheet to each AWA-related case file being transferred to the VSC (see attached uniform AWA cover sheet). For previously batched AWA case shipments, use only one cover sheet for each batch.
- Provide written notice to each petitioner regarding the transfer of the underlying petition or application
- Forward all AWA petitions to the following VSC shipping address:

DHS-USCIS Vermont Service Center
 Attn: AWA TEAM
 75 Lower Welden Street
 St. Albans, VT 05479-0001

(vi) Post-shipment Audit. VSC will audit each shipment of AWA files, as follows:

- The audit will consist of random checks (i.e., samples will be pulled from each box) to an AQL of 1.5 % Level II of ANSI/ASQ Z1.4 2003.*
- The audit will:
 - Verify that the files have been properly transferred forward in NFTS;
 - Verify that the files have been properly manifested;
 - Verify that the files have been properly relocated in CLAIMS "Transferred to new jurisdiction (VSC)";
 - Verify the files are I-130s and I-129Fs; and
 - Verify the I-130 and I-129F data is in CLAIMS 3.
- Once the petition is received at the VSC, all files will be routed to the designated AWA shelf in Essex "Attn: AWA BCU Team" for review and processing. Each file must be clearly marked so that BCU is aware that the petition has been identified as an AWA petition.

(vii) Jurisdiction over AWA-related Determinations. The decision to centralize the adjudication of AWA-related petitions filed does not alter the VSC's ability to refer petitions to district offices when an interview is deemed necessary or an investigation of suspected fraud is merited. In those instances, the VSC will retain exclusive authority to make all AWA-related determinations. Any case referred to a district office should be accompanied by a completed AWA-approval worksheet indicating the VSC has determined that the petitioner poses no risk to his or her intended beneficiary.

(g) Post-Adjudication Actions .

(1) Decision - Approvals

(A) Notification .

When you approve a petition, be sure to note the priority or filing date on the appropriate line, place the approval stamp in the designated block, and sign or initial it. Be sure to check the proper section of law to designate the beneficiary's immigrant classification. If you mark the wrong section of law or fail to affix the approval stamp, the consular office will return the petition to you for correction, and the processing of the beneficiary's immigrant visa will be delayed unnecessarily.

(B) Form I-797 .

Form I-797 is used to notify the petitioner, and any recognized representative, of the approval and disposition of the petition. Any mistakes on the notice will probably be detected by the petitioner, and, in most cases, the petitioner will want a corrected notice. If the mistake is related to the beneficiary's classification or the filing date, it may even be necessary to have the petition recalled from the consular office. This is time-consuming and does not reflect favorably on USCIS .

(C) Beneficiary in the United States and Eligible for Adjustment of Status.

If the beneficiary is in the United States and appears eligible to adjust status pursuant to section 245, you would adjudicate the case. If approvable, note the Consulate block "Adj. case." If there is no "A" file, then you should have one created.

(D) Beneficiary in the United States, But Ineligible for Adjustment of Status .

If the beneficiary is in the United States, but the file indicates ineligibility for adjustment of status, forward the approved petition to the National Visa Center (NVC), with reference to the consulate abroad. It is to be noted also that all immigrant petitions designated as "homeless" petitions will be forwarded to NVC. Designation on the I-130 for a consulate other than one in the beneficiary's country of birth or country of

last residence may only be made by the petitioner. Under no circumstances should an officer advise a petitioner to designate a country other than the appropriate consulate having jurisdiction.

(E) Section 243(d) Sanctions and Waivers Thereof .

Section 243(d) sanctions can be imposed against countries which fail to cooperate in the removal of their nationals who have been ordered removed from the United States. Upon being advised by the Attorney General that a particular country is not cooperating, the Secretary of State orders consular officers not to issue either immigrant visas or nonimmigrant visas, or both, to nationals of that country. (The Secretary of State may also choose to apply sanctions against only certain visa categories.) Unless such sanctions are waived by the consular officer on an individual case basis, an alien seeking a visa subject to the sanctions cannot be issued a visa. Unlike the former section 243(g) sanctions, which required adjudicators to annotate visa petitions when sanctions were waived, there is no action required by adjudicators to either implement or waive section 243(d) sanctions. Furthermore, even if sanctions have been imposed, they have no effect on applications (e.g., adjustment applications, change of status applications, waiver applications) handled by USCIS .

There are currently no countries subject to sanctions under section 243(d) of the Act with regard to immigrant visas.

(2) Denials .

A visa petition may not be denied as a matter of discretion or because the beneficiary is excludable. The only valid ground for denial is failure to establish the qualifying relationship as defined in the Act and interpreted through precedent decisions or because of ineligibility of the petitioner. Use Form I-292 to notify the petitioner of the decision and the right to appeal within 15 calendar days from the date of the notice (18 days if the notice is mailed). The appellate body (if any) to which the appeal is filed depends on the type of relative petition involved:

- The appeal from a denial of a Form I-130 petition is made to the Board of Immigration Appeals (BIA) on Form EOIR-29.

- The appeal from a denial of a Form I-360 filed by a widow(er) is made to the BIA on Form EOIR-29.

Note

Any appeal on a case where the BIA has appellate jurisdiction must be accepted and forwarded to the BIA, even if it is not timely filed. The BIA will decide whether to consider the case.

- The appeal from a denial of a Form I-360 filed by a battered spouse is made to the Office of Administrative Appeals on Form I-290B.
- The appeal from a denial of a Form I-600 or I-600A is made to the Office of Administrative Appeals.
- The denial of a Form I-730 is not appealable.

Notify the petitioner in writing of the decision and the right to appeal. As required in Chapter 10.7(b)(5) of this manual, the decision must include information about appeal rights and the opportunity to file a motion to reopen or reconsider.

(3) Issuance of a Notice To Appear (NTA).

Upon completion of adjudication of a visa petition filed on behalf of an alien who is illegally in the United States, the adjudicating officer must consider whether USCIS or DHS should initiate removal proceedings through the issuance of a Notice to Appear. Generally, NTAs should be issued if the beneficiary is illegally in the United States and is not immediately eligible to apply for adjustment of status (e.g., if he or she is subject to bars to adjustment contained in sections 245(a) or 245(c) of the Act).

Only certain officials have the regulatory authority to issue NTAs (see **8 CFR 239.1**) and the director of each office or center determines which unit within that office or center exercises that authority. For example, in some offices, upon completion of adjudicative action, cases are referred from the Adjudications Branch to the Investigations Branch for consideration of NTA issuance; in other offices the NTA is prepared by the Adjudications Branch and signed by the ADD for Examinations or ADD for Adjudications. Follow the procedures set forth in your local office or center.

(h) Revocation of Approval.

The approval of a relative petition may be revoked under **section 205** of the Act and **8 CFR 205** if certain conditions arise or are discovered. Revocations can be divided into 2 areas: Automatic revocation and Revocation Upon Notice.

(1) Automatic Revocation.

(A) Grounds for Automatic Revocation.

The grounds for automatic revocation are set forth in **8 CFR 205.1(a)**. Officers should be familiar with each of the events spelled out in the regulation. Under each of these grounds, the revocation is automatic when the specified events occurs, regardless of whether USCIS is aware of its occurrence or not, and regardless of when (or even whether) USCIS provides notification of the revocation. For example, if an alien who is the beneficiary of an approved 2nd preference visa petition as the unmarried son or daughter of a lawful permanent resident marries before immigrating to the United States or adjusting status, the petition's approval is revoked. It should be noted that although it is the event of the marriage which triggers the revocation, the revocation itself is as of the date of the petition's approval (in automatic revocation proceedings, revocation upon notice is different). Furthermore, because the petition's approval has been revoked, it does not become valid again if the marriage of the beneficiary is terminated through divorce or death of the beneficiary's spouse. (However, if the marriage is annulled by a court of competent authority, the legal effect is that the marriage never occurred and therefore, neither did the revocation.)

(B) Notification.

Once USCIS becomes aware of the revocation, it must notify the consular post to which the petition was sent (or the National Visa Center, as appropriate) of the revocation and provide a copy of that notice to the petitioner at his or her last known address, or at the estate of the petitioner, as appropriate. As always, if a G-28 is on file indicating that the petitioner has or had legal representation in the petition process, the petitioner's copy of the notice is sent to the legal representative. Again, it is important to understand that under 8 CFR 205.1(a) it is the event which triggers the automatic revocation, not the notice; and that the revocation is as of the date of the petition's approval, not as of the date of the notice.

(C) Discretionary Authority to Not Automatically Revoke Approval .

Although revocation of approval is automatic under **8 CFR 205.1(a)(3)(i)(C)** , when the petitioner has died there are circumstances under which the Attorney General may exercise his or her discretion to not revoke the approval. Such discretionary authority is delegated to the district director or service center director who approved the petition, and may be exercised when he or she “determines that for humanitarian reasons revocation would be inappropriate.”

The Affidavit of Support (AOS) requirement at section 213A of the Act rendered such “humanitarian reinstatement” moot as there was no sponsor to sign the AOS. Congress remedied this by passing the Family Sponsor Immigration Act, Pub. L. 107-150, that allows for the use of a “substitute sponsor.” Now, if a visa petitioner dies after approval of the petition, but prior to the beneficiary adjusting status or immigrating to the U.S., the beneficiary may use a “substitute sponsor” on the AOS.

To request humanitarian reinstatement of a revoked petition, the beneficiary should send a written request for reinstatement to the USCIS service center or field office that approved the petition except that, if the beneficiary has properly filed an application for adjustment of status with USCIS, the written request should be submitted to the USCIS office with jurisdiction over the adjustment application. The written request must include a copy of the approval notice for the revoked petition, the death certificate of the petitioner (or other qualifying relative) and, if required by section 213A of the Act and 8 CFR part 213a, a Form I-864 from a substitute sponsor and proof of the substitute sponsor's relationship to the beneficiary. If the director decides that humanitarian reinstatement is not warranted, this decision should be communicated, in writing, to the beneficiary. There is no appeal from a determination not to exercise this discretionary authority. If the director decides that humanitarian reinstatement is warranted, the beneficiary should be notified and the decision forwarded to either the Department of State (if the beneficiary is abroad) or to the USCIS officer adjudicating the beneficiary's adjustment application (if the beneficiary is present in the U.S.).

While there are no other rules or precedents on how to apply this discretionary authority, reinstatement may be appropriate when revocation is not consistent with the furtherance of justice, especially in light of the goal of family unity that is the underlying premise of our nation's immigration system. In particular, reinstatement is generally appropriate as a matter of discretion, if section 204(l) of the Act and Chapter 10.21 of this AFM would support approval of the petition if it were still pending. For cases that are not covered by section 204(l) of the Act, the reinstatement request will be addressed in light of the factors that USCIS has traditionally considered in acting on reinstatement requests, which include:

- The impact of revocation on the family unit in the United States, especially on U.S. citizen or LPR relatives or other relatives living lawfully in the United States;
- The beneficiary's advanced age or poor health;
- The beneficiary's having resided in the United States lawfully for a lengthy period;

- The beneficiary's ties to his or her home country; and
- Significant delay in processing the case after approval of the petition and after a visa number has become available, if the delay is reasonably attributable to the Government, rather than the alien.

Although family ties in the United States are a major consideration, there is no strict requirement for the alien beneficiary to show extreme hardship to the alien, or to relatives already living lawfully in the United States, in order for the approval to be reinstated. If the alien is required to have a Form I-864 affidavit of support, however, there must be a Form I-864 from a substitute sponsor. 8 C.F.R. 205.1(a)(3)(i)(C).

Note

[Note removed on 12-02-2009] See Appendix 21-8. [Appendix 21-8 added on 12-02-2009]

(D) Conversion to Another Visa Classification.

Under certain circumstances, the triggering event not only makes the beneficiary ineligible for the visa classification under which the petition was originally approved, it also makes him or her eligible for a different visa classification. For example, when an unmarried son of a U.S. citizen reaches age 21, he is no longer eligible for immediate relative classification as the child of a U.S. citizen (IR-2), but the same event makes him eligible for first preference classification as the unmarried son of a U.S. citizen (F1-1). Likewise, if the unmarried adult daughter of a citizen marries, she is no longer eligible for first preference classification, but the same event makes her eligible for third preference classification as the married daughter of a citizen (F3-1). Paragraphs (G) and (H) of 8 CFR 205.1(a)(3) provide that under such circumstances not only is the approval for the original classification automatically revoked, but the same petition is automatically converted to (i.e., approved for) the new classification. The priority date of the newly-converted petition is the date on which that petition was originally filed (albeit for another classification), not the date on which the conversion occurred.

Similarly, if the petitioner in a second preference case naturalizes, the petition is automatically converted to the new classification for which the beneficiary becomes eligible [“spouse of LPR” (F2-1) becomes “spouse of citizen” (IR-1); “child of LPR” (F2-2) becomes “child of citizen (IR-2)”; “unmarried son or daughter of LPR” (F2-4) becomes “unmarried son or daughter of U.S. citizen” (F1-1)].

Note

An alien who is eligible for F2-3 derivative classification as the child of an alien classified F2-1 is not the beneficiary of a petition filed on his or her behalf. Accordingly, upon the naturalization of the LPR who petitioned for such child's parent, there is no conversion that can occur. A new petition would have to be filed for such child. If the child qualifies for classification as the child of the newly-naturalized citizen (i.e., step-child or adopted child), that citizen may file an immediate relative petition. If the child does not so qualify, then his mother or father (the spouse of the newly-naturalized citizen) may file a second preference petition on the child's behalf once he or she becomes an LPR.

(E) Amerasian Petitions .

Special circumstances apply to the automatic revocation of Amerasian petitions which are discussed in subchapter 21.7 .

(2) Revocation Upon Notice .

In addition to those situations covered under the automatic revocation provisions of **8 CFR 205.1** , there are other situations where USCIS determines that the approval of a petition should be revoked for what **section 205** of the Act refers to as “good and sufficient cause.” For example, if subsequent to the approval of a petition for a (natural) sibling, USCIS learned that the sibling relationship had previously been terminated by the adoption of the petitioner out of the family, there would be good and sufficient cause for revocation of approval of the petition upon notice.

(A) Triggering Event .

Under 8 CFR 205.2(a) USCIS can initiate revocation proceedings on a visa petition any time “the necessity of the revocation comes to the attention of the Service.” While this may be the result of a particular triggering event (such as USCIS learning that the petitioner had been adopted out of the natural family unit in the example above), there does not need to be a specific “triggering event” (as with automatic revocation); instead there can be a series of events that leads to the conclusion that the petition's approval should be revoked. These events could have occurred either before or after the original approval, or some might have occurred before approval and others after.

(B) Good and Sufficient Cause .

The BIA has held that good and sufficient cause exists where the evidence of record at the time of issuance of the notice of intent, if unexplained and unrebutted, would warrant a denial (see **Matter of Estime** , 19 I&N Dec. 450 (BIA, 1987)).

(C) Notice of Intent .

When it appears that revocation upon notice is appropriate, USCIS sends the petitioner a Notice of Intent to Revoke, setting forth the reasons (the “good and sufficient causes”) why revocation is appropriate. It is important that all the valid reasons for which USCIS intends to revoke the petition be spelled out in the notice, since the petition is only required to respond to, and the ultimate decision can only be based on, reasons which were specified in the notice. In addition to a specific statement of the facts and evidence underlying the proposed revocation, the notice must advise the petitioner of his or her right to review and rebut the evidence. Quite simply, the BIA has held that “a decision to revoke approval of a visa petition will not be sustained where the notice of intent was not properly issued” (see **Matter of Estime** , 19 I&N Dec. 450 (BIA, 1987)).

(D) Burden of Proof .

In revocation proceedings, as in all visa petition proceedings, the burden of proof rests with the petitioner. This does not change simply because USCIS is now the party proposing the action of revocation. USCIS's requirement is to set forth the good and sufficient grounds in the notice of intent (and to meet the other requirements of the notice). Once this has been done, the burden of proof is on the petitioner to establish eligibility for the benefit sought (see **Matter of Cheung** , 12 I&N Dec. 715 (BIA, 1968)).

(E) Response to Notice .

The petitioner should be given 30 days to respond to the notice of intent to revoke. If the petitioner requests additional time to respond, and USCIS is satisfied that he or she is not simply seeking to delay the revocation, additional time may be granted to respond to the notice. If the petitioner does not respond within the allotted time, or if the response is inadequate to meet the petitioner's burden of proof, the approval should be revoked through a formal order attached to a notice of decision (Form I-292), with appropriate appeal forms.

(F) Appeal Rights .

As required in Chapter 10.7(b)(5) of this manual, the decision must include information about appeal rights and the opportunity to file a motion to reopen or reconsider. The petitioner has the same appeal rights from a decision to revoke upon notice as he or she would have from a decision to deny the petition. If a denial of the petition would be appealable to the BIA on Form EOIR 29, so is the revocation; if it would be appealable to the AAO on Form I 290B, so is the revocation. The petitioner also has a right to file a motion to reopen or reconsider the decision revoking the petition approval.

(G) Date of Revocation .

When a petition is revoked upon notice, the revocation is effective as of the date on which the decision becomes final.

(i) Precedent Decisions .

(1) Relating Index Topics .

The foregoing are only a few selected precedent or interim decisions particularly important to the adjudication of the particular petitions. To locate other relevant decisions refer to the index of administrative decisions under the following subtitles:

Adoption	Immediate Relatives	Quota Preference
Annulment	Legitimation	Stepparent, question of
Child	Marriage	Visa, petition for
Divorce	Nonquota Immigration	Visa Petition, revocation of

(2) Synopses of Selected Precedent Decisions .

(A) Precedent decisions of general applicability:

- **Matter of O-** , 8 I&N Dec. 295 (BIA 959) . Admissibility of beneficiary is not relevant to decision of visa petition.
- **Matter of C-** , 9 I&N Dec. 433 (BIA 1961) . - There is no provision for retroactive approval of a petition. Furthermore, only the petitioner (not the beneficiary) can appeal a decision on a visa petition.
- **Matter of Brantigan** , 11 I&N Dec. 493 (BIA 1966) ; and **Matter of Phillis** , 15 I&N Dec. 385 (BIA 1975) . Burden of proof to establish eligibility for the benefit sought lies with the petitioner.
- **Matter of Pearson** , 13 I&N Dec. 152 (BIA 1969) . Failure to prosecute is a valid ground for denial when petitioner fails to comply with a reasonable request to appear for interview.
- **Matter of Varela** , 13 I&N Dec. 453 (BIA 1970) ; distinguished by **Matter of Pagnerre** , 13 I&N Dec. 688 (BIA 1971) . Death of the petitioner terminates relationship; this petition filed prior to the death may not be approved.
- **Matter of Herrera** , 13 I&N Dec. 755 (BIA 1971) ; followed by **Matter of Serna** , 16 I&N Dec. 643 (BIA 1978) . A delayed birth certificate plus delayed secondary evidence does not meet the requirements of 8 CFR 204.2(a).
- **Matter of Ah San** , 15 I&N Dec. 315 (BIA 1975) . Non-citizen nationals of the U.S. may file petitions pursuant to section 203(a)(2) of the Act.
- **Matter of Nevarez** , 15 I&N Dec. 550 (BIA 1976) . English translations of foreign language documents are required notwithstanding the documents were entered into evidence by the Service.

· **Matter of Aviles** , 15 I&N Dec. 588 (BIA 1976) ; **Matter of Mintah** , 15 I&N Dec. 540 (BIA 1975) . Reopening visa petition proceedings on a Service motion after an appeal to the BIA has been taken is prohibited. The District Director loses jurisdiction on such cases once the appeal is filed.

· **Matter of Cintron** , 16 I&N Dec. 9 (BIA 1976) . A petition withdrawn by the petitioner may not be denied.

· **Matter of Tahsir** , 16 I&N Dec. 56 (BIA 1976) ; **Matter of Calilao** , 16 I&N Dec. 104 (BIA 1977) . A decision may not be based on adverse evidence if the petitioner is unaware of it.

· **Matter of Calilao** , 16 I&N Dec. 104 (BIA 1977) . A petition may be filed for a beneficiary who is currently an LPR under removal proceedings.

· **Matter of Serna** , 16 I&N Dec. 643 (BIA 1978) . A delayed birth certificate is given weight on a case by case basis and is not always sufficient to establish U.S. citizenship.

· **Matter of DaBaase** , 16 I&N Dec. 720 (BIA 1979) . Reopening of visa petition proceedings may not be instituted by the beneficiary; the right lies solely with the petitioner.

· **Matter of Bardouille** , 18 I&N Dec. 114 (BIA1981) . A beneficiary of a visa petitioner must be fully qualified at the time the visa petition is filed.

(B) Precedent decisions pertaining to section 204(c) of the Act:

· **Matter of F-** , 9 I&N Dec. 684 (BIA, 1962) ; **Matter of Samsen** , 15 I&N Dec. 28 (BIA, 1974). The decision on section 204(c) applicability must be made on all the evidence.

- **Matter of Cabeliza** , 11 I&N Dec. 812 (BIA 1966) . Section 204(c) contains no statute of limitations and applies to any subsequently filed petition.

- **Matter of Rahmati** , 16 I&N Dec. 538 (BIA 1978) . A finding that a previous marriage was non-viable does not necessarily indicate it was contracted solely for immigration purposes; therefore, such a finding does not conclusively place an alien within 204(c).

- **Matter of Agdinaoay** , 16 I&N Dec. 545 (BIA 1978) . A finding of deportability under section 241(c)(2) provides a basis for determination that section 204(c) is applicable for subsequent visa petition proceedings.

- **Matter of May** , 18 I&N Dec. 381 (BIA 1983) ; and **Matter of Chu** , 19 I&N Dec. 81 (BIA 1984) ; **Matter of Ma** , 20 I&N Dec. 394 (BIA 1991) . Certificates issued by notarial offices in the People's Republic of China shall be accepted as evidence that both the adoptive relationship was created and that the adoption was valid. However, notarial certificates shall not be regarded as conclusive proof because of the potential for fraud or error in issuance. Lack of corroborating evidence, contradicting evidence and unexplained inconsistencies are indications of possible fraud or error.

- **Matter of Villanueva** , 19 I&N Dec. 101 (BIA 1984) . Unless void on its face, a **valid** U.S. passport issued to an individual as a citizen of the U.S. is not subject to collateral attack in administrative immigration proceedings, but constitutes conclusive proof of such person's U.S. citizenship.

- **Matter of Obaigbena** , 19 I&N Dec. 533 (BIA 1988) . Where a petitioner fails to timely and substantively respond to the notice of intention to deny or to make a reasonable request for an extension, the Board will not consider any evidence first proffered on appeal as its review is limited to the record of proceeding before the district director; for further consideration, a new visa must be filed.

- **Matter of Hilaire** , 19 I&N Dec. 566 (BIA 1988) . Although a petitioner may submit certified copies of documents, the Service may still require the originals in order to determine authenticity.

(C) Precedent decisions pertaining to revocation of approval:

· **Matter of Cheung** , 12 I&N Dec. 715 (BIA, 1968) . The burden of proof in revocation proceedings rests with the petitioner.

· **Matter of Zaidan** , 19 I&N Dec. 297 (BIA 1985) . Since there is no provision for appellate review when a visa petition is automatically revoked under 8 CFR 205.1, the Board lacks jurisdiction over appeals dealing with the automatic revocation of a petition.

· **Matter of Estime** , 19 I&N Dec. 450 (BIA, 1987) . A decision that sets forth requirements for a notice of intent to revoke (see also **Matter of Arias** , 19 I&N Dec. 568 (BIA 1988) ; **Matter of Tawfik** , 20 I&N Dec. 166 (BIA 1990) ; and **Matter of Li** , 20 I&N Dec. 700 (BIA 1993)).

· **Matter of Arias** , 19 I&N Dec. 568 (BIA 1988) . A decision to revoke approval of a visa petition can only be grounded upon, and the petitioner is only obligated to respond to, the factual allegations specified in the notice of intention to revoke.

21.3 Petition for a Spouse.

(a) Petition By Citizen or LPR for a Spouse.

In addition to the general filing and adjudication procedures and issues discussed in **Chapter 21.2** of this *field manual*, this section will discuss matters more specific to the adjudication of an I-130 petition filed by a citizen or LPR on behalf of his or her spouse.

(1) Procedural Concerns Particular to Spousal Petitions.

(A) Concurrent Filing of I-130 and I-485.

A petitioner may file a Form I-130, Petition for Alien Relative, and the beneficiary may file a Form I-485, Application to Register Permanent Residence or Adjust Status, concurrently in certain circumstances. In order to file concurrently, the Form I-130 petitioner and the Form I-485 applicant (who is also the Form I-130 beneficiary) must, at the time of filing, meet all the eligibility requirements of both forms. For example:

- If the beneficiary of the Form I-130 is subject to INA 212(e) as an exchange visitor who has neither complied with nor obtained a waiver of the 2-year foreign residency requirement, the Form I-485 cannot be filed concurrently. The Form I-130 can be filed separately.

- If the petitioner is an LPR and second preference visa numbers are not “current,” i.e. available, the beneficiary cannot concurrently file Form I-485. Again, the Form I-130 would have to be filed separately.

- If the Form I-130 beneficiary entered on a K nonimmigrant visa and the Form I-130 petitioner is not the same person who filed the Form I-129F on the beneficiary’s behalf, then the beneficiary is prohibited from adjusting status under INA 245(a). See INA 245(d). A Form I-130 may be filed by a different petitioner, but the beneficiary must consular process or be readmitted in a different non-immigrant classification. (Note: There are also limited exceptions available if the applicant is adjusting in the United States based on T nonimmigrant status (for victims of a severe form of trafficking in persons) or U nonimmigrant status (for victims of qualifying criminal activity).)

Family-based Form I-485s generally require the Form I-130 petitioner to be the sponsor and executor of Form I-864, Affidavit of Support under INA 213A. The Form I-864 must generally be submitted with the beneficiary's Form I-485. INA 213A. While there is no age requirement for a petitioner filing a spousal Form I-130, a Form I-130 petitioner cannot execute a Form I-864 unless he or she is at least 18 years old. INA 213A(f)(1)(B) and (f)(5). In cases where a joint sponsor is used to meet the income requirements, the joint sponsor must also be at least 18 years of age. In cases where the petitioning spouse is deceased and a substitute sponsor is needed, the substitute sponsor that executes a Form I-864 must also be at least 18 years of age. INA 213A(f)(1)(B) and (f)(5).

If the Form I-130 petitioner is under age 18, he/she cannot execute a Form I-864. A joint sponsor 18 years of age or older cannot remedy an underage sponsor's ineligibility to execute a Form I-864, as the purpose of a joint sponsor is only to cure the petitioner's inability to meet the income requirements. Therefore, if the Form I-130 petitioner cannot execute a Form I-864 due to being under the age of 18, the beneficiary will be inadmissible under INA 212(a)(4) based on his or her failure to submit a sufficient Form I-864 as required. The beneficiary will be ineligible to file for adjustment of status based on that underlying Form I-130 until the Form I-130 petitioner turns 18.

For more information about Affidavits of Support, see AFM Chapter 20.5; or the Policy Manual Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section D, Determine Admissibility, Subsection 2, Affidavit of Support Under Section 213A of the Act (Form I-864) [7 USCIS-PM A.6(D)(2)].

(B) Supporting Documents.

As with other relative petitions, documentation must be submitted to establish both the standing of the petitioner (evidence of U.S. citizenship or lawful permanent residence) and validity of relationship (evidence of the lawful marriage of the petitioner and beneficiary and of the termination of any and all prior marriages of both parties). In addition, in the case of spousal petitions, the supporting documentation must include ADIT-style photographs of both the petitioner and the beneficiary. If the petitioner has failed to provide any of these documents, either:

- Send the petitioner an RFE requesting the missing documentation; or

- If the I-130 was filed concurrently with the beneficiary's adjustment application, require the petitioner to bring the missing documentation to the interview.

(2) Adjudication Issues.

In addition to the more general adjudication issues discussed in subchapter 21.2, pay particular attention to these concerns pertaining specifically to spousal visa petitions:

(A) Proxy Marriages.

Section 101(a)(35) of the Act provides that the term "spouse", "wife", or "husband" does not include a spouse, wife, or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present together at the ceremony, unless the marriage has been consummated afterwards. (Note: Consummation of a marriage can only occur after the ceremony, there is no such thing as "pre-consummation" of a marriage.)

(B) Validity of a Marriage Celebrated in a Foreign Country.

One may normally presume the validity of a marriage upon presentation of a marriage certificate, duly certified by the custodian of the official record. As a general rule, the validity of a marriage is judged by the law of the place of celebration. If the marriage is voidable but no court action to void the marriage has taken place, it will be considered valid for immigration purposes. However, if a marriage is valid in the country where celebrated but considered offensive to public policy of the United States, it will not be recognized as valid for immigration purposes. Plural marriages fall within this category.

(C) Marriage Between Close Relatives.

In some foreign countries, and some states in the United States, marriages between close relatives (e.g., cousins) are permitted under certain circumstances. In cases where such marriages do not offend the laws of the state where the parties reside, the marriage will be recognized for immigration purposes.

(D) Marriage Involving Minor(s).

There are no statutory minimum age requirements for the petitioner or beneficiary of a Form I-130 spousal petition. In some U.S. states and in some foreign countries, marriage involving a minor is generally not allowed but may be permitted under certain circumstances, including where there is parental consent, a judicial order, emancipation of the minor, pregnancy of the minor, etc. (Note: Although the INA definition of “child” includes being under 21 years of age, in family law, a “minor” in a marriage context is generally defined as an individual under 18 years of age.)

However, a marriage involving a minor warrants special attention. Officers should evaluate all marriages involving a minor for evidence that: 1) the marriage was lawful in the place it was celebrated and on the date it was celebrated, 2) if the couple resides outside the place of celebration, the marriage is recognized as valid in the U.S. state where the couple currently resides or will presumably reside and does not violate the state of residence’s public policy, and 3) the marriage is bona fide, and the minor(s) provided full, free, and informed consent to enter into the marriage.

Note: U.S. state laws vary in setting minimum age requirements to marry and exceptions that may permit minors to marry. Some U.S. states do not have an age floor below which a minor cannot marry if an exception applies. However, there may still be public policy considerations that would result in the domicile refusing to confer reciprocity to an out of state marriage involving a minor.

Note: The officer can generally rely upon a marriage certificate, court decree or parental consent as probative evidence of the minor’s consent. However, if the case presents forced marriage issues, please consult with headquarters and/or your regional office through your normal supervisory chain.

(i) Legality of Marriage in the Place of Celebration.

Where the record does not establish the legality of the marriage, officers should issue an RFE for evidence that the marriage was lawful in the place where it was celebrated and on the date it was celebrated. The petitioner bears the burden of proof [See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966)] and must provide evidence that the minor(s) met the legal minimum age requirements in the place of celebration or that the minor(s) qualified for an exception to the general age requirements. If you have questions about the legality of a marriage involving a minor, please contact local USCIS counsel.

Note: Officers retain discretion to deny a petition without first issuing an RFE or NOID when required initial evidence was not submitted or the evidence of record fails to establish eligibility. See AFM 10.5(a) and AFM 10.5(b).

Note: Regardless of the age of the petitioner and beneficiary at the time the I-130 petition is adjudicated, officers should ensure that any marriage that involved a minor was valid at the time it was entered into. *Matter of P*, 4 I&N Dec. 610 (Decided by the AG March 18, 1952).

(ii) Validity of the Marriage in Petitioner and Beneficiary's State of Residence or Presumed State of Residence and State Public Policy Considerations.

If the marriage involving a minor was lawfully entered into in the place where it was celebrated, whether domestically or overseas, but the couple now lives in or can be expected to live in a different place at the time of adjudication, officers should determine whether the marriage is or will be recognized as valid in the petitioner's current or presumed state of residence. (Note: A marriage complying with all the requirements of the state of celebration might nevertheless be deemed invalid if it is invalid under the laws of a state where one of the parties is domiciled at the time of the marriage and where both parties intend to make their home afterward, or if it violates a strong public policy of the state of domicile. See *Matter of Zappia*, 12 I. & N. Dec. 439 (BIA 1967); *Matter of Da Silva*, 15 I. & N. Dec. 778, 779 (BIA 1976).)

Where the beneficiary resides abroad, unless otherwise indicated or known to the officer, officers should presume that the couple will reside in the petitioner's state of residence [See *Matter of Manjoukis*, 13 I&N Dec. 705 (BIA 1971)]. The officer should consult with local USCIS counsel for assistance in determining the validity of the marriage or considering whether to issue an RFE for the petitioner to establish whether the marriage is or will be recognized as valid in the petitioner's current or presumed state of residence. For example, the petitioner may provide evidence that the state Attorney General's Office recognizes the marriage involving a minor, which was celebrated out of state. [Note: Officers retain discretion to deny the petition without first issuing an RFE or NOID when required initial evidence was not submitted or the evidence of record fails to establish eligibility. See AFM 10.5(a) and AFM 10.5(b).]

Where it is unclear whether the marriage is or will be recognized as valid outside the place of celebration, officers should also determine whether the marriage violates the public policy of the new place of residence. A state's public policy is often reflected in specific criminal statutes that penalize undesirable or offensive conduct. Officers should look at the state's criminal statutes or consult with local counsel to determine whether the marriage is contrary to the state's public policy. A marriage involving a minor may be legal in the place of celebration but void under the state law of the minor's residence as contrary to state public policy. Conversely, state law may prohibit the marriage of a person under age 16, but may recognize as valid an out of state marriage of a resident under age 16 [See *Matter of Da Silva*, 15 I&N Dec. 778 (BIA 1976)]. The assessment as to whether a marriage violates state public policy is a case-by-case determination and involves the facts surrounding the parties, the marriage, and U.S. state law. Officers should contact local counsel if it appears that the petitioner has not met his or her burden of establishing that the marriage would not violate the public policy of the state of residence despite being legal in the place of celebration. (Note: Some states will not recognize a marriage as valid if celebrated outside the state because the parties intended to evade the marriage restrictions in that state. These are generally referred to as 'evasion laws'.)

(iii) Bona Fides of the Marriage. Including Forced Marriage Considerations.

Officers must also consider the bona fides of the marriage and all other eligibility requirements as they evaluate a marriage involving a minor. A marriage cannot be considered bona fide if it was entered into for the sole purpose of evading U.S. immigration law. See *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983).

A marriage that was entered into without the consent of one or both parties is not considered bona fide for immigration purposes. Generally, an officer may rely upon a marriage certificate, court decree, or parental

consent as probative evidence of the minor's consent unless the case involves forced marriage indicators, such as an affidavit from the victim or a communication from Department of State (Note: Instances of forced marriage are almost always self-identified). Forced marriage is a marriage entered into without the full, free, and informed consent of one or both parties to the marriage, regardless of age. (Note: For additional information, please see the USCIS Forced Marriage webpage, at <https://www.uscis.gov/humanitarian/forced-marriage>.) Forced marriage should not be confused with the cultural practice of arranged marriage, where families may be involved in selecting a partner. USCIS will consider any evidence that a forced marriage exists in its determination of whether the marriage is bona fide. If you have reason to believe that the marriage underlying an I-130 spousal petition may have been forced, please consult with headquarters and/or your regional office through your normal supervisory chain.

If the marriage involving a minor: (1) was legal in the place of celebration; (2) is recognized as valid in the couple's current or presumed state of residence and there are no state public policy concerns; (3) is bona fide and there are no indications of a forced marriage; and all other eligibility requirements have been met, then officers must approve a Form I-130 spousal petition involving the lawful marriage of a minor.

Note: While there is no minimum age associated with being party to a Form I-130 spousal petition, any sponsor executing Form I-864 (including the Form I-130 petitioner, any joint sponsor, and/or a substitute sponsor) must be at least 18 years of age at the time the Form I-864 is executed. The Form I-864 must generally be submitted with the beneficiary's Form I-485. For more information about Affidavit of Support Considerations, AFM Chapter 20.5; AFM Chapter 21.3(a)(1)(A); and Policy Manual Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section D, Determine Admissibility, Subsection 2, Affidavit of Support Under Section 213A of the Act (Form I-864) [7 USCIS-PM A.6(D)(2)].

(iv) Interview Guidelines for Form I-130 Spousal Petitions Involving a Minor.

USCIS has the authority to interview any petitioner or beneficiary, including a minor. See 8 CFR 103.2(b)(7) and 8 CFR 103.2(b)(9). While the eligibility of a spousal relationship for immigration purposes is generally assessed in person by USCIS when the alien spouse applies to adjust status or by Department of State when the alien spouse applies for an Immigrant Visa, USCIS has determined that Form I-130 spousal petitions involving a minor party warrant special consideration due to the possible vulnerabilities associated with marriage involving minor(s).

To better examine the eligibility of the spousal relationship for immigration purposes, service center officers must refer the following standalone Form I-130 spousal petitions for interview when the case appears approvable under Section D (i) – (iii):

1. All Form I-130 spousal petitions in which the petitioner or the beneficiary is less than 16 years of age; and

2. All Form I-130 spousal petitions in which the petitioner or the beneficiary is 16 or 17 years of age and there are 10 years or more difference between the ages of the spouses.

USCIS may interview either party to an I-130 spousal petition (petitioner or beneficiary), including minors and adults. The interview of the Form I-130 spousal petitioner and/or beneficiary should follow the same procedures as the interviews USCIS already conducts during the Form I-485 spousal adjustments. Generally, officers should ask the usual questions to evaluate the relationship for immigration purposes, while remaining aware of the unique nature of interviewing minors. Interviews of minors must be conducted with sensitivity and may warrant special considerations, including determining whether a trusted adult should be present and conducting additional rapport building. Interviews involving minors may require additional lines of questioning if the officer suspects the minor is a victim of forced marriage or human trafficking.

Please note, while this population warrants special consideration, spousal relationships involving a minor should not be viewed as inherently fraudulent or containing elements of forced marriage.

For further guidance on Interviewing the Petitioner or Beneficiary of a Form I-130 spousal petition, please see Section I below.

(E) Fraudulent Marriage Prohibition.

Section 204(c) of the Act provides that:

Notwithstanding the provisions of subsection (b) no petition shall be approved if (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws[,], or (2) the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

If there is evidence that the beneficiary has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws, the petition must be denied. However, the evidence of the attempt or conspiracy must be contained in the alien's file. (See also **8 CFR 204.2(a)(1)(ii)** .)

Note

Section 204(c) prohibits the approval of any petition, not just an I-130 petition. Accordingly, if an alien has attempted or conspired to enter into a fraudulent marriage, USCIS would also be barred from approving an I-140 petition filed in his or her behalf.

(F) Freedom to Marry.

The parties to a marriage must be legally free to marry. Some people “marry” with a bona fide intent to have a life together as man and wife, but the marriage is not valid because one of the parties was not legally free to marry when the marriage was contracted. Although the I-130 petition asks for the names of all prior spouses, the response to the question is sometimes inaccurate. The reasons given for an inaccurate answer are numerous, but the most common reasons are:

- Desire to conceal prior marriage(s) from spouse;
- Separated for many years and unsure if legally divorced;
- Even though legally divorced, not in possession of the divorce decree and unwilling to take time to get it;
- Not divorced because divorce is not allowed in the person's country of origin (e.g., the Philippines).

(G) Legal Separation vs. Divorce or Annulment.

A legal separation is not proof of marital capacity. A final decree of divorce, annulment or death must be presented as proof of termination of a prior marriage. If either party’s prior marriage(s) has/have been terminated by divorce or annulment, the petitioner must establish that the divorce or annulment is valid under the laws of the place where pronounced. It must then be judged by the law of the jurisdiction where the parties to the divorce were actually residing at the time of the divorce.

(H) Legal Separation vs. Separate Cohabitation .

You may deny the visa petition in cases where the parties entered into a valid marriage, but have since obtained a legal separation prior to the final adjudication of the visa petition. However, if the parties entered into a valid marriage, have not obtained a legal separation, but simply reside separately, the petition may not be denied merely because of such separate cohabitation. The issue of separate cohabitation is relevant, however, in determining the intent of the parties at the time of the marriage.

(I) Interviewing Petitioner and Spouse .

This section provides general guidance on interviewing the petitioner or beneficiary of an I-130 spousal petition. If the marriage involves a minor, the officer should follow the guidance below and the guidance provided in subsection (D)(iv), Interview Guidelines for Form I-130 Spousal Petitions Involving a Minor.

You will often have to question both the petitioner and the beneficiary to determine whether the marriage is bona fide. Remember that the issue to be resolved during the interview is the bona fides of the marriage, not its “viability” (i.e., the probability of the parties remaining married for a long time). USCIS is not in the business of determining (or even speculating about) viability. Although the petitioner and the beneficiary may not appear to have a “viable” marriage, the petition may be approved if the marriage is valid and was not entered into solely for immigration purposes.

On the other hand, a marriage which was contracted solely for immigration purposes does not confer benefits under the Act. A number of factors may raise questions about the intent of the marriage, and therefore necessitate more in depth questioning (see **Chapter 15** regarding interviewing techniques), or even a field examination (see **Chapter 17**) or an investigation (see **Chapter 10.5(d)**). Some indications that a marriage may have been contracted solely for immigration benefits include:

- Large disparity of age;

- Inability of petitioner and beneficiary to speak each other's language;

- Vast difference in cultural and ethnic background;

- Family and/or friends unaware of the marriage;
- Marriage arranged by a third party;
- Marriage contracted immediately following the beneficiary's apprehension or receipt of notification to depart the United States;
- Discrepancies in statements on questions for which a husband and wife should have common knowledge;
- No cohabitation since marriage;
- Beneficiary is a friend of the family;
- Petitioner has filed previous petitions in behalf of aliens, especially prior alien spouses.

A sham marriage has been defined by the BIA as a marriage which may comply with all the formal requirements of the law but which the parties entered into with no intent, or "good faith", to live together and which is designed solely to circumvent the immigrations laws. Sham marriages are not recognized for immigration purposes. See **Matter of Patel** , 19 I&N Dec. 774 (BIA 1988).

(J) Same Sex Marriages.

In *United States v. Windsor*, 133 S. Ct. 2675 (2013), the Supreme Court held that section 3 of the Defense of Marriage Act (DOMA) (1 U.S.C. § 7), which previously had barred recognition of same-sex marriages for Federal purposes, is unconstitutional. As a result, same-sex marriage is now a lawful basis for all immigration benefits based on marriage.

In order to be valid for immigration purposes, a same-sex marriage must meet all of the same requirements as an opposite-sex marriage. As with opposite-sex relationships, a civil union, domestic partnership, or other relationship that is not recognized as a legal marriage in the place of celebration is not considered a marriage for immigration purposes.

A same-sex marriage that is legally valid in the jurisdiction in which it was celebrated is valid for immigration purposes, regardless of whether the jurisdiction in which the parties reside recognizes same-sex marriage. See *Matter of Zeleniak*, 26 I. & N. Dec. 158 (BIA 2013).

(K) Transgender issues and marriage. [Revised 8/10/12; PM-602-0061.1, AD12-02]

Prior to the Supreme Court's ruling in *United States v. Windsor*, 133 S. Ct. 2675 (June 27, 2013), benefits involving the marriage of transgender individuals could be granted pursuant to the Board of Immigration Appeals decision in *Matter of Lovo-Lara*, 23 I&N Dec. 746 (BIA 2005). *Lovo-Lara* provides that benefits based upon marriage may be approved on the basis of a marriage between a transgender individual and an individual of the other gender if the Petitioner/Applicant establishes 1) the transgender individual has legally changed his or her gender and subsequently¹ married an individual of the other gender, 2) the marriage is recognized as a heterosexual marriage under the law where the marriage took place (*Matter of Lovo-Lara, supra*), and 3) the law where the marriage took place does not bar a marriage between a transgender individual and an individual of the other gender. *Lovo-Lara* remains binding precedent for marriages that were celebrated in a jurisdiction that does not allow same-sex marriages. However, following *Windsor*, whether a spouse is transgender has no bearing on the validity of the marriage that was celebrated in a jurisdiction that recognizes same-sex marriage.

A timely registered marriage certificate from the appropriate civil authority is prima facie evidence of the validity of a marriage. When an officer determines, based on the record or through interview or other means, that a party to a petition has changed gender, the officer must ascertain that the marriage is a valid marriage under the laws of the jurisdiction in which it was contracted.

The validity of the marriage must be established by the preponderance of the evidence. As with most administrative immigration proceedings, the petitioner bears the "preponderance of the evidence" burden. Thus, even if there is some doubt, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. See *United States v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring). As such, officers should be satisfied that this burden is met if the marriage is recognized in the jurisdiction in which it was contracted. USCIS will presume the validity of the marriage involving a transgender individual in the absence of jurisdictional law and/or precedent that would place the validity of such marriage in doubt.

Only in jurisdictions where a specific law or precedent either prohibits or sets specific requirements for a legal change of gender, and does not permit same-sex marriage, is the individual required to demonstrate that he or she has met the specific requirements needed to establish the legal change of gender and the

validity of the marriage. The individual may also show, in an appropriate case, that the law barring a legal change of gender for purposes of marriage has changed and that the marriage is valid under current law, or that under the particular facts of the case and law of the jurisdiction in question, the marriage should be recognized (for example, if state law recognizes neither gender change nor same-sex marriage, then a marriage between a couple that is same-sex as a result of gender change of one of the parties may be considered lawful).

Where an individual claims to have legally changed his or her gender, USCIS will recognize that claim based upon the following documentation:

- Amended birth certificate; or
- Other official recognition of new gender, such as a passport, court order, certificate of naturalization or citizenship, or driver's license (note that some jurisdictions may have a lower threshold for issuing a driver's license than to establish a legal change of gender for purposes of the marriage laws, and USCIS would require additional evidence that the individual met the threshold for marriage, if applicable); or
- Medical certification of the change in gender from a licensed physician (a Doctor of Medicine (M.D.) or Doctor of Osteopathy (D.O.)). This is based on standards² and recommendations³ of the World Professional Association for Transgender Health, who are recognized as the authority in this field by the American Medical Association.⁴ Medical certification of gender transition received from a licensed physician (an M.D. or D.O.) is sufficient documentation, alone, of gender change. If the physician certifies the gender transition, USCIS will not question the certificate by asking for specific information about the individual's treatment. Additional information about medical certifications:
 - For the purposes of this chapter only an M.D. or a D.O. qualifies as a licensed physician. Officers may accept medical certifications from any number of specialties as well as from general practitioners.
 - Statements from persons who are not licensed physicians, such as psychologists, physician assistants, nurse practitioners, social workers, health practitioners, chiropractors, are not acceptable.
 - The medical certification should include the following information:
 - Physician's full name;
 - Medical license or certificate number;
 - Issuing state, country, or other jurisdiction of medical license/certificate;
 - Drug Enforcement Administration registration number assigned to the doctor or comparable foreign registration number, if applicable;
 - Address and telephone number of the physician;
 - Language stating that the individual has had appropriate clinical treatment for gender transition to the new gender (male or female);
 - Language stating that he/she has either treated the applicant in relation to the applicant's change in gender or has reviewed and evaluated the medical history of

the applicant in relation to the applicant's change in gender and that he/she has a doctor/patient relationship with the applicant

Sex reassignment surgery is not required in order for USCIS to approve a Form I-130 to establish a legal change of gender unless the law of the place of marriage clearly requires sex reassignment surgery in order to accomplish a change in legal gender and the jurisdiction does not permit same-sex marriage. The fact of sex reassignment surgery, however, would generally be reflected in the medical certification. USCIS will not ask for records relating to any such surgery.

These documents are listed in order of evidentiary preference. Officers must recognize, however, that the personal circumstances and jurisdictions involved in an individual's case will affect availability of specific types of documentation. As evidence of the new gender, officers should treat an amended birth certificate as carrying the same weight as USCIS would normally give to other timely registered primary evidence.

This guidance also applies to the adjudication of all immigration benefits based upon marriage, including but not limited to a Petition for Alien Fiancé(e). In the case of a proposed marriage involving a transgender individual, the petition may be approved assuming the same conditions are met for legal gender change and validity of the marriage as described above. If the record indicates the parties' specific intent to marry in a jurisdiction where the marriage would not be valid, the officer will issue an intent to deny in which the petitioner is informed that the marriage would not be valid for immigration purposes and why. USCIS will provide the petitioner the opportunity to submit evidence that USCIS's interpretation of the jurisdiction's law and/or precedent is incorrect or provide an affidavit attesting that the intended marriage will take place in a jurisdiction where the marriage will be valid for immigration purposes.

The same principles for determining the validity of a marriage involving a transgender individual for a spousal Petition for Alien Relative apply to those who may derive an immigrant or nonimmigrant benefit by virtue of a spousal relationship.

If an officer has questions about the validity of a marriage involving a transgender individual, the officer should contact local USCIS counsel.

As in all adjudications, if an officer finds significant substantive discrepancies, has reason to question the accuracy or authenticity of documents submitted, or finds other indicators of fraud, the case may be referred to FDNS in accordance with current national and local policies.

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(L) Immigration Marriage Fraud Amendments of 1986 .

In an effort to deter immigration-related marriage fraud, Congress passed the Marriage Fraud Amendments of 1986 on November 10, 1986. This legislation had a major effect on the adjudication of relative petitions, including:

- In many cases, certain conditions had to be met prior to the acceptance or approval of certain petitions on behalf of spouses (see paragraphs (L) and (M)).

- Criminal penalties were added or enhanced for individuals who were convicted of having engaged in a fraudulent marriage.

- An alien's lawful permanent residence is "conditional" if the qualifying marriage occurred less than 2 years prior to the alien's immigration or adjustment. The provision requires that a conditional resident alien seek removal of the conditional basis of the residence shortly before the second anniversary of the date on which he or she immigrated or adjusted (see **Chapter 25** regarding removal of conditions).

(M) Marriage within Five Years of Obtaining LPR Status .

Section 204(a)(2)(A) of the Act generally prohibits the approval of a visa petition filed by a lawful permanent resident for a spouse within 5 years of the date on which the petitioner became a LPR if that LPR obtained his or her residence status through a prior marriage. The LPR can overcome this prohibition if he or she establishes by clear and convincing evidence that the prior marriage was not entered into with the purpose of evading the immigration laws, or that the prior marriage ended through death. **8 CFR 204.2(a)(1)(i)** specifies the type of evidence which the petitioner must submit to meet the clear and convincing standard. If the petitioner falls within this restriction and has not submitted the requisite evidence, send him or her a letter explaining the deficiency and requesting additional evidence. If satisfactory evidence is not submitted within 60 days (or 120 days if the petitioner has requested and been granted additional time), deny the petition.

(N) Marriage During Proceedings .

There is a general prohibition against approval of visa petition filed on behalf of an alien by a United States citizen or a lawful permanent resident spouse if the marriage creating the relationship occurred on or after November 10, 1986, and while the alien was in exclusion, deportation, or removal proceedings, or judicial proceedings relating thereto. Issues concerning determination of commencement and termination of proceedings and exemptions are covered in **8 CFR 245.1(c)(9)** , except that the burden in visa petition proceedings to establish eligibility for the exemption in **8 CFR 245.1(c)(9)(iii)(F)** rests with the petitioner. The petitioner can request an exemption if he or she:

(i) Is able to establish through clear and convincing evidence that:

- the marriage was entered into in good faith; and

- the marriage was not entered into for the purpose of obtaining LPR status for the beneficiary; or

(ii) The alien beneficiary has resided outside the United States for at least two years after the date of the marriage.

Note

If the alien was deported from the United States (or was a “self- deport”), he or she may need permission to reapply before immigrating to the United States, but not before the I-130 may be approved. (See **Chapter 43** of this field manual.)

(3) Closing Action . See Chapter 21.2(g) of this field manual.

(b) Petition for Widow(er) .

(1) Background .

The Immigration Act of 1990 expanded the definition of immediate relatives to include spouses of United States citizens who had been married at least two years before their spouse died. A widow(er) of a U.S. citizen may file a petition on his or her own behalf to be classified as an immediate relative under Section 201(b) of the Act. **Section 201(b)(2)(A)(i)** of the Act and **8 CFR 204.2(b)** govern the process. An alien who obtains an immigrant visa or adjustment of status through this process is not subject to the conditional resident provisions of section 216 of the Act.

(2) Procedure .

An eligible widow or widower may apply for immediate relative classification by filing Form I-360 concurrently with his or her adjustment application with the Service Center having jurisdiction over the petitioner's residence. If the petitioner resides outside the United States, the I-360 petition should be filed with the USCIS office or American consulate having jurisdiction over such residence.

(3) Eligibility.

Widow(er) may be classified as an immediate relative if:

- He/she was married for at least two years to a United States citizen (**Note:** The United States citizen must have been a U.S. citizen at the time of death, but did not have to have the status of a U.S. citizen for the entire two year period);

- The petition was filed within two years of the death of the citizen spouse or before November 29, 1992, if the citizen spouse died before November 29, 1990;

- The alien petitioner and the citizen spouse were not legally separated at the time of the U.S. citizen's death; and

- The alien spouse has not remarried.

(4) Evidence.

The petition must be accompanied by the following evidence:

- Evidence of citizenship of the United States citizen (birth certificate, certificate of naturalization, certificate of citizenship, or U.S. passport); and

- Evidence of the relationship, which includes:
 - Marriage certificate issued by civil authorities;
 - Proof of the terminations of all prior marriages of both husband and wife (divorce or annulment decrees or death certificates of prior spouses); and
 - Death certificate of the U.S. citizen issued by civil authorities.

Primary evidence of the relationship (as listed above) is preferred. If the primary evidence is not available, secondary evidence may be considered (see **Chapter 11** of this field manual).

(5) Adjudication Issues.

The adjudication of an I-360 petition filed by a widow or widower is quite similar to the adjudication of an I-130 petition filed by a citizen for his or her spouse. The basic eligibility requirements are the same (status of petitioner and relationship between the petitioner and the beneficiary), and the significant concerns are the same (dissolution of any and all prior marriages, fraud, etc.). The most significant difference in the adjudication is the obvious one: the citizen cannot be questioned as to the bona fides of the marriage. However, the burden of proof still rests with the petitioner (who in this case is also the beneficiary), and the resolution of questions regarding the bona fides of the marriage is still the petitioner's responsibility. The basic techniques for determining whether the marriage is suspect still exist: examination of the paper trail; formal interrogation of the petitioner; and field examination or investigation.

Factors which may lead you to doubt the bona fides of the marriage and to more intensively question the petitioner (or to call for a field examination or investigation) include:

- A large age discrepancy between the petitioner and the (now) deceased citizen at the time of the marriage;

- Ill health of the citizen at the time of the marriage, although this is obviated to some extent by the requirement that the marriage be in existence for at least 2 years before the death of the citizen;
- Lack of common residence of the petitioner and the citizen prior to the latter's demise;
- Lack of intermingling of financial assets and liabilities (and other resources and obligations).

(6) Closing Action .

(A) Approval .

If the petition is approved:

- Place the examiner's approval stamp in the Action Block on the petition;
- Sign your name;
- Annotate the petition with the proper classification (IW1) and the consulate selected by the petitioner;
- If the petitioner will be applying for an immigrant visa, forward the petition to the Department of State's National Visa Center;
- If the widow(er) is in the U.S. and is eligible for adjustment of status under Section 245 of the Act, retain the approved petition and write "245 Adjust" in the Consulate box.

(B) Denial.

If the petition is denied, notify the widow(er) in writing of the reasons for the denial. As required in Chapter 10.7(b)(5) of this manual, the decision must include information about appeal rights and the opportunity to file a motion to reopen or reconsider.

(7) Child of Petitioning Widow(er).

A child of a petitioning widow(er) classified as an immediate relative is also eligible for classification as an immediate relative. Except as provided in section 423 of the Patriot Act (see paragraph (b)(8)), no separate petition is filed for such child. The child of the petitioning widow(er) need not be the child of the deceased citizen and could have been born either before, during, or after the marriage of the petitioner to the (now) deceased citizen. However, the child would **not** be eligible for derivative classification under the widow(er) provision if:

- He or she has reached the age of 21;
- He or she is married;
- The petitioning widow(er) has remarried;
- He or she was born after date on which the petitioning widow(er) immigrated to the U.S.

Note 1

When the widow/widower provisions were first incorporated into the law (1990), there was no provision for the child of such widow or widower. The provision which allows for immediate relative classification for the child was added by **section 219(b)(1)** of the Technical Corrections Act of 1994. If a

widow(er) who immigrated under the pre-1994 version of this provision had a child who (still) qualifies under the 1994 revision, that child can immigrate under this provision, without the filing of a new petition.

Note 2

Although the statute is silent on whether the child must be accompanying or following to join the petitioning widow(er)/parent, **8 CFR 204.2(b)(4)** states that the child “may accompany or follow to join.” Accordingly, by regulation, the child cannot be admitted or adjusted unless and until the petitioning widow(er)/parent has been admitted or adjusted.

(8) Special Provisions Added by the USA Patriot Act of 2001 .

In response to the September 11, 2001, terrorist attack on the World Trade Center and the Pentagon, Congress passed Public Law 107- 56, Act of October 26, 2001, 115 Stat. 272 (the “USA Patriot Act”). **Section 423** of that law expanded the widow(er) self-petition entitlement for widow(er)s of citizens killed as a direct result of those terrorist acts. It did so in two significant ways:

- It provided that an otherwise qualifying widow(er) of a citizen killed in the terrorist attacks of that day may self-petition without any regard to the length of the marriage; and

- It provided that any child of a U.S. citizen who was killed in one of the terrorist acts of September 11, 2001, may file a petition for status as an immediate relative child within two years of the death of the parent, regardless of changes in age or marital status. (In other words, he or she must have met the definition of child on September 11, 2001, but could have turned 21 and/or married after that date.) As a result of the child’s ability to self-petition, the regulatory “accompanying or following to j oin” requirement that normally attaches to the child of a widow(er) (see Note 2 of paragraph (b)(6)) does not apply in the case of a child of a citizen killed as a direct result of the September 11, 2001 terrorist attack.

All other statutory requirements remain unchanged, as do all other aspects of the adjudication of the I-360 petition described in this field manual.

Note

Although a child of a citizen killed as a direct result of the September 11, 2001, terrorist attacks on the World Trade Center and the Pentagon may self-petition even if he/she has married, there is no visa category for the spouse or child of such self-petitioning child. If such self-petitioning child has a spouse or child of his/her own, he/she would have to immigrate first and then file a 2 nd preference petition for such spouse or child.

(c) Precedent Decisions Relating to Spouse Petitions .

In addition to the decisions cited in section 21.2(h), which apply to I-130 petitions in general, the following precedents apply to petitions filed for a spouse:

- **Matter of B-** , 5 I&N Dec. 698 (BIA 1954) . A proxy marriage must be consummated to be valid for benefits under the I&N Act.
- **Matter of M-** , 8 I&N Dec. 217 (BIA 1958) . Where no bona fide husband-wife relationship was intended, a marriage is deemed invalid for immigration purposes regardless of whether it would be considered valid under the domestic law of the jurisdiction where it was performed.
- **Matter of Agoudemos** , 10 I&N Dec. 444 (BIA 1964) ; **Matter of G-** , 9 I&N Dec. 89 (BIA 1960) . A marriage which is voidable but not void without any action to void the marriage is generally valid for benefits under the I&N Act.
- **Matter of H-** , 9 I&N Dec. 640 (BIA 1962) . A polygamous marriage, though valid where contracted, is not recognized for immigration purposes.
- **Matter of Zappia** , 12 I&N Dec. 439 (BIA 1967) . A marriage complying with all the requirements of the state of celebration might nevertheless be deemed invalid if it is invalid under the laws of the state where the parties are domiciled at the time of the marriage and where both intend to make their home afterward or if it violates a strong public policy of the state of domicile.
- **Matter of Pearson** , 13 I&N Dec. 152 (BIA 1969) . The marriage following a divorce can only be considered valid if the divorce is considered valid under the laws of the place where the marriage was contracted.

- **Matter of Phillis** , 15 I&N Dec. 385 (BIA 1975) . The facts of an individual case may suggest or imply that the marriage was entered into solely for the purpose of obtaining immigration benefits. The mere denial of fraud does not overcome the inference and is insufficient to sustain the petitioner's burden of proof.
- **Matter of Weaver** , 16 I&N Dec. 730 (BIA 1979) .The validity of a divorce should be governed by the law of the state where the parties were domiciled at the time of the divorce.
- **Matter of P-** , 4 I&N Dec. 610 (BIA 1952) . The validity of a marriage is generally governed by the law of the place where it is celebrated.
- **Matter of Lenning** , 17 I&N Dec. 476 (BIA 1980) . A petition was properly denied where the parties entered into a formal, written separation agreement notwithstanding the fact that the marriage had not been finally dissolved by an absolute divorce decree.
- **Matter of W-** , 8 I&N Dec. 16 (BIA 1958) . A Mexican "mail order" divorce, not ordinarily recognized as valid by California courts,.was not valid for immigration purposes, thus the applicant was not legally free to marry.
- **Matter of Kurys** , 11 I&N Dec. 315 (BIA 1965) . A visa petition filed under compulsion of a court order by a petitioner who stated that a bona fide marital relationship did not exist and that she did not intend to live with her husband is properly denied. The petition was not filed in good faith.
- **Matter of Arenas** , 15 I&N Dec. 174 (BIA 1975) . In determining the validity of a marriage for immigration purposes, the law of the place of celebration of the marriage will generally govern. Under Section 2.22 of the Texas Family Code, a marriage is void if either party was married and the prior marriage is not dissolved. However, the marriage becomes valid when the prior marriage is dissolved and the parties continue to reside together as husband and wife and present themselves to others as being married.
- **Matter of DaSilva** , 15 I&N Dec.778 (BIA 1976) . A marriage between an uncle and his niece is valid

for immigration purposes for a couple who reside in New York but who marry in Georgia where marriage between an uncle and niece are legal. Since the marriage was legally contracted in Georgia and is thus not regulated by New York law nor violative of New York public policy, the marriage is recognized as valid in New York and is valid for immigration purposes.

- **Matter of Magana** , 17 I&N Dec. 111 (BIA 1979) . Where the respondent entered the United States as the spouse of a citizen, concealing the fact of his prior marriage in Mexico, a decree from a Washington state court declaring the Mexican marriage invalid from its inception will not be given retroactive effect for immigration purposes.

- **Matter of Laureano** , 19 I&N Dec. 1 (BIA 1983) . A marriage entered into for the primary purpose of circumventing the immigration laws, commonly referred to as fraudulent or sham marriage, is not recognized for the purpose of obtaining immigration benefits.

- **Matter of Kumah** , 19 I&N Dec. 290 (BIA 1985) . A Ghanaian court decree of divorce is accepted as evidence that a customary divorce was validly obtained, however, it is not deemed to be conclusive proof of the facts certified therein because of the potential for fraud or error in the issuance.

- **Matter of Zeleniak** , 26 I. & N. Dec. 158 (BIA 2013). Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, is no longer an impediment to the recognition of lawful same-sex marriages and spouses under the Immigration and Nationality Act if the marriage is valid under the laws of the jurisdiction where it was celebrated.

Notes:

¹ Please consult with OCC in cases where the marriage was originally an opposite-sex marriage celebrated in a state that does not recognize same-sex marriage, and one of the spouses changed gender after the marriage. [Return](#)

² Standards of Care, 7th Version (2012), World Professional Association for Transgender Health (WPATH) [Return](#)

³ Identity Recognition Statement (2010), World Professional Association for Transgender Health (WPATH), [Return](#)

⁴ American Medical Association. Res. 122; A-08, Removing Barriers to Care for Transgender Patients (2008) [Return](#)

21.4 Petition by Citizen or Lawful Permanent Resident for a Child, Son or Daughter has been partially superseded by the USCIS Policy Manual as of November 19, 2021.

(a) Eligibility Requirements.

Chapter 21.4(a), Eligibility Requirements, has been superseded by USCIS Policy Manual, Volume 6: Immigrants as of August 5, 2021.

(b) Form and Filing Issues.

Form I-130 is used by a citizen or lawful permanent resident to petition for his or her child, son or daughter. [It is also used by either to petition for a spouse and by a citizen to petition for a parent or sibling (see Chapter 21.3, Chapter 21.8 and Chapter 21.9).] It may be filed through a Service Center, or at a local office if filed concurrently with an adjustment application.

(c) General Adjudicative Issues.

Regardless of the circumstances under which an immigrant visa petition is filed on behalf of a child, son or daughter, there are four basic adjudicative issues which must be taken into consideration: the petitioner's status, the beneficiary's age, the beneficiary's marital status, and the relationship between the petitioner and the beneficiary.

Note

With each of these factors, the criteria must be met not just at the time of filing, but also at the time of the adjudication of the petition, in order for the petition to be approved. Furthermore, in most circumstances, the criteria must continue to be met after the petition's approval and until the beneficiary becomes an LPR; otherwise, the petition's approval may be revoked. (See **Chapter 20.3** of this field manual.)

· Petitioner's Status - The petitioner may be a citizen of the U.S. or a lawful permanent resident of the U.S. The relationships for which the petition may be filed depend on the petitioner's status (see below). The evidence which must be submitted to establish the petitioner's status as a citizen or LPR is specified in

8 CFR 204.1(g). Any doubts about the status of an LPR or naturalized citizen should be resolved through a review of the petitioner's A-file.

- Age of Beneficiary - The age of the beneficiary affects the classification under which a petition may be approved. If under age 21 and unmarried, the (otherwise eligible) beneficiary is considered to be a child; if 21 or older or if married, the (otherwise eligible) beneficiary is considered a son or daughter (see below).
- Marital Status of Beneficiary - One of the most frequent problems arising in this category is that a beneficiary who is reputed to be unmarried may actually be married. In the case of a petition filed by citizen, this can affect the classification under which the petition is approved; in the case of a petition filed by a LPR, it makes the difference between an approval and a denial:

<u>PETITIONER</u>	<u>MARITAL STATUS & AGE OF THE BENEFICIARY</u>	<u>RESULT</u>
Citizen	Unmarried and under age 21	Immediate Relative
Citizen	Unmarried and 21 or older	1 st Family Preference
Citizen	Married (any age)	3 rd Family Preference
LPR	Unmarried and under age 21	2a Family Preference*
LPR	Unmarried and 21 or older	2b Family Preference*
LPR	Married (any age)	Not eligible

*** Note**

While 2a and 2b are both 2nd preference classifications, quota numbers for the 2a sub-group (which is limited to spouses and unmarried children of LPRs) are much more readily available.

Since a lawful permanent resident can petition on behalf of an unmarried son or daughter regardless of age, you must be satisfied that the beneficiary has either never been married or has terminated any and all prior marriages before you approve the petition. Any doubts about the beneficiary's marital status should be resolved through an interview at a local office.

- Relationship Between Petitioner and Beneficiary - This is the most complex issue to be considered in the adjudication of a petition for a child, son or daughter. In examining this issue, it is important to keep in mind not only the nature of the relationship (e.g., legitimate child, illegitimate child, adopted child), but also the point at which the relationship existed (e.g., the child's age at the time of the marriage between his or her parent and stepparent or at the time of the petitioner's acquisition of status). Each possibility is discussed separately under section (d) of this subchapter.

· Assisted Reproductive Technology (ART)

Chapter 21.4(c), General Adjudicative Issues - Assisted Reproductive Technology (ART), has been superseded by USCIS Policy Manual, Volume 6: Immigrants as of August 5, 2021.

(d) Adjudicative Issues Pertaining to Relationship Between Petitioner and Beneficiary.

The following list of issues provide guidance on specific familial relationships. Adjudicators should also be aware of the issues discussed in the relevant precedent decisions pertaining to petitions for a child, son or daughter (see Chapter 23.4(g)).

(1) Child Born in Wedlock (Formerly Referred to as “Legitimate Child”).

Chapter 21.4(d)(1), Child Born in Wedlock, has been superseded by USCIS Policy Manual, Volume 6: Immigrants as of August 5, 2021.

(2) Step Child.

See **8 CFR 204.2(d)(2)(iv)** for information regarding primary evidence for a stepchild.

(A) Creation of the Stepparent-Stepchild Relationship.

A stepchild relationship is created whenever a parent of the child marries someone (other than the child's other parent) before the child's 18 th birthday. The relationship is created automatically as a result of the marriage, assuming that the marriage is not a sham or does not violate the Defense of Marriage Act - see *Matter of Teng* , 15 I. & N. Dec 516 (BIA 1975) and **Chapter 21.3** of this field manual.)

(B) Termination of Stepparent-Stepchild Relationship.

Normally, a step relationship terminates when a marriage ends, especially if it ends in divorce. See *Matter of Simicevic*, 10 I. & N. Dec. 363 (BIA 1963). However, under certain circumstances a step relationship may continue after the death of the natural parent or even after the legal separation or divorce of the stepparent and natural parent if there is an ongoing relationship between the stepparent and stepchild (see *Matter of Pagnerre*, 13 I. & N. Dec. 173 (BIA 1971), *Matter of Mowrer*, 17 I. & N. Dec. 613 (BIA 1981), and *Matter of Mourillon*, 18 I. & N. Dec. 122 (BIA 1981)). If the marriage ends in annulment, however, the step relationship is deemed to have never existed because legally the marriage never existed.

Note

The creation of a step relationship in no way terminates the relationship between the child and his or her other natural parent (i.e., the one who did not marry the stepparent). It is neither unusual nor improper for a child who acquired LPR status through a stepparent to later petition for the other natural parent once the child naturalizes and reaches the age of 21.

(C) Petition by Wife of Natural Father.

In some cases, although a natural father may be ineligible to petition for his illegitimate child, a stepparent-stepchild relationship may exist under the Act between the child and the wife of the natural father even if she has never seen or cared for the child. See *Matter of McMillan*, 17 I. & N. Dec. 605 (BIA 1981).

(3) Legitimated Child.

See **8 CFR 204.2(d)(2)(ii)** for information regarding primary evidence for a legitimated child or son or daughter.

Some nationalities are not concerned with the formal legalization of a relationship; therefore, a child may be raised in a household in a parent-child relationship when legally there is no relationship. A petition based on that relationship could not normally be approved.

In considering petitions for parents or children, you must take into account the laws governing the places of residence of the parents and of the child in addition to the restrictions of the Act. Some countries require formal court action to legitimate a child, while others do not. You may find a case where the father of an illegitimate child acknowledges paternity of a child, but that acknowledgment may or may not have constituted legitimation. If the petitioner fails to establish that the beneficiary has been legitimated, you should then consider whether the beneficiary may qualify as a child born out of wedlock with whom the petitioner has a bona-fide parent-child relationship (see paragraph (4)).

While legitimation has historically applied to father-child relationships, the non-genetic gestational mother of a child born through ART may be required to take action after the birth of the child to formalize the legal relationship. Whether such action is required depends on the law of the relevant jurisdiction.

(4) Child Born out of Wedlock (Formerly Referred to as “Illegitimate Child”).

Chapter 21.4(d)(4), Child Born out of Wedlock, has been superseded by USCIS Policy Manual, Volume 6: Immigrants as of August 5, 2021.

(5) Child Adopted While Under the Age of 16.

Chapter 21.4(d)(5), Child Adopted While Under the Age of 16, has been superseded by USCIS Policy Manual, Volume 5: Adoptions as of November 19, 2021.

(f) Final Decision.

(A) Denial.

If the petitioner fails to establish eligibility for the benefit sought, the adjudicating officer shall deny the petition and notify the petitioner in writing of the reasons. As required in Chapter 10.7(b)(5) of this manual, the decision must include information about appeal rights and the opportunity to file a motion to reopen or reconsider.

(B) Approval.

If no adverse information is developed in a case at a USCIS office, the adjudicating officer shall approve the petition and:

- Forward it, with all attachments, to the National Visa Center (NVC) so that it may be processed and then forwarded to the embassy or consulate where the beneficiary will apply for an immigrant visa if the alien is:
 - outside the U.S., or
 - unable or unwilling to apply for adjustment of status; or
- Retain the approved petition in the beneficiary's file (i.e., A-file is one is pre-existing or receipt/petition file if no A-file exists) and invite him or her to apply for adjustment of status if he or she is in the U.S., and is eligible to and intending to so apply.

The adjudicating officer will also send Form I-797, Notice of Approval of Relative Immigrant Visa petition, to the petitioner.

(C) Revocation Proceedings Based on Adverse Information.

If adverse information is developed subsequent to the approval of the petition, the petition will be returned to the approving office with a memorandum (and supporting evidence) setting forth the arguments for revocation. When the USCIS office of origin receives the petition with the adverse information, that office shall notify the petitioner of the derogatory information and of the Bureau's intent to revoke the approval of the petition. The petitioner is to be given the choice of withdrawing the petition or having a determination of eligibility made in formal revocation proceedings. (See **Chapter 20.3** of this field manual.) The USCIS office must notify the immigration or consular officer who developed the adverse information by memorandum of the final action.

If the petition is not withdrawn and the approval is not revoked, the petition and all attachments must be forwarded to the consulate or embassy where the beneficiary has applied or will apply for an immigrant visa. If the adverse information was developed at an overseas DHS office, a memorandum explaining the reasons for not revoking the petition's approval must be attached to the approved petition. See, generally, **8 CFR 205** and **Chapter 20.3** of this field manual regarding revocation of petitions. See also **Chapter 20.4** of this field manual regarding withdrawal of petitions.

(g) Precedent Decisions.

(1) Precedents Pertaining to a Petition on Behalf of a Child.

· *Matter of M-*, 8 I. & N. Dec. 118 (BIA 1958, Attorney General 1959); *Matter of Lee*, 11 I. & N. Dec. 911 (BIA 1966); *Matter of Cho*, 16 I. & N. Dec. 188 (BIA 1977). Residence requirement of section 101(b)(1)(E) may include residence occurring prior the formal adoption decree.

· *Matter of Kirby*, 13 I. & N. Dec. 173 (BIA 1969). A child adopted in accordance with requirements of section 101(b)(1)(E) of the Act is not entitled to benefits from a petition filed by the natural parents.

· **Matter of Pagnerre**, 13 I. & N. Dec. 688 (BIA 1971). A stepparent-stepchild relationship may continue after the death of the alien's natural parent terminates the marriage which created the relationship if there is a continuing parent-child relationship.

· *Matter of Stultz*, 15 I. & N. Dec. 362 (BIA 1974 and 1975; Attorney General 1975). Adulterine children, irrespective of the time of birth, should be treated like any other illegitimate children under section 101(b)(1)(B) of the Act.

· *Matter of Teng*, 15 I. & N. Dec. 516 (BIA 1975). Where there is a sham marriage and no actual familial relationship between the stepchildren are not entitled to be considered the children of the U.S. citizen.

· *Matter of Cariago* , 15 I. & N. Dec. 716 (BIA 1976). Retroactive adoption decree does not confer benefits under the Act when actual adoption did not take place prior to the limiting age.

· *Matter of Cho* , 16 I. & N. Dec. 188 (BIA 1977). "Proxy" adoption valid where contracted is generally valid for INS (now USCIS) purposes.

· *Matter of Cabucana* , 16 I. & N. Dec. 217 (BIA 1977). Jurisdiction of the person, as well as jurisdiction over the subject matter is not necessarily a prerequisite for a valid adoption. (Overrules *Matter of Dela Cruz*, 15 I. & N. Dec. 580 (BIA 1976).)

· *Matter of Au Yeung* , 16 I. & N. Dec. 540 (BIA 1978). An alien, who is admitted to the U.S. as an "eligible orphan" pursuant to section 101(b)(1)(F) of the Act, and is never adopted by the petitioning U.S. citizen "parent", and who leaves the U.S., is not eligible for preference status as the "son" of the petitioning U.S. citizen "parent" since the relationship never came into existence.

· *Matter of Reyes* , 17 I. & N. Dec. 512 (BIA 1980). To be "legitimated" pursuant to section 101(b)(1)(C), the legitimating act must have placed the child in all respects on the same footing as if begotten and born in wedlock.

· *Matter of Mowrer* , 17 I. & N. Dec. 613 (BIA 1981). When the marriage creating the stepparent-stepchild relationship is terminated through divorce, it must be determined whether a family relationship has continued to exist as a matter of fact between the stepparent and stepchild.

· *Matter of McMillan* , 17 I. & N. Dec. 605 (BIA 1981). Persons who become stepchildren through the marriage of a natural parent prior to their 18 th birthday fall within section 101(b)(1)(B) without further qualification (i.e., there is no need to show a close family unit).

· *Matter of Clahar* , 18 I. & N. Dec. 1 (BIA 1981). A child within the scope of the Jamaican Status of Children Act of 1976 is included within the definition of a legitimated "child" as set forth in section 101(b)(1).

· *Matter of Richard* , 18 I. & N. Dec. 208 (BIA 1982); *Matter of Mesias* , 18 I. & N. Dec. 298 (BIA 1982); *Matter of Cherismo* , 19 I. & N. Dec. 25 (BIA 1984). Under the Civil Code of Haiti, as amended by the 1959 Presidential Decree, children born out of wedlock after January 27, 1959, and acknowledged by their natural father have the same rights and obligations as legitimate children. (This precedent is country specific to Haiti.)

· *Matter of Fakalata* , 18 I. & N. Dec. 213 (BIA 1982). In order to prove that customary adoption is valid for immigration purposes, the petitioner must establish that the adoption creates a legal status or relationship which is recognized by the government of the place where it occurred as carrying with it substantial legal rights and obligations.

· *Matter of Drigo* , 18 I. & N. Dec. 223 (BIA 1982); **Matter of Atembe** , 19 I. & N. Dec. 427 (BIA 1986). The beneficiary does not qualify for immigration priority date to which the beneficiary was not entitled at the time of the filing of the visa petition. (Relates to the change in age requirement of section 101(b)(1)(E) for adopted children.)

· *Matter of Oduro* , 18 I. & N. Dec. 421 (BIA 1983). Under Massachusetts law, legitimation of a person born out of wedlock is affected only by an acknowledgment of paternity (or judicial declaration of paternity) and the marriage of his/her natural parents. The LPR petitioner's natural, acknowledged offsprings who were born out of wedlock and whose natural parents never married did not qualify as the petitioner's "legitimated children". (This precedent is specific to Massachusetts.)

· **Matter of Cardoso** , 19 I. & N. Dec. 5 (BIA 1983). Legislation passed on May 21, 1980, in the Republic of Cape Verde resulted in no distinction between legitimate and illegitimate children and all children have equal rights under this law. Consequently, a beneficiary, who is born in Cape Verde on or after October 1, 1976, is deemed the legitimate "child" of his or her natural father under section 101(b)(1)(A) of the Act, whereas a beneficiary who was under eighteen years of age on that date is deemed the legitimated "child" of his or her natural father under section 101(b)(1)(C) of the Act. (This precedent is country specific to Cape Verde.)

· **Matter of Hernandez** , 19 I. & N. Dec. 14 (BIA 1983). To qualify under section 101(b)(1)(C), a change in law making all children legitimate must occur prior to the child's 18th birthday.

· **Matter of Repuyan** , 19 I. & N. Dec. 119 (BIA 1984). Mere visit is not sufficient to fulfill two-year residence requirement under section 101(b)(1)(E).

· **Matter of Awwal** , 19 I. & N. Dec. 617 (BIA 1988). Even where there is an ongoing actual family relationship between a stepparent and a stepchild, that relationship cannot be recognized under section 101(b)(1)(B) of the Act where the marriage creating the step-relationship was a sham. *Matter of Teng* , 15 I. & N. Dec. 516 (BIA 1975), clarified.

· **Matter of Vizcaino** , 19 I. & N. Dec. 644 (BIA 1988). Section 101(b)(1)(D) of the Act, as amended by P.L. 99-603, 100 Stat. 3359, is applicable to all visa petitions filed after the date that the law went into effect.

· **Matter of Pineda** , 20 I. & N. Dec. 70 (BIA 1989). Discusses the evidence relevant to establishing a bona fide parent-child relationship, requiring at minimum a showing of emotional and/or financial ties or an active concern by the father for the child's support, instruction, and general welfare for purposes of establishing eligibility under section 101(b)(1)(D) of the Act.

· **Matter of Cuello** , 20 I. & N. Dec. 94 (BIA 1989). Where an adoption has been effected, be it intra-family or otherwise, and the adopted child continues to reside in the same household with the natural parent or parents during the period in which the adoptive parent seeks to establish his or her compliance with the statutory residence requirement of section 101(b)(1)(E) of the Act, the petitioner has the burden of establishing that the adoptive parent exercised primary parental control during that period of residence. Evidence of parental control may take many forms, including competent objective evidence that the adoptive parent owns or maintains the property where the child resides, provides financial support and day-to-day care, and assumes responsibility for important decisions in the child's life. The evidence must clearly establish the physical living arrangements of the adopted child, adoptive parents, and the child's natural parents during the period of time in which the adoptive parent seeks to establish compliance with the residence requirement of the statute and, where a fraudulent or ad hoc adoption is suspected, during any period following the adoption which the adjudicating officer deems appropriate. Where a petitioner establishes compliance with the statutory requirements of section 101(b)(1)(E) of the Act, demonstrating, where necessary, primary parental control during the parties' residence with one another, the relationship will be presumed bona fide in the absence of evidence indicating otherwise.

· **Matter of Marquez** , 20 I. & N. Dec. 160 (BIA 1990). Rejects a strict statutory interpretation of section 101(b)(1)(E) of the Act, and relies instead upon the legislative history of the statute which indicates that Congress did not intend to recognize *ad hoc* adoptions designed to circumvent the immigration laws. This decision found that an adoptive relationship to be more akin to marital relationships than to step-relationships, and thus, in certain cases, the bona fides of adoptions will be determined. Visa petitions involving the specter of sham adoptions which generally arise in adoptions by a close relative where the relationship between the natural parent and the adopted child does not appear to change subsequent to the

adoption will be analyzed under the standards set forth in **Matter of Cuello** , 20 I. & N. Dec. 94 (BIA 1989).

(2) Precedent Decisions Pertaining to a Petition for a Son or Daughter .

· *Matter of Coker* , 14 I. & N. Dec. 521 (BIA 1974). To qualify as a son or daughter for preference classification, the beneficiary of the visa petition must once have qualified as a "child" of the petitioner under section 101(b)(1) of the Act.

· *Matter of Wong* , 16 I. & N. Dec. 87 (BIA 1977). Beneficiary of a visa petition classified as an "unmarried son" or "unmarried daughter" who obtains an immigrant visa and enters the U.S. in that classification, but who at the time of entry was actually married, may be deportable notwithstanding a subsequent annulment is granted *ab initio* .

· *Matter of Aldecoaotalora* , 18 I. & N. Dec. 430 (BIA 1983). Where the beneficiary was divorced for the sole purpose of obtaining immigration benefits and continued to reside with and own property jointly with her former husband in what by all appearances is a marital relationship; such a divorce is considered a sham and is not acceptable for immigration purposes.

¹But see paragraph (d)(3) describing where parentage may be recognized through legitimation where some action is taken post-birth to formalize the legal relationship. In the case of post-birth legitimation, the legal parent-child relationship relates back to the time of birth.

²If the petitioner was unable to obtain a statement from the Central Authority in the appropriate COO addressing the child's habitual residence, the interim PM stated the notice criteria applied to adoption decrees issued one month after the publication date – therefore, the notice criteria applies to adoptions issued on or after February 3, 2014.

**21.5 Petition for an Orphan has been superseded by USCIS Policy Manual, Volume 5:
Adoptions as of November 19, 2021.**

21.6 Petition for Hague Convention Adoptee has been superseded by USCIS Policy Manual, Volume 5: Adoptions as of November 19, 2021.

**21.7 Petition for an Amerasian has been superseded by USCIS Policy Manual, Volume 7:
Adjustment of Status as of May 19, 2021.**

21.8 Petition for a Parent.

(a) Eligibility Requirements.

(1) Status.

Only a citizen of the U.S. may file a visa petition for a parent. A petition filed by a LPR must be denied.

(2) Age.

The petitioner must be at least 21 years old at the time of filing.

(3) Relationship.

In order for the beneficiary to be considered the parent of the petitioner:

- The petitioner must have once qualified as the child of the beneficiary under one or more of the definitions contained in section 101(b)(1) of the Act; and

- The relationship must continue to exist, even though the petitioner is over age 21 and, therefore, no longer a child. If the relationship has been terminated (as would happen in the case of a stepparent-stepchild relationship if marriage between the stepparent and natural parent were to be terminated by divorce or annulment, or would happen in the case of any other parent-child relationship if the child were to be given up for adoption), the beneficiary would no longer be eligible for classification as a parent, even though the petitioner had once been considered to be the beneficiary's child.

The requirements for establishing the parent-child relationship are the same as with petitions for children,

except that the roles of the petitioner and the beneficiary are reversed (see **Chapter 21.4** of this field manual).

(b) Filing Requirements .

In accordance with the instructions on the form, the petitioner must file an I-130 petition, with fee and all supporting documents, with:

- the appropriate Service Center, or

- the local office having jurisdiction over the beneficiary's location in the U.S., if the beneficiary is filing a concurrent Form I-485.

(c) Adjudication .

(1) Evidence to Support a Petition for a Parent .

In addition to evidence of U.S. citizenship as listed in paragraphs (i) through (vi) of **8 CFR 204.1 (g)** , the petitioner must also provide evidence of the claimed relationship. See the references below:

- **8 CFR 204.2 (f) (2) (i)** – Primary evidence if the petitioner is a legitimate son or daughter of the beneficiary;

- **8 CFR 204.2 (f) (2) (ii)** – Primary evidence if the petitioner is a legitimated son or daughter of the beneficiary;

· **8 CFR 204.2(f)(2)(iii)** – Primary evidence if the petitioner is an illegitimate son or daughter of the beneficiary; and

· **8 CFR 204.2(f)(2)(iv)** – Primary evidence if the petitioner is the adopted son or daughter of the beneficiary.

If primary evidence is not available, secondary evidence may be submitted by the petitioner and considered by the adjudicator. See **8 CFR 204.1(g)(2)** and **8 CFR 204.2(d)(v)** and **Chapter 11.1** of this field manual.

(2) Petitions for More than Two Parents.

There is no limitation on the number of parents for whom a single petitioner may file visa petitions. For example, if the (alien) natural parents of the petitioner divorced and both remarried other aliens prior to the petitioner's 18 th birthday, the petitioner could file petitions for his natural mother, his natural father, his stepmother and his stepfather.

(3) Fraud.

While not as common as marriage fraud, parent-child fraud is a serious problem. The same techniques used to detect and deter fraud in petitions filed for children (e.g., DNA tests) apply to petitions filed for parents. See **Chapter 21.2** of this field manual.

(4) Final Decision.

(A) Approval.

If no adverse information is developed in a case at a USCIS office, the adjudicating officer shall approve the petition and:

- Forward it, with all attachments, to the National Visa Center (NVC) so that it may be processed and then forwarded to the embassy or consulate where the beneficiary will apply for an immigrant visa if the alien is outside the U.S. or is unable or unwilling to apply for adjustment of status; or
- Retain the approved petition in the beneficiary's file (i.e., A-file is one is pre-existing or receipt/petition file if no A-file exists) and invite him or her to apply for adjustment of status if he or she is in the U.S., and is eligible to and intending to so apply.

The adjudicating officer will also send Form I-797, Notice of Approval of Relative Immigrant Visa petition, to the petitioner. If no adverse information is developed in a case at a consulate or the embassy, the consular officer will proceed with the processing of the visa application.

(B) Denial. If the petitioner fails to establish eligibility for the benefit sought, the adjudicating officer shall deny the petition and notify the petitioner of the reasons in writing. As required in Chapter 10.7(b)(5) of this manual, the decision must include information about appeal rights and the opportunity to file a motion to reopen or reconsider.

(C) Revocation Proceedings Based on Adverse Information.

If adverse information is developed subsequent to the approval of the petition, the petition will be returned to the approving office with a memorandum (and supporting evidence) setting forth the arguments for revocation. When the USCIS office of origin receives the petition with the adverse information, that office shall notify the petitioner of the derogatory information and of the Bureau's intent to revoke the approval of the petition. The petitioner is to be given the choice of withdrawing the petition or having a determination of eligibility made in formal revocation proceedings. (See Chapter 20.3 of this field manual.) The USCIS office must notify the immigration or consular officer who developed the adverse information by memorandum of the final action.

If the petition is not withdrawn and the approval is not revoked, the petition and all attachments must be forwarded to the consulate or embassy where the beneficiary has applied or will apply for an immigrant visa. If the adverse information was developed at an overseas DHS office, a memorandum explaining the reasons for not revoking the petition's approval must be attached to the approved petition.

(5) Derivative Beneficiaries.

There are no provisions in the law for issuance of a visa to a dependent spouse or child of a parent of U.S. citizen. If the person in question qualifies as a (step)parent or sibling of the citizen, then that citizen can file a separate petition on his or her behalf. If the person in question does not so qualify, (e.g., if the person in question married the petitioner's parent subsequent to the petitioner's 18th birthday) the parent of the citizen could file a second preference petition on his or her behalf, provided all other requirements are met. This may involve considerable delay between the immigration of the petitioner's parent and the person in question, since the process would require (1) the immigration of the parent, (2) the filing and adjudication of an I-130 petition by the newly-immigrated parent, (3) the availability of a second preference visa number, and (4) all necessary steps and checks in the visa issuance process.

(d) Precedent Decisions.

In addition to the following precedent decisions pertaining to visa petitions filed on behalf of parents, the adjudicator should also be familiar with precedents pertaining to visa petitions filed on behalf of children (see **Chapter 21.3**):

- *Matter of Hassan*, 16 I. & N. Dec. 16 (BIA, 1976) – In order for a son or daughter to confer immediate relative status upon a parent, the petitioner must be a U.S. citizen, at least 21 years of age, and must have once qualified as the "child" of the beneficiary as defined in 101(b) of the Act.
- *Matter of Fong*, 17 I. & N. Dec. 212 (BIA, 1980) – The fact that a petitioner has already successfully petitioned for a natural parent does not preclude approval of a visa petition filed on behalf of a stepparent in the absence of a statutory bar such as that existing in section 101(b)(1)(E) of the Act with respect to the natural parents of an adopted child.
- **Matter of Li**, 20 I. & N. Dec. 700 (BIA, 1993) - An adopted child may not confer immigration benefits upon a natural parent without regard to whether the adopted child has been accorded or could be accorded immigration benefits by virtue of his or her adoptive status. An adopted child may not confer immigration benefits upon his or her natural sibling, because their common natural parent no longer has the status of parent of the adopted child for immigration purposes.

21.9 Petition for a Sibling.

(a) Establishing the Standing of the Petitioner.

Only a U.S. citizen who is 21 years of age or older may file a petition for a brother or sister for classification under section 203(a)(4).

(b) Establishing a Qualifying Relationship.

It must be established that the petitioner and beneficiary are or once were "children of a common parent" within the meaning of section **101(b)(1)** and **(2)** of the Act. A consanguineous (i.e., blood) relationship between the petitioner and the beneficiary is not required (see *Matter of Hueng*, 15 I. & N. Dec. 145 and *Matter of Garner*, 15 I. & N. Dec. 215). The parent-child relationships can be established through any of the means recognized in the definition of child contained in section 101(b)(1) of the Act (i.e., through birth, through adoption, or through a marriage creating a steprelationship). As in the case of a stepparent-stepchild relationship, a stepsibling relationship is normally dissolved should the marriage of the parent and stepparent end in divorce or annulment (see the discussion under **Chapter 21.4**). It may help, therefore, to look upon the adjudication of a petition for a sibling as being more of an adjudication of two separate relationships: the relationship between the petitioner and his/her parent, and the relationship between the beneficiary and that same parent. An example may help to illustrate this point:

John Smith married Mary Jones. At the time of the marriage, John Smith had a 19 year old son, Fred, and Mary Jones had a 17 year old daughter, Betty and a 22 year old son, Steve. Fred was the legitimate offspring of John's prior marriage, and Betty and Steve were the legitimate offspring of Mary's prior marriage, both prior marriages having been legally dissolved. Of the 5, only Fred is a citizen of the U.S., the rest being neither citizens nor LPRs. Because Fred was over age 18 at the time of the marriage, he is not considered to be Mary's stepson under immigration law; likewise, Steve is not considered to be Fred's stepson. Betty, on the other hand, became John's stepdaughter because she was under age 18. Under immigration law:

- Fred and Betty are children of John and are therefore siblings through John only, but not through Mary.

- Betty and Steve, being the children of Mary and her first husband, are siblings through both of their blood parents.

· Fred is not Mary's son and Steve is not John's son, so (not having a common parent) they are not siblings at all.

If Fred is a citizen, he may file a petition for his sister Betty once he turns 21. He may not file a petition for Steve. Of course, if Betty immigrates to the U.S. and later naturalizes, she may then file a petition for her brother Steve.

(c) Adjudication.

(1) Evidence.

(A) The documentation required to establish a sibling relationship varies and depends entirely on the common parent(s) through whom the relationship occurs. Therefore, officers should carefully review the supporting documents to ensure that both the petitioner and beneficiary have a parent-child relationship with the claimed common parent(s), as defined at INA 101 (b)(1)-(2). The following sections of the regulations discuss the primary or secondary evidence necessary to support a petition for a sibling, depending on the nature of the sibling relationship:

- **8 CFR 204.2(g)(2)(i)** – primary evidence, if the siblings share a common mother or are the legitimate children of a common father;

- **8 CFR 204.2(g)(2)(ii)** – primary evidence, if either or both siblings are legitimated;

- **8 CFR 204.2(g)(2)(iii)** – primary evidence, if either sibling is illegitimate;

- **8 CFR 204.2(g)(2)(iv)** – primary evidence for stepsiblings; and

· **8 CFR 204.2(d)(2)(v) and (iv)** – secondary evidence of parent-child relationships.

(B) DNA Evidence. When USCIS determines that primary evidence is unavailable or unreliable, it may suggest and accept DNA test results as evidence of a full-sibling relationship (where siblings share two biological parents) or a half-sibling relationship (where siblings share one biological parent). Test results should be evaluated for probative value according to the guidance contained in the chart below. Please note that there are currently no regulations requiring a petitioner or beneficiary to submit DNA test results.

Overview of Guidance for Sibling DNA Test Results

DNA Test Result	Full-Sibling Interpretation	Half-Sibling Interpretation
90% or higher ^[1]	Relationship Supported – Probative evidence that the claimed relationship exists.	Relationship Supported – Probative evidence that the claimed relationship exists.
9% to 89% ^[2]	Inconclusive Result – By itself, the test result is not sufficient to establish the claimed relationship without additional affirmation from an AABB-accredited lab. ^[3]	Inconclusive Result – By itself, the test result is not sufficient to establish the claimed relationship without additional affirmation from an AABB-accredited lab. ^[4]
Below 9% ^[5]	Relationship Not Supported – Probative evidence that the claimed relationship does not exist.	Inconclusive result – By itself, the test result is not sufficient to establish the claimed relationship without additional affirmation from an AABB-accredited lab. ^[6] In contrast to full-sibling results, this result for half-siblings does not necessarily mean the claimed relationship does not exist.

Full- and Half-Sibling Test Results Demonstrating 90 Percent Probability or Higher are Probative Evidence of the Claimed Relationship

Adjudicators must consider DNA test results reflecting 90 percent probability or higher to be probative evidence of a full- or half-sibling relationship. When an officer determines that primary evidence is unavailable or unreliable, the officer may consider DNA test results reflecting 90 percent probability or higher as sufficient to establish the claimed relationship and forego securing additional evidence. However, petitioners are generally expected to submit other available evidence of the claimed sibling relationship (such as primary evidence, secondary evidence, affidavits, or an explanation as to why it is not possible to submit additional evidence) and evidence of legitimation or a bona fide father-child relationship, if necessary. Generally, a Request for Evidence (RFE) or Notice of Intent to Deny (NOID) will not be required for additional explanation or evidence of the relationship when the record contains a probative DNA test

result. Where evidence is submitted in addition to DNA test results, adjudicators must consider all evidence in the totality of the circumstances. While a DNA test result may indicate that a relationship is supported, any other evidence to the contrary must also be considered.

Full-Sibling Test Results Between 9 and 89 Percent Probability are Inconclusive Evidence of the Claimed Relationship

USCIS considers DNA results reflecting less than 90 percent, but greater than or equal to 9 percent probability, to be inconclusive evidence of a full-sibling relationship. A valid full-sibling relationship may exist, even when a DNA test result reflects less than 90 percent probability. However, due to the significant variation between inconclusive results, officers should not consider inconclusive results to either support or weaken the case for the existence of the claimed relationship, unless the results include independent clarification from the AABB-accredited lab that demonstrates to the officer that the claimed relationship is more likely than not to exist. For example, comparisons of the test results of the petitioner and beneficiary against the test results of other relatives may lead the lab to indicate that the claimed relationship exists, even if the test results of the petitioner and beneficiary do not reach 90 percent.^[7] Where a result is inconclusive, an officer must continue to evaluate the remaining evidence in the totality of the circumstances to determine whether the claimed relationship is more likely than not to exist.

Full-Sibling Test Results Below 9 Percent Probability Demonstrate that the Claimed Relationship Does Not Exist

USCIS considers DNA results for full-siblings reflecting less than 9 percent probability to be exclusionary, or as evidence that the claimed full-sibling relationship does not exist. Where DNA test results do not support the existence of a full-sibling relationship, the officer must continue to review other evidence of the claimed relationship. In some rare cases, the remaining evidence may be sufficient to establish a half-sibling or step-sibling relationship.

Half-Sibling Test Results Below 90 Percent Probability are Inconclusive Evidence of the Claimed Relationship

Due to the considerable variations in DNA test results for valid half-sibling relationships, USCIS considers half-sibling test results reflecting less than 90 percent probability to be inconclusive for immigration purposes. While an inconclusive result does not necessarily indicate that the claimed relationship does not exist, officers should not consider inconclusive results for half-siblings to either support or weaken the case for the existence of the claimed relationship, unless the results include independent clarification from the AABB-accredited lab, and they demonstrate to the officer that the claimed relationship is more likely than not to exist.^[8] Where a result is inconclusive, an officer must continue to evaluate the remaining evidence in the totality of the circumstances. Unlike full-sibling test results, a half-sibling test result below 9 percent does not rule out the possibility that the claimed half-sibling relationship exists.

Encouraging Testing Against Additional Family Members

Direct sibling-to-sibling testing is normally performed when it is not possible to test against the common parent(s). Some labs have reported that, when a DNA test is conducted for immigration purposes, the lab may incorrectly believe that it can only test the individuals named on the petition. However, where the

claimed sibling relationship is valid, testing against additional family members improves the likelihood of test results, and thereby reduces the need to issue additional RFEs, NOIDs, or denials. The AABB standards encourage accredited labs to recommend testing against additional relatives, as appropriate.

Including additional family members, particularly first-degree relatives, such as parents and other siblings, or second-degree relatives, such as aunts, uncles, and cousins, in the testing may produce more conclusive results. Therefore, when an RFE or NOID includes a suggestion to undergo voluntary DNA testing, officers should suggest that the petitioner include additional relatives, particularly the shared parent(s), if possible.

Significance of Type of Relationship Test Conducted

The type of test conducted by the lab may also impact the ultimate result. For example, when half-siblings explicitly request a half-sibling test rather than a full-sibling test, they will receive a stronger test result. Conversely, when half-siblings incorrectly request a full-sibling test, they will receive skewed results. The lab may guide a customer as to which test may be appropriate after reviewing initial results. The AABB-accredited lab has sole discretion to set the parameters of the test that will be conducted.

Loci Tested in Sibling Relationships

USCIS guidance for test results that fall below 90 percent is based upon testing at 20 loci. A locus (or loci, in plural) is a genetic marker which indicates a specific location on the DNA strand. Test results that fall below 90 percent probability have the strongest conclusions if they show 20 loci were tested. Each lab report indicates by name which loci have been tested and, thereby, displays the number of loci tested.

In January 2018, the AABB Relationship Testing Subcommittee revised its standards to require accredited labs to test at least 20 loci for full- and half-sibling relationships where results appear lower than 90 percent (inconclusive or exclusionary). Results that measure at or above 90 percent will not be subject to a minimal loci requirement.

Where DNA testing was conducted after January 1, 2018, (the effective date of the 13th edition of the AABB standards) officers will not need to verify the number of loci tested. However, when evaluating a result that was conducted before January 1, 2018, officers will need to verify the number of loci tested, if a result falls below 90 percent probability.

In general, the officer must advise the petitioner, in writing, of the option to request that the AABB-accredited lab test to 20 loci and/or test against additional relatives to improve the accuracy of results when:

- The result falls below 90 percent probability and fewer than 20 loci were tested;
- The claimed relationship has not otherwise been established by a preponderance of the evidence; and

- The petitioner was not previously advised that results will have the strongest probability if tested to 20 loci.

Parent-Child Test Results

USCIS policy on parentage testing remains unchanged. Parent-child DNA test results between one or both claimed siblings and the claimed common parent will be considered according to current policy relating to DNA testing for parent-child relationships.^[9]

Step-Sibling Relationships

When DNA test results do not establish the validity of the claimed relationship, but other evidence appears to support a step-sibling relationship, the officer may continue to review the relationship as a step-sibling relationship, if appropriate. For example, if a petitioner submits DNA test results that exclude the possibility of a biological relationship, but the file contains evidence, such as marriage certificates or birth certificates, that indicate the existence of a step-sibling relationship, the adjudicator may evaluate the relationship as a step-sibling relationship.

(2) Fraud.

Eligibility for relative classification as a brother or sister depends upon the petitioner establishing that both petitioner and beneficiary were "children" of a common parent. This relationship is usually established through the submission of the birth certificates of the petitioner and beneficiary, as well as evidence of the relationship between their parents, where appropriate. Some indications that a birth certificate attempting to establish a sibling relationship may be fraudulent include:

- A delayed birth certificate for either the petitioner or the beneficiary might indicate an attempt to document a relationship that does not exist. (Or it might not, since there are also legitimate reasons for obtaining a delayed birth certificate.)
- Birth certificates from countries that are experiencing economic problems or political turmoil should be given special attention. The incentive to leave those countries is great and that fact sometimes causes petitioners who would otherwise obey the law to submit fraudulent documents in support of petitions on behalf of aliens from those countries.
- Some countries change governments frequently. One indication that a birth certificate may be fraudulent is an issuance date that is prior to or after the government of a country came into or went out of

existence. Officers should be familiar enough with the political backgrounds of the countries so that they are able to detect this type of fraud.

While not as common as marriage fraud, sibling fraud is a potential problem. The same techniques used to detect and deter fraud in petitions filed for children (e.g., DNA tests) apply to petitions filed for parents. See **Chapter 21.2** of this field manual.

(4) Final Decision.

(A) Approval.

If no adverse information is developed in a case at a USCIS office, the adjudicating officer shall approve the petition and:

- Forward it, with all attachments, to the National Visa Center (NVC) so that it may be processed and then forwarded to the embassy or consulate where the beneficiary will apply for an immigrant visa if the alien is outside the U.S. or is unable or unwilling to apply for adjustment of status; or
- Retain the approved petition in the beneficiary's file (i.e., A-file is one is pre-existing or receipt/petition file if no A-file exists) and invite him or her to apply for adjustment of status if he or she is in the U.S., and is eligible to and intending to so apply.

The adjudicating officer will also send Form I-797, Notice of Approval of Relative Immigrant Visa petition, to the petitioner. If no adverse information is developed in a case at a consulate or the embassy, the consular officer will proceed with the processing of the visa application.

(B) Denial.

If the petitioner fails to establish eligibility for the benefit sought, the adjudicating officer shall deny the

petition and notify the petitioner of the reasons in writing. As required in Chapter 10.7(b)(5) of this manual, the decision must include information about appeal rights and the opportunity to file a motion to reopen or reconsider.

(C) Revocation Proceedings Based on Adverse Information .

If adverse information is developed subsequent to the approval of the petition, the petition will be returned to the approving office with a memorandum (and supporting evidence) setting forth the arguments for revocation. When the USCIS office of origin receives the petition with the adverse information, that office shall notify the petitioner of the derogatory information and of the Bureau's intent to revoke the approval of the petition. The petitioner is to be given the choice of withdrawing the petition or having a determination of eligibility made in formal revocation proceedings. (See **Chapter 20.3** of this field manual.) The USCIS office must notify the immigration or consular officer who developed the adverse information by memorandum of the final action.

If the petition is not withdrawn and the approval is not revoked, the petition and all attachments must be forwarded to the consulate or embassy where the beneficiary has applied or will apply for an immigrant visa. If the adverse information was developed at an overseas DHS office, a memorandum explaining the reasons for not revoking the petition's approval must be attached to the approved petition.

(d) Precedent Decisions .

In addition to the following decisions, adjudicating officers should be aware of precedents pertaining to visa petitions for parents (see **Chapter 21.8** of this field manual) and those pertaining to spousal visa petitions (see **Chapter 21.3** of this field manual).

· **Matter of Van Pamelan** , 12 I. & N. Dec.11 (BIA, 1966) – Acknowledgment , but not legitimation, by natural father did not give petitioner standing to petition for sibling through the common father.

(**Note:** This case was decided before the amendments to section 101(b)(1)(E) of the Act allowing a parent-child relationship with the father if the child was born out of wedlock.)

· **Matter of Mahal** , 12 I. & N. Dec. 409 (BIA, 1967) – Citizen may petition for a sibling born to a common father and different mother where father was married to both mothers in a polygamous relationship if polygamy is legal in the country of the parents marriages and residence. (**Note:** This case

was decided before the amendments to section 101(b)(1)(E) of the Act allowing a parent-child relationship with the father if the child was born out of wedlock.)

- **Matter of Wong-Setoo** , 12 I. & N. Dec.484 (BIA, 1967) – Petition for a blood niece as a sibling is denied where petitioner’s parents “adopted” the beneficiary (their own granddaughter) in China, since adoption of a grandchild is illegal in China.

- **Matter of Campbell** , 13 I. & N. Dec. 552 (BIA, 1970) – This decision was overruled by Matter of Heung (see below).

- *Matter of Butterfly* , 14 I. & N. Dec. 460 (BIA, 1973) – Citizen may not petition for sibling adopted by petitioner’s mother where the adoption did not meet the provisions of section 101(b)(1) of the Act in that the beneficiary was over 18 at the time of the adoption.

- **Matter of Kim** , 14 I. & N. Dec. 561 (BIA, 1974) – Citizen cannot petition for sibling who is the child of the same father and the father’s concubine if sibling was never legitimated. (This case was specific to Korea and was overruled in part by *Matter of Lee* , 16 I. & N. Dec. 305 (BIA 1977).)

- **Matter of Heung** , 15 I. & N. Dec.145 (BIA, 1974) – Citizen may petition for stepsibling (*Matter of Campbell* overruled).

- **Matter of Garner** , 15 I. & N. Dec. 215 (BIA, 1975) – While the term “sister” is not defined in the Act, petitioner must establish that he/she and sibling once qualified as the children of a common parent as provided in sections 101(b)(1) and (2) of the Act.

- **Matter of Kwong** , 15 I. & N. Dec. 312 (BIA, 1975) – Citizen cannot petition for sibling who was born to father’s concubine in Hong Kong if the concubine did not occupy the status of a *tsip* . Such status requires concubine to enter the household of the man and his principal wife and to accept position subordinate to the principal wife. which did not occur in this case.

- **Matter of Mourillon**, 18 I. & N. Dec. 122 (BIA 1981). In order to qualify as stepsiblings, either (1) the

marriage which created the step-relationships must continue to exist, or (2) where parties to that marriage have legally separated or the marriage also terminated by death or divorce, a family relationship must continue to exist as a matter of fact between the "stepsiblings".

· **Matter of Li** , 20 I. & N. Dec. 700 (BIA, 1993) - An adopted child may not confer immigration benefits upon a natural parent without regard to whether the adopted child has been accorded or could be accorded immigration benefits by virtue of his or her adoptive status. An adopted child may not confer immigration benefits upon his or her natural sibling, because their common natural parent no longer has the status of parent of the adopted child for immigration purposes.

Footnotes

[1] This does not require testing to 20 loci.

[2] This assumes testing to 20 loci. This row includes results between 89 and 89.99 percent.

[3] For further discussion of the additional affirmation from an AABB-accredited lab, see *Full-Sibling Test Results Between 9 and 89 Percent Probability are Inconclusive Evidence of the Claimed Relationship*, as detailed below.

[4] For further discussion of the additional affirmation from an AABB-accredited lab, see *Half-Sibling Test Results Below 90 Percent Probability are Inconclusive Evidence of the Claimed Relationship*, as detailed below.

[5] This assumes testing to 20 loci.

[6] For further discussion of the additional affirmation from an AABB-accredited lab, see *Half-Sibling Test Results Below 90 Percent Probability are Inconclusive Evidence of the Claimed Relationship*, as detailed below.

[7] In one case, a lab was able to test the petitioner against the beneficiary and also test the petitioner and beneficiary separately against a third sibling. The test results indicated a 44.99 percent probability between the petitioner tested against the beneficiary, a 99.99 percent probability between the petitioner tested against the third sibling, and a 99.96 percent probability between the beneficiary tested against the third sibling. In evaluating these results, the lab director concluded the following: "Results such as those obtained when testing (the petitioner) against (the beneficiary) can occur even if they are truly full siblings because there is no obligate sharing of alleles in siblings like there is in a parent/child relationship... Using the basic rules of logic, there is a very strong indication that all three are full siblings. Additionally, there are no genetic loci at which four alleles would occur. If it were true that some loci displayed five or six alleles, there would have to be more than two total parents for the three tested alleged siblings. Since this is not true and the indicated Siblingship Indexes were obtained, I feel that the data indicate strongly that all three individuals share the same parents."

[8] For further discussion of the additional affirmation from an AABB-accredited lab, see *Full-Sibling Test Results Between 9 and 89 Percent Probability are Inconclusive Evidence of the Claimed Relationship*, as detailed above.

[9] The relationship between each sibling and the claimed common parent must be individually established. When one sibling's relationship to the common parent is established through primary and/or secondary evidence already contained in the record, the petitioner may only need to submit additional evidence of the claimed relationship between the other sibling and the common parent. See Aytes, Michael,

PM, Genetic Relationship Testing; Suggesting DNA Tests, Revisions to the Adjudicator's Field Manual (AFM) Chapter 21 (AFM Update AD07-25), March 19, 2008 (http://www.uscis.gov/files/pressrelease/genetic_testing.pdf) for additional information on the use of DNA testing to establish a parent-child relationship.

21.10 Refugee / Asylee Relative Petitions.

(a) Background.

Section 207(c)(2) of the Act entitles a qualifying spouse or child of a refugee to be admitted as a refugee if accompanying or following to join the refugee. **Section 208(b)(3)** of the Act entitles a qualifying spouse or child of an asylee to be granted asylum status if accompanying or following to join the asylee.

(b) Eligibility Requirements.

A Form I-730 (“Refugee/Asylee Relative Petition”) may be filed on behalf of either a spouse or a child (i.e., a person meeting the definition contained in paragraphs (A) through (E) of section 101(b)(1) of the Act) by an alien who has been admitted to the United States as a refugee or has been granted asylee status in the United States. A separate Form I-730 must be filed for each beneficiary.

(c) Form and Filing Issues.

Form I-730 must be filed with the Nebraska Service Center.

By regulation, the Form I-730 must be filed within two years of the date on which the refugee petitioner arrived in the United States or was granted asylum status, with the following exceptions:

- If the alien acquired his or her status on or prior to February 27, 1998, the petition could have been filed at any time prior to February 28, 2000.
- If USCIS determines that valid humanitarian reasons exist for extending the filing deadline, it may do so. (There is no set limit on the length of extension which may be granted.)

Note

If more than 2 years have passed since the refugee arrived in the U.S. or asylum status was granted, and neither of the exceptions applies, the petitioner's only option is to wait until he or she becomes a lawful permanent resident and then file a Form I-130, Petition for Alien Relative.

(d) General Adjudication Issues .

· Petitioner's Status - A petitioner must be either a refugee or an asylee in the U.S. when the Form I-730 is filed. If, pursuant to section **209(a)** or section **209(b)** of the Act, he or she adjusts status to that of lawful permanent resident before the petition is approved, the petition may still be approved and the beneficiary may receive derivative status (provided all other requirements are met).

· Age of (Child) Beneficiary - For asylum and refugee applications pending on or filed after August 6, 2002, whether or not a son or daughter may continue to be classified as a child is based on the age of the derivative at the time the refugee or asylee application is filed. As long as the child was under 21 on the date of filing the asylum or refugee application, he or she will continue to be classified as a child for purposes of adjudicating the refugee or asylum application, This provision continues to protect the beneficiary after the approval of the Form I-730, through the admission process, and (in the case of a dependent asylee) the section 209(b) adjustment process. (Section 209(a), under which a refugee or derivative refugee "adjusts" to permanent resident status, does not require that a derivative refugee have continued to qualify as the child of a refugee, so aging out is not an issue.) See **section 207(c)(2)(B)** and **section 208(b)(3)(B)** of the Act. These special provisions do not apply to beneficiaries who had aged out prior to the filing of an I-730 petition on their behalf or whose I-730 petition had been denied prior to August 6, 2002.

· Marital Status of Beneficiary - A child must be unmarried in order to qualify as a beneficiary of an I-730 petition.

· Time at Which Relationship Was Created - Generally, in order to qualify as a spouse or child of a refugee or asylee for Form I-730 purposes, the relationship must have existed at the time the petitioner/parent acquired refugee or asylee status (except for *in utero* children, see below). Relationships created after that date do not qualify for Form I-730 petition purposes, although the refugee or asylee may be eligible to file a second preference petition for the same individual once that refugee or asylee adjusts to LPR status.

Unlike other classifications, the regulations at 8 CFR 207.7 and 8 CFR 208.21 governing following to join dependents of refugees and asylees allow a child to qualify even if the child was not born until after the petitioner acquired refugee or asylee status, provided such child was in *utero* (i.e., had been conceived) prior to the date on which the petitioner acquired such status. Accordingly, an I-730 petition may be approved for a child who was born within approximately 9 months after the date on which the petitioner acquired status, so long as the beneficiary falls within one of the definitions of child set forth in section 101(b)(1) of the Act.

Note

A child might qualify as the child of the principal refugee or asylee even if the petitioner is not the birth father or birth mother as a matter of fact. For example, the petitioner may have been married to the child's mother when the child was born, but may also have been in the United States continuously since prior to the earliest possible date of the child's conception. First, the law of the place of birth of the child may conclusively establish that the mother's husband is the legal birth father. Second, even if the law does not establish a legal parental relationship, when a child is born as the legal child of only one partner of a married couple, the child is considered the "step-child" of the other partner for immigration purposes. See Matter of Stultz, 15 I&N Dec. 362 (AG 1975). Because the child qualifies as the petitioner's "step-child" under INA 101(b)(1)(B), you do not need to decide if the child is the petitioner's child under INA 101(b)(1)(A), (C), or (D).

· Relationship Between the Petitioner and the Beneficiary - With the exception of the issues covered in the preceding bullets, the same relationship issues that pertain to an I-130 petition for a spouse or child pertain to an I-730 petition for the same relationship. Accordingly, in adjudicating an I-730 petition, the adjudicator should be aware of, and follow, the relating guidance set forth in Chapter 21.2, Chapter 21.3 and Chapter 21.4 of this field manual.

· For Adopted Child(ren)- Effects of the Adoption - An adopted child, as defined in INA 101(b)(1)(E), can be the beneficiary of a Form I-730. See chapter 21.16 of this AFM for information on what qualifies as an "adoption" for immigration purposes.

(e) Final Decision.

(1) Approval.

If no adverse information is developed in a case at a USCIS office, the adjudicating officer shall approve the petition and either:

- Send the approved Form I-730 to the National Visa Center, which will in turn forward it to the appropriate overseas post. (See Chapter 16.2(d) and Chapter 16.3(b) of the *Inspector's Field Manual* for information regarding admission of derivative refugees and asylees at ports-of-entry); or
- Retain the approved petition in the beneficiary's file (i.e., A-file is one is pre-existing or receipt/petition file if no A-file exists) and invite him or her to apply for derivative refugee/asylee status if he or she is in the U.S.

Note

Previously, a Visas Ninety-Two (in the case of a derivative asylee) or Visas Ninety-Three (in the case of a derivative refugee) cable would have been sent to the appropriate U.S. embassy or consulate. Although the practice of sending a cable has been discontinued, I-730 petition approvals are still known as "Visas 92" and "Visas 93" cases.

(2) Denial.

If the petitioner fails to establish eligibility for the benefit sought, the adjudicating officer shall deny the petition and notify the petitioner of the reasons in writing. There is no appeal from the denial of an I 730 petition. As required in Chapter 10.7(b)(5) of this manual, the decision must include information about the opportunity to file a motion to reopen or reconsider.

(3) Reopening Proceedings Based on Adverse Information.

If adverse information is developed subsequent to the approval of the petition, the petition will be returned to the Nebraska Service Center with a memorandum (and supporting evidence) setting forth the arguments for revocation. When the Nebraska Service Center receives the petition with the adverse information, that office shall notify the petitioner of the derogatory information and of the Bureau's intent to reopen the decision to approve the petition. The petitioner is to be given the choice of withdrawing the petition or having a determination of eligibility made in reopened proceedings. There is no appeal from the revocation

of a Form I-730. After the new decision has been made, the Nebraska Service Center will notify the immigration or consular officer who developed the adverse information by memorandum of the final action.

If the reopened petition is not withdrawn or denied, the petition and all attachments must be forwarded to the consulate or embassy where the beneficiary is being processed for Form I-730 benefits. If the adverse information was developed at an overseas DHS office or a consular post, a memorandum explaining the reasons for not reopening and denying the petition must be attached to the re-affirmed petition.

(e) Precedent Decisions.

To date, there have been no precedent decisions relating to Refugee/Asylee Relative Petitions.

21.11 Petition for Spouse, Child, or Parent of Certain Deceased U.S. Armed Forces Members [Chapter added 04-03-2006; AD05-34]

(a) General Eligibility: Immediate Relative Benefits under Section 1703 of Public Law 108-136.

(See **Appendix 21-4** for relevant section of Public Law 108-136.)

Section 1703(a) of Public Law 108-136 provides that a surviving alien spouse, child, or parent of a U.S. citizen may be classified as an immediate relative if the U.S. citizen:

- served honorably in an active duty status in the military, air, or naval forces of the United States; and
- died as a result of injury or disease incurred in or aggravated by combat.

Similarly, sections **1703(c) and (d) of Public Law 108-136** provide that a surviving alien spouse, child, or parent of a lawful permanent resident (LPR) may be classified as an immediate relative if the LPR:

- served honorably in an active duty status in the military, air, or naval forces of the United States;
- died as a result of injury or disease in or aggravated by combat; and
- has been granted posthumous citizenship under section **329A** of the Act.

The adjudicator may treat such surviving alien spouse, child, or parent as an immediate relative (IR) for purposes of sections **201(b)(2)(A)(i)**, **204(a)(1)(A)(ii)**, and **245** of the Act if the surviving family member satisfies the other applicable requirements of section **1703 of Public Law 108-136** and is otherwise eligible for the immigration benefit(s) sought.

(1) Spouse, Child, or Parent of United States Citizen Member of the Armed Forces

Section 1703(a) provides that a surviving alien spouse, child, or parent of a United States citizen member of the Armed Forces can remain classified as an immediate relative under certain circumstances.

(A) Spouse or Child

(i) The alien spouse or child must file **Form I-360**. In cases where the qualifying U.S. citizen died on or after November 24, 2003, the alien spouse or child may file **Form I-360** with fee within 2 years of the qualifying U.S. citizen's death. In cases where the qualifying U.S. citizen died on or after September 11, 1999, but prior to November 24, 2003, the alien spouse or child must have filed the **Form I-360** on or before November 24, 2005.

(ii) Special Consideration for the Spouse. The alien spouse must have been the spouse of the U.S. citizen at the time of the U.S. citizen's death and cannot have been legally separated from the U.S. citizen at that time. Unlike other provisions of the Act, there is no requirement that the marriage must have existed for a specific length of time. The spouse will cease to qualify as an immediate relative if he or she remarries prior to obtaining lawful permanent residence based on his or her relationship to the deceased U.S. citizen.

(iii) Special Consideration for the Child. The alien child will remain classifiable as an immediate relative even if he or she marries or turns 21 years of age.

(B) Parent

(i) The alien parent must file Form I-360 . In cases where the qualifying U.S. citizen died on or after November 24, 2003, the alien parent may file **Form I-360** with fee within 2 years of the qualifying U.S. citizen's death. In cases where the qualifying U.S. citizen died on or after September 11, 1999, but prior to November 24, 2003, the alien parent must have filed the **Form I-360** on or before November 24, 2005.

(ii) Special Consideration for the Parent . The alien parent will remain classifiable as an immediate relative irrespective of the U.S. citizen's age at the time of the U.S. citizen's death. The standard requirement that a U.S. citizen must be over the age of 21 in order to petition for his or her parents does not apply.

(2) Spouse, Child, or Parent of Lawful Permanent Resident (LPR) Member of Armed Forces

Section **1703(c) and (d) of Public Law 108-136** provide that a surviving alien spouse, child, or parent of an LPR member of the armed forces may be classified as an immediate relative under certain circumstances.

(A) Spouse or Child

The alien spouse or child must either:

(i) be the beneficiary of an approved **Form I-130** filed by the deceased LPR under section **203(a)(2)** of the Act as a spouse or child of a lawful permanent resident or

(ii) self-petition by filing a **Form I-360** to obtain an immediate relative classification within 2 years of the qualifying LPRs posthumous naturalization.

(B) Parent . The alien parent must file **Form I-360** to obtain an immediate relative classification within 2 years of the deceased LPRs posthumous naturalization.

(C) Eligibility for Interim Relief and Benefits . If present in the United States, the alien spouse, child, or parent is eligible for deferred action, an Employment Authorization Document (EAD), and/or advance parole, as necessary. The office with jurisdiction over the **Form I-360** may grant such benefits.

(b) USCIS Interpretation of "Died as a result of...Combat"

Consistent with the statutory definition of "combat-related disability" as well as United States Department of Defense (DOD), United States Veterans Affairs (VA), and United States Coast Guard (USCG) standards used to make combat-related disability determinations, the adjudicator is directed to interpret "died as a result of injury or disease incurred in or aggravated by combat" to mean:

(1) The death is attributable to an injury or disease for which the member was awarded the Purple Heart; or

(2) The death resulted from an injury or disease that was incurred or aggravated:

(A) as a direct result of armed conflict;

- (B) while engaged in hazardous service;
- (C) in the performance of duty under conditions simulating war; or
- (D) through an instrumentality of war.

To determine if a death related to a particular incident is combat-related, the adjudicator should consult the guidelines that are currently used by DOD, as in the following:

(1) Purple Heart

“Death attributable to an injury or disease for which the service member was awarded the Purple Heart” means that the service member received a Purple Heart for such injury or disease and also died as a result of such injury or disease. Generally, the death is associated with an incident involving armed conflict.

(2)(A) Direct Result of Armed Conflict

“Death resulting from an injury or disease that was incurred or aggravated as a direct result of armed conflict” means that the service member’s injury or disease was sustained or further exacerbated in armed hostilities and such injury or disease resulted in the service member’s death. Armed conflict includes war, expedition, occupation of an area or territory, battle, skirmish, raid, invasion, rebellion, insurrection, guerilla action, riot, or any other action in which service members are engaged with a hostile or belligerent nation, faction, force, or terrorists. Armed conflict may also include incidents involving a service member while interned as a prisoner of war, while detained against the service member’s will in custody of a hostile or belligerent force, or while escaping or attempting to escape from such confinement, prisoner of war, or detained status. Evidence simply demonstrating that the service member’s death occurring during a period of war, in an area of armed conflict, or while the service member participated in combat operations is insufficient to show that the service member’s death directly resulted from armed conflict.

(2)(B) While Engaged in Hazardous Service

“Death resulting from an injury or disease that was incurred or aggravated while engaged in hazardous service” means that the service member died from an injury or disease that was the direct result of actions taken in the performance of such service. Hazardous service includes, but is not limited to, aerial flight, parachute duty, demolition duty, experimental stress duty, and diving duty. Hazardous service does not include travel to and from hazardous service duty or actions incidental to a normal duty status.

(2)(C) In the Performance of Duty Under Conditions Simulating War

“Death resulting from an injury or disease that was incurred or aggravated in the performance of duty under conditions simulating war” means that a service member’s participation in a combat simulation activity caused or exacerbated an injury or disease, which resulted in the service member’s death. The performance of duty under conditions simulating war includes participation in military training, such as war games, practice alerts, tactical exercises, airborne operations, leadership reaction courses, grenade and live fire weapons practice, bayonet training, hand-to-hand combat training, repelling, and negotiation of combat confidence and obstacle courses. Incurring or aggravating an injury or disease during military training without participation in combat simulation activity, however, is not considered combat-related. Consequently, the performance of duty under conditions simulating war does not include physical training activities, such as calisthenics and jogging or formation running and supervised sport activities.

(2)(D) Instrumentality of War

“Death resulting from an injury or disease that was incurred or aggravated through an instrumentality of war” means that the instrumentality of war caused the service member’s injury or disease, which resulted in the service member’s death. Sustaining or aggravating an injury or disease during an actual period of war, however, is not required. An instrumentality of war is a vehicle, vessel, or device designated primarily for Military Service and intended for use in Military Service at the time the service member’s injury or disease was incurred or aggravated. An instrumentality of war may also include an instrumentality that is not designated primarily for Military Service if use of, or occurrence involving, such instrumentality subjects the service member to a hazard or risk peculiar to Military Service. Therefore, a determination that a service member’s death resulted from an instrumentality of war may include instances where the death occurred in any period of service as a result of such diverse causes as: wounds caused by a military weapon; accidents involving a military combat vehicle; or injury or sickness caused by fumes, gases, or explosion of military ordinance, vehicles, or material.

(c) Evaluation of Evidence Addressing “Died as a Result of...Combat”

It is the responsibility of the surviving alien spouse, child, or parent of the deceased service member to prove that the service member “died as a result of injury or disease incurred in or aggravated by combat.” The adjudicator should make reasonable efforts to verify whether the service member died of a combat-related injury or disease by contacting the appropriate DOD, VA, or USCG office when necessary. The adjudicator should exercise normal judgment and discretion when reviewing evidence submitted to establish that the service member’s death was combat-related and when determining whether the service member “died as a result of injury or disease incurred in or aggravated by combat.”

(1) Evidence.

Evidence should include, but is not limited to, the following:

(A) The service member’s death certificate, if such certificate indicates that the service member’s death was attributable to a combat-related injury or disease;

(B) Purple Heart certificate, other combat decoration, or DOD or USCG service records showing the award of a Purple Heart or combat decoration and, if available, accompanying citations explaining that the service member’s death was attributable to an injury or disease for which the service member was awarded the Purple Heart or other combat decoration;

(C) DOD or USCG forms, service records, service medical records, reports, or casualty notification telegrams indicating that the service member’s death was the result of an injury or disease that qualified the service member or the service member’s family for a Combat-Related Special Compensation (CRSC) benefit or demonstrating a causal relationship between an injury or disease that resulted in the service member’s death and a combat-related incident or activity;

(D) VA administrative, adjudicative, medical, or clinical records or reports showing that the service member’s death was the result of an injury or disease that qualified the service member or the service member’s family for a Combat-Related Special Compensation (CRSC) benefit or demonstrating a causal

relationship between an injury or disease that resulted in the service member's death and a combat-related incident or activity; and/or

(E) Other credible documentation that is not issued or endorsed by DOD, VA, or USCG but sufficiently proves that the service member's death resulted from an injury or disease incurred in or aggravated by a combat-related incident or activity.

Evidence demonstrating that DOD, VA, or USCG has determined that the service member's death was combat-related or qualified for a CRSC benefit clearly meets the "died as a result of injury or disease incurred in or aggravated by combat" provision.

(2) Consultation with DOD, VA, and/or USCG

The adjudicator should consult with the appropriate office within DOD, VA, and/or USCG under the following conditions:

(A) The adjudicator cannot determine eligibility, because the submitted DOD, VA, and/or USCG-issued and endorsed documents are inconclusive.

(B) The evidence has not been issued and endorsed by DOD, VA, or USCG, and the evidence is inconsistent with the circumstances, conditions, and/or hardships of the service member's active duty status assignments and responsibilities or is otherwise unsatisfactory.

Appendix 21-5 contains a list of DOD, VA, and USCG offices that serve as points-of-contact. If more detailed information for DOD, VA, or USCG points-of-contact is needed, the adjudicator should contact the California Service Center, Posthumous Citizenship for Military Casualties and Derivative Citizenship Team, at the following email address: CSCN644.REF9@dhs.gov .

(d) Jurisdiction and Filing Instructions.

(1) **Form I-360** and **Form I-485** Jurisdiction. An alien in the United States who qualifies for benefits under section **1703** as an immediate relative and who needs to file **Form I-360** may file **Form I-360** alone or concurrently with **Form I-485**. Both the California Service Center (CSC) and the USCIS district office that has jurisdiction over the alien's place of residence for family-based petitions and applications may accept a stand-alone **Form I-360** or **Form I-360** concurrently filed with **Form I-485**. However, if the alien is currently residing outside of the United States, he or she needs to file only **Form I-360** with the USCIS overseas office having jurisdiction over the alien's place of residence or with the appropriate Consular Section of the U.S. Embassy. If the **Form I-360** is approved overseas, the alien will be issued an immigrant visa.

(2) **Form I-130** and **Form I-485** Jurisdiction. An alien spouse or child residing in the United States who qualifies for benefits under section **1703(c)** as an immediate relative and who is the beneficiary of a qualifying approved **Form I-130** may file for adjustment of status. The alien should file **Form I-485** with the USCIS office that has jurisdiction over the alien's place of residence for family-based applications for adjustment of status.

(3) Filing Form I-360 . The alien should check box “K” in Part 2 and write “PUBLIC LAW 108-136” in the space provided. The alien should submit the following with **Form I-360** :

(A) Proof of the alien’s identity, such as a passport or foreign birth certificate with English translation.

(B) Evidence showing that the alien was the bona fide spouse, child, or parent of the deceased U.S. citizen or LPR member of the U.S. Armed Forces, such as a birth certificate or marriage certificate. A surviving spouse should submit proof of termination of any prior marriages for both the surviving spouse and the deceased service member. The surviving spouse should also submit documentation showing that the marriage was entered in good faith, such as holding joint accounts and property leases, filing joint income tax returns, and/or testimonials by credible witnesses/acquaintances regarding the spousal relationship.

(C) A copy of the deceased service member’s death certificate.

(D) Documentation showing that the deceased member of the U.S. Armed Forces was a U.S. citizen or was granted citizenship, such as a birth certificate, naturalization certificate, certificate of citizenship, or posthumous naturalization certificate (N-645).

(E) Certified proof issued by the appropriate military department showing that the deceased member of the U.S. Armed Forces served honorably in an active duty status in the military, air, or naval forces of the United States.

(F) Evidence demonstrating that the deceased member of the U.S. Armed Forces died as a result of injury or disease incurred in or aggravated by combat. See sections (b) and (c) of this subchapter.

(4) Approved Form I-130 . If the alien’s qualifying **Form I-130** has been approved and the alien has not yet established eligibility under section **1703(c) or (d) of Public Law 108-136** , the alien should submit the evidence and documentation noted in (d)(3) of this subchapter when filing **Form I-485** in the United States or when applying for an immigrant visa prior to entry into the United States. The adjudicator handling the approved **Form I-130** should write “PUBLIC LAW 108-136” in the “Remarks” section of the form.

(5) Filing Form I-485 . Refer to instructions in **Chapter 23.5(d)(2)** .

21.12 Process for Responding to Requests by the Department of State (DOS) to Accept a Locally Filed Form I-130, Petition for Alien Relative has been superseded by USCIS Policy Manual, Volume 6: Immigrants as of February 1, 2020.

21.13 Reserved

21.14 Self-Petitions by Abused Spouses and Children has been superseded by USCIS Policy Manual, Volume 3: Humanitarian Protection and Parole as of February 10, 2022.

21.15 Self Petitions by Parents of U.S. Citizens has been superseded by USCIS Policy Manual, Volume 3: Humanitarian Protection and Parole as of February 10, 2022.

21.16 Adoption as a Basis for Immigration Benefits has been superseded by USCIS Policy Manual, Volume 5: Adoptions as of November 19, 2021.

Appendix 21-1 List of States Recognizing Common Law Marriages and their Requirements.

BASIC CRITERIA : Merely living together is NOT enough to validate a common law marriage. The four basic requirements for a valid common law marriage are:

- The parties must live together.
- The parties must present themselves to others as a married couple. Some ways of doing this are by using the same last name, referring to one another as husband or wife, and filing a joint tax return.
- Although not defined, the parties must have been together for a significant period of time.
- The parties must intend to be married.

JURISDICTION : There are a limited number of states which currently have statutory provisions allowing for common law marriages. (However, under Article IV, Section 1 of the Constitution, every state is required to recognize as valid a common-law marriage that was “celebrated” in another state.) The following states, sometimes with restrictions, recognize common law marriages performed by parties living together within their jurisdiction and meeting certain other criteria:

- Alabama The requirements for a common-law marriage are: (1) capacity; (2) an agreement to be husband and wife; and (3) consummation of the marital relationship
- Colorado A common-law marriage may be established by proving cohabitation and a reputation of being married
- Georgia Recognized only if performed by January 1, 1997
- Idaho Recognized only if performed by January 1, 1996
- Iowa The requirements for a common-law marriage are: (1) intent and agreement to be married; (2) continuous cohabitation; and (3) public declarations that the parties are husband and wife.

- Kansas For a man and woman to form a common-law marriage, they must: (1) have the mental capacity to marry; (2) agree to be married at the present time; and (3) represent to the public that they are married.

- Montana The requirements for a common-law marriage are: (1) capacity to consent to the marriage; (2) an agreement to be married; (3) cohabitation; and (4) a reputation of being married.

- New Hampshire Common law marriages are recognized only at death and only for probate purposes. (N.H. RSA. 457:39)

- Ohio Recognized only if performed by October 10, 1991

- Oklahoma To establish a common-law marriage, a man and woman must (1) be competent; (2) agree to enter into a marriage relationship; and (3) cohabit

- Pennsylvania A common-law marriage may be established if a man and woman exchange words that indicate that they intend to be married at the present time

- Rhode Island The requirements for a common-law marriage are: (1) serious intent to be married and (2) conduct that leads to a reasonable belief in the community that the man and woman are married

- South Carolina A common-law marriage is established if a man and woman intend for others to believe they are married

- Texas A man and woman who want to establish a common-law marriage must sign a form provided by the county clerk. Or, they must (1) agree to be married, (2) cohabit, and (3) represent to others that they are married

- Utah For a common-law marriage, a man and woman must (1) be capable of giving consent and getting married; (2) cohabit; and (3) have a reputation of being husband and wife

- Washington, D.C. The requirements for a common-law marriage are: (1) an express, present intent to be married and (2) cohabitation.

(Added AD01-16)

Appendix 21-2 Orphan Case Related Cables to Consulates has been superseded by USCIS Policy Manual, Volume 5: Adoptions as of November 19, 2021.

Appendix 21-2e The Child Status Protection Act of 2002 (CSPA) (Revised AD07-04; 04-11-08)

The following examples reflect how the guidance would be applied to some specific scenarios.

A. Form I-129F was approved and the K1 entered the country with a K2 who was then 17. The marriage between the K1 and USC petitioner occurred within 90 days and before the child's 18th birthday. The USC petitioner then files an I-130 on behalf of the K2 when the K2 is 20 years old. Consequently the K2 would be treated as if he or she is an immediate relative for CSPA purposes and his or her eligibility for permanent residence would be 20, the beneficiary's age on the date the form I-130 was filed on his or her behalf. See **Chapter 21.2(e)(1)(i)** .

B. An immigrant visa petition was filed when the beneficiary was under the age of 21 and approved before August 6, 2002. After August 6, 2002, the beneficiary filed Form I-485 within one year of visa availability. USCIS determined that the CSPA did not apply because no petition or application was pending on the August 6, 2002, and the alien received a denial solely because he or she aged out. Based on this new CSPA guidance, the applicant may be eligible for CSPA benefits. The alien may file a new application for adjustment of status today. USCIS will adjudicate the current Form I-485 as if it had been filed within one year of visa availability. See **Chapter 21.2(e)(2)(iii)** .

C. An immigrant visa petition was filed when the beneficiary was under the age of 21 and subsequently approved. The beneficiary did not file Form I-485 within one year of visa availability because previous USCIS guidance indicated that they would not benefit from the CSPA. Based on this new CSPA guidance, the applicant may be eligible for CSPA benefits. The alien may file a Form I-485, and USCIS will adjudicate the Form I-485 as if it had been filed within one year of visa availability. See **Chapter 21.2(e)(2)(iii)** , and **(iv)** .

D. An immigrant visa petition (either a Form I-130 or a Form I-140) was filed in 2000 when the derivative beneficiary was 20. When the petition was filed, the priority date for the principal's classification was current. The visa petition was not approved until 2007, and a Form I-485 was filed one month after approval. The derivative beneficiary's "age" for CSPA purposes would be 20 (the beneficiary was 27 when the I-485 was filed, but the visa petition was pending for 7 years). This derivative beneficiary can benefit from the CSPA since he or she applied for permanent residence within one year of visa number availability. The visa availability date in this example is the immigration petition approval date. Thus, this derivative beneficiary would be able to retain classification as a child. See **Chapter 21.2(e)(1)(ii)(A)** and **(C)** .

E. An immigrant visa petition (either a Form I-130 or a Form I-140) was filed in 2000 when the derivative beneficiary was 20. The visa petition is approved exactly one year later in 2001. A visa becomes available exactly 5 years later in 2005 and the principal files an I-485 immediately. The application is approved in 2007 and the beneficiary applies for adjustment of status one month after approval of the principal's application. The derivative beneficiary's "age" for CSPA purposes would be 24 (the beneficiary is 25 in 2005 when the visa became available, but the visa petition was pending for 1 year). Not only would this derivative beneficiary be considered over the age of 21, this beneficiary could not benefit from the provisions of the CSPA because he or she did not file a Form I-485 within one year of the principal's visa becoming available. Thus, this derivative beneficiary would be unable to retain classification as a child. See Chapter **21.2(e)(1)(ii)(A)** and **(C)** .

F. An immigrant visa petition (either Form I-130 or Form I-140) was filed and denied in 2000 when the derivative beneficiary was 20. The petitioner filed a timely appeal with the AAO/BIA which, in 2006, sustained the appeal, remanded the matter, and directed the petition approved (on grounds other than the new availability of the CSPA). On the date of approval, visas are available for the principal's classification. The principal and derivative beneficiaries each file a Form I-485 six months later. The derivative beneficiary's "age" for CSPA purposes would be 20 (the beneficiary is 27 in 2007, but the Form I-140 was pending for 7 years). Thus this beneficiary would be eligible to retain classification as a child. See Chapter **21.2(e)(1)(ii)(A)** and **(C)** .

G. An immigrant visa petition (either Form I-130 or a Form I-140) was filed and denied in 2000 when the beneficiary was 20. The petitioner filed a timely motion to reopen, and, in 2007, the motion to reopen is granted (on grounds other than the new availability of the CSPA). The petition is then approved and a visa is available to the beneficiary on the date of approval, and the alien files a Form I-485 nine months later. The beneficiary's "age" for CSPA purposes would be 20 (the beneficiary is 27 today, but the Form I-130 was pending for 7 years). Thus, this beneficiary would be eligible to retain classification as a child. See Chapter **21.2(e)(1)(ii)(A)** and **(B)** .

Appendix 21-3 American Association Of Blood Banks.

(Revised 04/08/2005; AFM 05-10)

Editor's Note: The following information was obtained from:

American Association of Blood Banks
8101 Glenbrook Road
Bethesda, MD 20814-2749

Phone	(301) 907-6977
FAX	(301) 907-6895
Website	www.aabb.org
Email	aabb@aabb.org

Part A: Accredited Parentage Testing Laboratories. A current list of the AABB accredited parentage testing laboratories can be viewed at: http://www.aabb.org/About_the_AABB/StdS_and_Accred/aboutplabs.htm . You must access the AABB website set forth above to obtain current laboratory information. The USCIS office is no longer providing a paper list of the AABB facilities due to the transient nature of this information.

Please be advised that the AABB website lists only the headquarters or primary location for each AABB laboratory. In fact, many of the laboratories listed have multi-state and/or multi-site locations despite being listed under only one state. Therefore, it is necessary to go to the selected laboratory's website to identify all locations and contact information for that particular laboratory.

April 2005

Fact Sheet

American Association of Blood Banks ("AABB") Accredited Parentage Testing Laboratories

Parentage testing, or what is also referred to as blood testing or DNA testing, must be conducted by an American Association of Blood Banks ("AABB") accredited laboratory.

A current list of the AABB accredited parentage testing laboratories can be viewed at: http://www.aabb.org/About_the_AABB/StdS_and_Accred/aboutplabs.htm . You must access the AABB website set forth above to obtain current laboratory information. The USCIS office is no longer providing a paper list of the AABB facilities due to the transient nature of this information.

Please be advised that the AABB website lists only the headquarters or primary location for each AABB laboratory. In fact, many of the laboratories listed have multi-state and/or multi-site locations despite being listed under only one state. Therefore, it is necessary to go to your selected laboratory's website to identify all locations and contact information for that particular laboratory.

Any questions regarding the actual parentage testing procedures or test results should be directed to the AABB parentage testing laboratory selected.

PART B: GENERAL POLICIES

ITEM	ISSUE	YES	NO	N/A
1.100	PERSONNEL			
1.101	Is the laboratory under the direction of an individual(s) with a doctoral degree who is/are qualified by advanced training and/or experience in parentage testing			
1.102	Is there evidence that the director(s) is/are spending adequate amounts of time as DIRECTOR			
1.103	Is there evidence of personal review of the cases by a director			
1.104	Are there clear-cut assignments of responsibility for:			
1.105	Day-to-day performance of specific tests			
1.106	Scheduling of tests			
1.107	Implementation of quality control			
1.108	Maintenance of laboratory records			
1.109	Review of laboratory performance			
1.110	Delegation of responsibility in director's absence			
1.111	Is there evidence of interaction between the director and staff			
1.112	If not, comment			

REFERENCE

PI.110 The laboratory shall be under the direction of an individual/individuals with a doctoral degree who is/are qualified by advanced training and/or experience in parentage testing.

PI.130 A qualified individual must be available to act as an expert witness in the event that legal testimony related to the test results is required.

EXPLANATION

The director of a parentage testing laboratory is the most important component of that laboratory. The director provides expertise and ensures that the technical staff are competent to perform their duties. It is the director's responsibility to establish and review policies and procedures that ensure accurate test results. In addition, the laboratory director usually serves as the expert witness and as such must be familiar with all aspects of paternity testing and be able to interpret results for individuals unfamiliar with medical technology and terminology.

The director must have a doctoral degree in an area such as medicine, genetics, biology, or other related fields. The director should be able to demonstrate experience and expertise in those methods the laboratory employs for paternity testing (HLA, red cell antigen tests, enzymes and proteins, DNA). In some larger laboratories, expertise in a given area (such as DNA testing) may be provided by another individual. The laboratory director, however, must still be conversant with all areas of testing and is responsible for the results of testing performed in all areas. It is essential that a laboratory director have adequate experience to detect possible errors in test performance or in the interpretation of test results. Adequate experience is difficult to quantify. It cannot be measured necessarily by years of experience or number of cases reviewed, nor can it be assumed based upon education or coursework. Adequate experience can only be demonstrated in the way that the individual directs his or her laboratory, through the care given to case review, through response to errors or problems, through the procedures and protocols established for the performance of the testing, through interactions with the staff, and through demonstration of adequate understanding of the genetics and statistics that form the foundation of the science of parentage testing. Failure of a director to adequately demonstrate sufficient experience and general competence to the satisfaction of the inspector may result in a deficiency.

1.113 Personal review of all cases by a director is required, as this individual is responsible for all results generated by the laboratory. This shall be documented by having the director sign all reports. In addition, the director and/or his/her designee must review and sign or initial important worksheets, autoradiograms, and other pertinent test results. The director shall also review the laboratory's procedures manual and indicate that review by initialing and dating the document. And, there should be evidence that the director reviews results of external (and internal if appropriate) proficiency tests. Corrective action, where appropriate, must be documented.

Some large laboratories may find it necessary or practical to have multiple directors. Thus, there may be several individuals who sign paternity test reports. However, each individual in that laboratory who reviews and signs those reports must meet the qualifications of a paternity laboratory director outlined above. In addition, there must still be one individual who has the overall responsibility for the paternity testing laboratory. Any change in director(s) must be reported to the AABB within 30 days.

Authority for the technical and clerical aspects of the laboratory functions may be delegated. In some institutions the director may arrange for consultative services to augment existing services or for the purpose of dealing with problems requiring special expertise.

The director is also responsible for the development, implementation, and review of the quality assurance (QA) program of the laboratory. The QA program developed and administered by the Director must include procedures for training staff and reviewing their competency periodically. In addition, policies for quality control of reagents and the periodic maintenance of equipment must be a part of the QA plan. The QA plan must also define acceptable limits for all equipment and reagents and must indicate the course of action when these limits are not achieved.

Records must be maintained for at least 5 years unless local law requires a longer retention time. All paternity files are to be considered confidential and stored with security.

1.211 B EXPLANATION

The laboratory shall have a quality plan in place that describes how the facility plans to develop their quality program, including a time line.

In the future, the laboratory will be required to have a quality program in place that monitors performance to ensure that predetermined quality criteria are met and that laboratory improvement is a management goal. Responsibility for the ongoing implementation of the quality program may be assigned to a designated individual(s), but is ultimately the responsibility of the laboratory director. The quality program must address the items found in the Quality System Essentials (Association Bulletin 97-4).

	10 ESSENTIAL
Organization	A table of organization or description of organization is to be included in this section in which lines of responsibility are clearly shown. The individual(s) responsible for the quality program is named here. The goals of the organization and a quality statement should be defined and written.
Personnel	Job descriptions that define educational and experience requirements, duties and responsibilities, and lines of authority are to be included in this section. A description of the training program for new hires and documentation of appropriate training prior to on-line responsibility are also kept here as well as documents of periodic evaluations and competency for each staff member.

Equipment	Each item of equipment must be listed with a unique inventory number. Records of calibration, schedules of periodic maintenance with dates of activity, and repairs are to be kept in this section.
Supplier Issues	A list of suppliers/vendors of all scientific items and services is maintained. The list should document the names of the vendors with addresses, phone and FAX numbers, and what items/services are provided by each vendor.
Process Control	This section contains a description of all the various quality control procedures in place with a calendar schedule of set intervals for checks. A policy should be established to follow when established limits are exceeded. It should also list the various proficiency tests used in the laboratory and what action is taken if a nonconsensual result is reported. Separate notebooks should be used to store the actual quality control data and the proficiency testing records.
Documents and Records	A model format for writing a standard operating procedure (SOP) should display the various sections of the procedure in a set order. There should also be a description of how SOPs are changed and how data entries in records are to be changed when appropriate. The length of time for the retention of records should be established as well as security for any offsite storage.
Incidents, Errors and Accidents	A process must be in place to investigate errors, accidents, and credible complaints. Clients whose challenges about test results appear to have merit must be offered a repeat test at no charge by the laboratory, or, if the client chooses, in another laboratory accredited by the /LA.BB. The director should advise the client to prepare a written appeal to the Parentage Testing Program Unit if the client and director disagree on the merit of the challenge. Errors must be investigated to determine root cause and appropriate action must be taken. Documentation must be kept on errors and accidents regarding discovery, root cause analysis, and corrective action taken.
Assessments Process	There must be a schedule for internal assessments. The director and the responsible head of the quality program (if not the director) shall establish specific items for periodic review. Appropriate assessments might include test result discrepancies, completeness of records, sigma and delta calculations in RFLP analysis, paternity index and power of exclusion (PE) consistency checks, etc. The director and the responsible head of the quality program (if not the director) should set Improvement goals with timetables for process improvement activities. Appropriate study areas might include DNA extraction yields, background noise on autorads, number (%) of redraws, etc.

Facilities and Safety	There shall be a description of the safety training program for the staff and records of periodic participation by each staff member must be kept.

Appendix 21-4 Public Law 108-136 (National Defense Authorization Act for Fiscal Year 2004), Sec. 1701. Requirements for Naturalization through Service in the Armed Forces of the United States has been superseded by USCIS Policy Manual, Volume 12: Citizenship and Naturalization as of January 22, 2013.

Appendix 21-5 U.S. Department of Defense, U.S. Department of Veterans Affairs, and U.S. Coast Guard Points-of-Contact for Public Law 108-136 (National Defense Authorization Act for Fiscal Year 2004) has been superseded by USCIS Policy Manual, Volume 12: Citizenship and Naturalization as of January 22, 2013.

Appendix 21-6 Adam Walsh Child Protection and Safety Act of 2006

[Appendix added 02-08-2007]

TITLE IV--IMMIGRATION LAW REFORMS TO PREVENT SEX OFFENDERS FROM ABUSING CHILDREN

SEC. 401. FAILURE TO REGISTER A DEPORTABLE OFFENSE.

Section 237(a)(2)(A) of the Immigration and Nationality Act (8 U.S.C. 1227(a)(2)(A)) is amended--

(1) by redesignating clause (v) as clause (vi); and

(2) by inserting after clause (iv) the following new clause:

“(v) Failure to register as a sex offender.--

Any alien who is convicted under section 2250 of title 18, United States Code, is deportable.”

SEC. 402. BARRING CONVICTED SEX OFFENDERS FROM HAVING FAMILY-BASED PETITIONS APPROVED.

(a) Immigrant Family Members.--Section 204(a)(1) of the Immigration and Nationality Act (8 U.S.C. 1154(a)(1)), is amended--

(1) in subparagraph (A)(i), by striking “Any” and inserting “Except as provided in clause (viii), any”;

(2) in subparagraph (A), by inserting after clause (vii) the following:

“(viii)(I) Clause (i) shall not apply to a citizen of the United States who has been convicted of a specified offense against a minor, unless the Secretary of Homeland Security, in the Secretary's sole and unreviewable discretion, determines that the citizen poses no risk to the alien with respect to whom a petition described in clause (i) is filed.

“(II) For purposes of subclause (I), the term ‘specified offense against a minor’ is defined as in section 111 of the Adam Walsh Child Protection and Safety Act of 2006.”; and

(3) in subparagraph (B)(i)--

(A) by striking “(B)(i) Any alien” and inserting the following: “(B)(i)(I) Except as provided in subclause (II), any alien”; and

(B) by adding at the end the following:

“(I) Subclause (I) shall not apply in the case of an alien lawfully admitted for permanent residence who has been convicted of a specified offense against a minor (as defined in subparagraph (A)(viii)(II)), unless the Secretary of Homeland Security, in the Secretary's sole and unreviewable discretion, determines that such person poses no risk to the alien with respect to whom a petition described in subclause (I) is filed.”.

(b) Nonimmigrants.--Section 101(a)(15)(K) (8 U.S.C. 1101(a)(15)(K)), is amended by inserting “(other than a citizen described in section 204(a)(1)(A)(viii)(I))” after “citizen of the United States” each place that phrase appears.

**Appendix 21-7 Legislation Affecting Certain Surviving Spouses and Visa
Petitioners [Appendix added on 12-02-2009]**



U.S. Citizenship
and Immigration
Services

HQDOMO 70/6.1.1-P
70/6.1.3-P
AFM Update AD10-09

Interoffice Memorandum

To: Executive Leadership

From: Donald Neufeld /s/
Acting Associate Director
Domestic Operations Directorate

Lori Scialabba /s/ Joanna Ruppel for
Associate Director
Refugee, Asylum, and International Operations Directorate

Pearl Chang /s/
Acting Chief
Office of Policy and Strategy

Date: December 2, 2009

SUBJECT: Additional Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and their Children (REVISED)

Effect of FY2010 DHS Appropriations Act on eligibility to immigrate after death of visa petitioner

Revisions to Adjudicator's Field Manual (AFM) Chapter(s) 21.2(a)(4) and (h)(1)(C)
(AFM Update AD10-09)

I. Purpose

This memorandum supersedes an earlier memorandum on this subject, dated November 13, 2009, and provides updated guidance to U.S. Citizenship and Immigration Services (USCIS) field offices and service centers regarding the processing of Forms I-130, petitions for alien relative, and I-485, application to register permanent residence or adjust status, filed by surviving spouses of deceased U.S. citizens and the qualifying children of the surviving spouses. This new guidance is based on the enactment of section 568(c) of the Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, 123 Stat. 4142, 4186 (2009), which provides

relief for these aliens. Section 568(c) entered into force on October 28, 2009, the date of enactment.

Sections 568(d) and (e) of the FY2010 DHS Appropriations Act, which provide relief for aliens who are surviving beneficiaries of certain pending or approved petitions filed by certain qualifying categories of noncitizens, will be addressed in a separate memorandum.

II. Background

A. Prior Policy and Related Litigation

For many years, U.S. immigration policy has been that a Form I-130 could not be approved if the petitioner died while the Form I-130 was pending. *See Matter of Sano*, 19 I&N Dec. 299 (BIA 1985); *Matter of Varela*, 13 I&N Dec. 453 (BIA 1970). As far back as 1938, our immigration regulations have provided for the revocation of the approval of a visa petition upon the petitioner's death. More recently, the regulations, while maintaining that general policy, have provided for discretion, for "humanitarian reasons," to reinstate the approval. 8 C.F.R. § 205.1(a)(3)(i)(C)(2). Also, since 2006, 8 C.F.R. § 204.2(i)(1)(iv) and 205.1(a)(3)(i)(C)(1) have provided that the automatic revocation provision does not apply to a spousal immediate relative visa petition, if the deceased petitioner and the alien widow(er) had been married at least two years when the petitioner died.

Over the past several years, widow(er)s of citizens who had died before the second anniversary of the underlying marriages have challenged this long-standing policy as being inconsistent with the statute. The federal courts of appeals have split on the legal issue. *Compare Robinson v. Napolitano*, 554 F.3d 358 (3d Cir. 2009) (sustaining agency view that petitioner's death while a Form I-130 is pending ends the beneficiary's eligibility); *petition for cert. filed*, No. 09- 94 (U.S. filed July 23, 2009), *with Taing v. Napolitano*, 567 F.3d 19 (1st Cir. 2009) (holding agency policy violative of statute); *Lockhart v. Napolitano*, 561 F.3d 611 (6th Cir. 2009) (same); *and Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006) (same). The issue has engendered much litigation before the federal district courts in recent months, with most courts ruling against the agency. Among the unfavorable decisions is the class action ruling in *Hootkins v. Napolitano*, ___ F. Supp. 2d ___, 2009 WL 2222839 (C.D. Cal. Apr. 28, 2009), which is on appeal to the Ninth Circuit Court of Appeals. Other cases are pending in district courts throughout the United States.

B. Section 568(c) of FY2010 DHS Appropriations Act

Congress, however, recently acted to resolve the issue. On October 28, 2009, the President signed into law the FY2010 DHS Appropriations Act. Section 568(c) of the new law amends the second sentence in section 201(b)(2)(A)(i) of the INA so that, for a widow(er) of a citizen to qualify as an immediate relative, it is no longer necessary for the couple to have been married at least two years when the citizen died. The second sentence of section 201(b)(2)(A)(i) now reads,

In the case of an alien who was the spouse of a citizen of the United States and was not legally separated from the citizen at the time of the citizen's death, the alien (and each child of the alien) shall be considered, for purposes of this subsection, to remain an immediate relative after the date of the citizen's death but only if the spouse files a petition under [section 204(a)(1)(A)(ii) of the INA] within 2 years after such date and only until the date the spouse remarries.

When a widow(er) qualifies as an immediate relative under the second sentence in section 201(b)(2)(A)(i) of the INA, his or her children, as defined in sections 101(b)(1) and 201(f) of the INA, also qualify. The amendment made by section 568(c) applies equally to aliens abroad who are seeking immigrant visas and aliens in the United States who are seeking adjustment of status. The amendment applies to any alien whose spouse died before October 28, 2009, and who had a Form I-130 pending on October 28, 2009. If no Form I-130 was pending, then an alien whose U.S. citizen spouse died before October 28, 2009, and before the second anniversary of their marriage, may file a visa petition under section 204(a)(1)(A)(ii) of the INA so long as (a) the alien has not remarried, and (b) the petition is filed no later than October 28, 2011.

Section 568(c) relates only to the impact of the citizen's death on the alien's eligibility for classification as an immediate relative. All other requirements for approval of a visa petition remain in force. In particular, the alien must still establish that he or she was the citizen's legal spouse, and that the marriage was a bona fide marriage and not an arrangement solely to confer immigration benefits on the alien. If the alien was in removal proceedings at the time of the marriage, the "clear and convincing evidence" standard in section 245(e)(3) of the INA will still apply to the adjudication of the visa petition. If the necessary visa petition is approved, the alien may then seek an immigrant visa or adjustment of status. The alien must still establish that he or she is admissible as an immigrant and, in an adjustment case, that he or she meets all other adjustment eligibility requirements and merits a favorable exercise of discretion.

In light of this new legislation, the policy guidance stated in the November 8, 2007, memorandum entitled "Effect of Form I-130 Petitioner's Death on Authority to Approve the Form I-130" (AFM Update AD08-04) is obsolete. This memorandum amends the Adjudicator's Field Manual to remove the material added in that earlier memorandum.

III. Policy Guidance and AFM Update

AFM Update

1. Chapter 21.2 of the *AFM* entitled "Factors Common to the Adjudication of All Relative Visa Petitions" is amended by
 - a. Removing chapter 21.2(a)(4)
 - b. Removing the **Note** at the end of chapter 21.2(h)(1)(C).

A. Widow(er)s with pending cases

Section 568(c)(2)(A) of the FY2010 DHS Appropriations Act makes the amendment to the second sentence in INA section 201(b)(2)(A)(i) applicable to any visa petition or adjustment application “pending on or after the date of enactment.” As noted, the date of enactment is October 28, 2009.

1. Reopening of pending Form I-130 cases

For purposes of this amendment, a Form I-130 will be deemed “pending” on October 28 2009, if the deceased citizen had filed a Form I-130 on or before that date but:

- USCIS has not adjudicated the Form I-130;
- USCIS denied the Form I-130, but USCIS granted a motion to reopen or reconsider, so that the Form I-130 is, again, pending;
- USCIS denied the Form I-130, but has not yet ruled on a motion to reopen or reconsider;
- USCIS denied the Form I-130, but the alien’s appeal from that decision is pending before the Board of Immigration Appeals (BIA) or the period for appeal of the adverse USCIS decision to the BIA had not yet expired; or
- The USCIS or BIA decision denying the Form I-130 is the subject of pending litigation before a federal court (including cases in which the district court issued a decision before October 28, 2009, but the appeals period established by law had not yet expired).

Under 8 C.F.R. § 204.2(i), a citizen’s spousal Form I-130 is automatically converted to a widow(er)’s Form I-360 if, on the date of the citizen’s death, the beneficiary qualifies as a widow(er) under the second sentence in section 201(b)(2)(A)(i). Under section 568(c) of the FY2010 DHS Appropriations Act, these aliens now qualify under the second sentence. Thus, any Form I-130 that is “pending” as described in the preceding paragraph will be deemed to be, and adjudicated as, a widow(er)’s Form I-360.

In any Form I-130 case in which a motion to reopen or for reconsideration was filed, but not acted on, USCIS will grant the motion and make a new decision in light of section 568(c) of the FY2010 DHS Appropriations Act.

Any Form I-130 that is the subject of litigation in any federal court on the issue of the effect of the petitioner’s death is, as of the date of this memorandum, reopened for a new decision in light of section 568(c) of the FY2010 DHS Appropriations Act. The beneficiary need not file a separate motion. Nor does it matter, for purposes of reopening the Form I-130, whether the beneficiary is currently in the United States or abroad. If the decision denying or terminating action on the Form I-130 was pending in any court on October 28, 2009, the decision is now

reopened. USCIS will therefore make a new decision in light of section 568(c) of the FY2010 DHS Appropriations Act.

Cases challenging the denial of a spousal immediate relative Form I-130 based on the petitioner's death have been filed in district courts throughout the United States. USCIS officers must consult with the appropriate regional or service center counsel to identify those cases that are the subject of litigation that was pending on October 28, 2009. Once a case is identified as subject to reopening under this memorandum, the USCIS officer will notify the alien in writing that the Form I-130 is reopened in light of section 568(c) of the FY2010 DHS Appropriations Act, and will be readjudicated as a Form I-360.

If it is determined that a Form I-130 had been filed but was not "pending" on October 28, 2009, because a USCIS decision denying the Form I-130 had become final before October 28, 2009 (and no administrative appeal or civil action challenging the denial was pending on October 28, 2009), please refer to part III(B) of this memorandum.

2. *Reopening of pending Form I-485 cases*

Section 568(c)(2)(A) of the FY2010 DHS Appropriations Act also makes the amendment applicable to any Form I-485 that was pending on the date of enactment. A Form I-485 is deemed "pending" on the date of enactment if it was filed before the deceased citizen's death but:

- USCIS has not adjudicated the Form I-485
- USCIS denied the Form I-485, but USCIS granted a motion to reopen or reconsider, so that the Form I-485 is, again, pending
- USCIS denied the Form I-485, but has not yet ruled on a motion to reopen or reconsider;
- The Form I-485 is the subject of litigation before a federal court (including cases in which the district court issued a decision before October 28, 2009, but the appeals period established by law had not yet expired).

With this guidance memo, USCIS also reopens, without the need for a formal motion, any Form I-485 that is the subject of litigation on this issue in any federal court, if USCIS still has jurisdiction to act on the Form I-485. As with the reopening of the related Form I-130, the USCIS officer will notify the applicant in writing that the Form I-485 is reopened in light of section 568(c) of the FY2010 DHS Appropriations Act.

In the case of a widow(er) who entered the United States as a K-1 nonimmigrant, and filed a Form I-485 after marrying the deceased citizen who had filed the Form I-129F, ordinarily there will not be a Form I-130. If the Form I-485 is still "pending" as described in this memo, and USCIS still has jurisdiction to act on it, the Form I-485 will also be reopened for a new decision in light of section 568(c) of the FY2010 DHS Appropriations Act, without the need for a formal

motion. Since no Form I-130 is required for a K-1 nonimmigrant to seek adjustment after marrying the K petitioner within the period specified by statute, the K-1 nonimmigrant will also be deemed the beneficiary of a Form I-360 if the K-1 nonimmigrant now qualifies as a widow(er). The K-1 nonimmigrant still may not adjust on any basis other than the K-1 nonimmigrant's having married the citizen petitioner who filed the Form I-129F.

Some aliens may have been placed into removal proceeding after USCIS denied their Forms I-485. Except for "arriving aliens," this factor would mean that USCIS no longer has jurisdiction to adjudicate the Form I-485. 8 C.F.R. § 245.2(a)(1) and 1245.2(a)(1). USCIS would have jurisdiction to adjudicate the Form I-485 only if the Executive Office for Immigration Review (EOIR) terminated the removal proceeding. Whether to support or oppose terminating a removal proceeding is a matter for U.S. Immigration and Customs Enforcement to decide, not USCIS. If a USCIS office reopens a Form I-130 involving an alien in removal proceedings, the USCIS office must, through the appropriate USCIS counsel, advise the local counsel for U.S. Immigration and Customs Enforcement.

Some aliens whose citizen spouses had died may have left the United States voluntarily, without obtaining a grant of advance parole. Others may have left after obtaining advance parole, but may have remained abroad after expiration of the Form I-512. Under 8 C.F.R. § 245.2(a)(ii)(4)(B), these aliens have abandoned their adjustment applications. Also abandoned is the adjustment application of an alien who left as the result of removal proceedings. 8 C.F.R. § 245.2(a)(4)(ii)(A). In these situations, a Form I-485 will not be deemed "pending" for purposes of section 568(c)(2)(A). However, where section 568(c) applies to the approved Form I-130, and the Form I-130 has been approved as a Form I-360, the alien approved on that I-360 who has left the United States may apply for an immigrant visa abroad.

3. Petition already approved before death

If a widow(er) is the beneficiary of a Form I-130 that was approved before the citizen petitioner's death, it is not necessary for the widow(er) to request humanitarian reinstatement of the approval. Under 8 C.F.R. § 204.2(i)(1)(iv), the approved Form I-130 is automatically converted to an approved Form I-360. Any children of the widow(er) will also be eligible to seek an immigrant visa or adjustment of status based on the converted petition.

There may be some cases in which a spousal immediate relative Form I-130 was approved, but the approval was revoked automatically under 8 C.F.R. 205.1(a)(3)(i)(C) upon the citizen petitioner's death. If the alien is now eligible for classification as the widow(er) of a citizen under section 568(c)(2)(A) of the FY2010 DHS Appropriations Act, the approval will be deemed to have been reinstated, effective October 28, 2009. No separate request for reinstatement is necessary. Under 8 C.F.R. § 204.2(i)(1)(iv), the Form I-130 will be deemed to be an approved Form I-360.

4. *Admissibility issues*

Whether an alien is actually admissible is not germane in adjudicating a Form I-130. *Matter of O-*, 8 I&N Dec. 295 (BIA 1959). The only issue resolved by enactment of section 568(c) of the FY2010 DHS Appropriations Act is that the death of the citizen spouse, by itself, does not make the widow(er) ineligible for immediate relative classification. Thus, the alien must still be admissible as an immigrant to obtain adjustment of status or an immigrant visa.

For those aliens, however, who had pending Form I-130 cases, and who now can benefit from section 568(c) of the FY2010 DHS Appropriations Act, two inadmissibility grounds warrant special consideration. The first is section 212(a)(9)(B)(i) of the Act, under which an alien is inadmissible if the alien seeks admission within a specified period after the alien leaves the United States, if the alien has accrued a lengthy period of unlawful presence. The second is section 212(a)(9)(A), under which an alien who has been removed (or who left the United States while under a final administrative order of removal) must obtain consent to reapply, if the alien seeks admission within the period set in section 212(a)(9)(A).

It is important to note that the special provisions in this memorandum relating to INA section 212(a)(9)(A) and (B) apply only to an alien who was the beneficiary of a Form I-130 that was filed by a now-deceased spouse petitioner, and that can now be approved as a Form I-360 under section 568(c) of the FY2010 DHS Appropriations Act. The purpose of these special provisions is simply to minimize the adverse effect on these aliens of the disputed, and now resolved, issue of the impact of the death of the petitioning spouse on the alien's eligibility.

a. Unlawful presence

By specifying, in section 568(c)(2)(A) of the FY2010 DHS Appropriations Act, that the amendment should apply to pending cases, Congress indicated its desire to resolve these cases fully. For this reason, for purposes of INA section 212(a)(9)(B)(i), if an alien remained in the United States while awaiting the outcome of Form I-130 that can now be approved as a Form I-360 under section 568(c) of the FY2010 DHS Appropriations Act, the alien will be deemed *not* to have accrued any unlawful presence. This protection applies even if the alien was not actually in a lawful status while the now-converted Form I-360 was pending.

An alien who had a Form I-130 pending on October 28, 2009, but who is present in the United States without a lawful admission or parole generally cannot obtain adjustment under INA section 245(a). Rather, the alien must generally seek adjustment under INA section 245(i). But this relief is not available to an alien who did not have a petition or labor certification filed before April 30, 2001. Thus, even if the Form I-130 can now be approved as a Form I-360, the alien may need to leave the United States to obtain an immigrant visa. But since, under this guidance memorandum, the alien will be deemed *not* to have accrued any unlawful presence, he or she will not be inadmissible under INA section 212(a)(9)(B)(i).

Again, these special provisions relating to the accrual of unlawful presence apply only to an alien who is the beneficiary of a spousal immediate relative Form I-130 that was pending on October

28, 2009, and that is now approved under section 568(c)(2)(A) of the FY2010 DHS Appropriations Act and 8 C.F.R. § 204.2(i)(1)(iv) as a widow(er)'s Form I-360: the widow(er) and his or her accompanying child(ren). Ordinarily, the pendency of a visa petition, itself, does not prevent accrual of unlawful presence. A pending adjustment application, by contrast, does prevent accrual of unlawful presence. *Adjudicator's Field Manual* chapter 40.9(b)(3)(A). Most aliens who have been in litigation because the death of a spouse led to denial of the Form I-130 are probably already protected from unlawful presence under the ordinary provisions in the AFM. This broader protection against unlawful presence, for this narrow class of cases, is designed to maximize the ability of those aliens whose specific situations gave rise to the new legislation to fully benefit from it.

b. Consent to reapply for admission after removal

These protections against accrual of unlawful presence apply even if the alien was actually removed from the United States under a removal order. Still, because the alien was removed under a valid order, the alien is inadmissible under INA section 212(a)(9)(A)(i) or (ii). USCIS, however, has discretion under section 212(a)(9)(A)(iii) to consent to the alien's re-application for admission. USCIS should generally exercise discretion favorably and grant an application for consent to reapply under section 212(a)(9)(A)(iii), if:

- The Form I-130 that had been filed by the alien's spouse has now been approved as a Form I-360 under section 568(c) of the FY2010 DHS Appropriations Act;
- The alien is otherwise admissible, and
- The alien's case does not present significant adverse factors beyond the removal itself.

A USCIS adjudicator will not deny a Form I-212 filed by an alien whose case was in litigation on October 28, 2009, and whose Form I-130 has been approved as a Form I-360 under section 568(c)(2)(A) of the FY2010 DHS Appropriations Act without consulting USCIS Headquarters through appropriate channels.

5. *Remarriage*

Any immediate relative Form I-130 that was filed on behalf of the spouse of a U.S. citizen, and that was pending on October 28, 2009, is no longer a spousal immediate relative Form I-130. By operation of 8 C.F.R. § 204.2(i)(1)(iv), what was filed as a spousal immediate relative Form I-130 is now a widow(er)'s Form I-360. The converted Form I-360 may be approved only if the beneficiary, who is now also deemed to be the petitioner, qualifies as the widow(er) of a citizen, as described in INA section 201(b)(2)(A)(i). Eligibility for classification as an immediate relative continues "only until the date the spouse remarries."

6. *Ninth Circuit cases*

In acting on the guidance in this memorandum, USCIS adjudicators must keep in mind that the *Hootkins* case was certified as a class action. Thus, an individual need not be a *named* Plaintiff in *Hootkins* in order for his or her Form I-130 and Form I-485 to be reopened under this memorandum. If an individual has not already been identified as a member of the *Hootkins* class, that individual may make a written request to have his or her Form I-130 and Form I-485 reopened and readjudicated. The purpose of the written request is simply to *identify* the case as a *Hootkins* case. The individual is not required to pay the filing fee for a motion to reopen. The case will be considered a *Hootkins* class member case if the case was denied on or after August 30, 2001,¹ and:

- either the citizen spouse petitioner or the alien spouse beneficiary lived in the Ninth Circuit when the citizen spouse died; or
- a USCIS office in the Ninth Circuit made the prior decision on the Form I-130 or Form I-485.

B. Widow(er)s without pending cases

The alien widow(er) of a citizen who died before October 28, 2009, but who did not have a Form I-130 pending on that date, may now file a Form I-360, provided that he or she does so no later than October 28, 2011, and has not remarried. FY2010 DHS Appropriations Act § 568(c)(2)(B). Section 568(c)(2)(B) applies if the citizen spouse did not file a Form I-130 on the alien spouse's behalf before dying. But it also applies if there was a Form I-130 filed, but the decision denying the Form I-130 had become administratively final before October 28, 2009, because the decision was not the subject of any type of administrative or judicial review that was pending on October 28, 2009. Note that section 568(c)(2)(B)(i) says the Form I-360 must be filed "not later than the date that is 2 years after the date of the enactment." Thus, a Form I-360 that is filed *on* October 28, 2011, will still be timely. A Form I-360 filed on or after October 29, 2011, will be untimely.

For any case in which a citizen dies on or after October 28, 2009, the alien widow(er) must file the Form I-360 within 2 years of the citizen's death.

C. Children of widow(er)s

The child of a widow(er) whose Form I-360 is approved may, as specified in the second sentence of INA section 201(b)(2)(A)(i) and in INA section 204(a)(1)(A)(ii), be included in the widow(er)'s petition. Whether an individual qualifies as the widow(er)'s "child" is determined according to INA sections 101(b)(1) and 201(f).

¹ Any case denied before August 30, 2001, is time-barred under 28 U.S.C. § 2401(a). But even if a Ninth Circuit case is not considered "pending" because of *Hootkins*, the alien may still be eligible to immigrate as the widow(er) of a citizen, if the alien has not remarried and files the Form I-360 no later than October 28, 2011.

In a case in which the deceased citizen had filed a Form I-130 for his or her spouse, and the Form I-130 can now be adjudicated as a Form I-360 widow(er)'s petition, the child(ren) of the widow(er) will be deemed to be included in the converted Form I-360. Thus, it will not be necessary to act on any separate Form(s) I-130 that the deceased citizen may have filed for the widow(er)'s children. And the child(ren) of the widow(er) will be deemed included in the converted Form I-360 even if the deceased citizen had not filed any Form(s) I-130 for the child(ren).

Note that, in light of INA section 201(f), whether an individual qualifies as the "child" of a widow(er) depends on the individual's age when the visa petition was filed. For those cases that were pending on October 28, 2009, the Form I-360 filing date is deemed to be the date on which the deceased citizen filed the prior Form I-130. If a widow(er) has an unmarried son or daughter who was under 21 when the deceased citizen filed the Form I-130, that individual will still be deemed to be under 21 for purposes of the widow(er)'s now-converted Form I-360.

D. Affidavits of support

Under section 212(a)(4)(C)(i)(I) of the INA, a Form I-864 (Affidavit of Support under Section 213A of the Act) is *not* required in the case of the widow(er) of a citizen and the widow(er)'s accompanying children.²

E. Conversion of deferred action applications filed under prior guidance

While remedial legislation was pending in Congress, the Secretary of Homeland Security directed the use of deferred action relief to allow widow(er)s of citizen whose cases may have been affected by the legislation to remain in the United States. In the September 4, 2009 Memorandum, "Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and their Children," USCIS designated the Form I-360 as the form an individual would use to request deferred action under the Secretary's policy.

Now that Congress has enacted the legislation, any Form I-360 that had been filed to obtain deferred action relief, and that has not yet been adjudicated as a deferred action request, will now be considered to be, and adjudicated as, a widow(er)'s visa petition under 8 C.F.R. § 204.2(b). If the Form I-360 has already been approved as a deferred action request, it will be reopened and adjudicated as a visa petition under 8 C.F.R. § 204.2(b). It is not necessary for the alien to file a formal motion, nor to pay a new Form I-360 filing fee. Additionally, any prior grant of deferred action relief need not be rescinded and should remain undisturbed.

² There may be an individual case in which, regardless of the Form I-864 issue, the factors specified in INA section 212(a)(4)(B) and the standard public charge guidance, as published at 64 Fed. Reg. 28689 (1999), will support a finding that a widow(er) is inadmissible as an alien likely to become a public charge. Even in this case, a Form I-864 is not required. Rather, since the statute does not specifically require the Form I-864, the Form I-134 can be used instead. 8 C.F.R. § 213a.5. It is important to note that, on a Form I-134, the sponsor does not have to meet the requirements in INA section 213A(f), and so does *not* need to be someone who could have been a "substitute sponsor" in a case in which a Form I-864 actually is required.

Under the deferred action guidance, an alien could file a Form I-765, application for employment authorization, only if the deferred action request had been granted. Now that a Form I-360 that was filed to request deferred action is deemed to be a widow(er)'s visa petition, the alien can, if otherwise eligible, file a Form I-485 even before the approval of the Form I-360. 8 C.F.R § 245.2(a)(2)(i)(B). Filing the Form I-485 permits the alien to file a Form I-765. 8 C.F.R. § 274a.12(c)(9).

F. Implementation

Section 568(c) of the FY2010 DHS Appropriations Act became effective on October 28, 2009, the date of enactment. USCIS offices and centers, therefore, are to begin implementing the instructions established in this memorandum immediately. USCIS adjudicators should note that Congress clearly intended to benefit the aliens affected by these provisions.

AFM Transmittal Memorandum Revisions. The AFM Transmittal Memorandum button is revised by adding a new entry, in numerical order, to read:

AD 10-09 [Date of Signature]	Chapter 21.2	This memorandum removes chapter 21.2(a)(4) and the Note at the end of chapter 21.2(h)(1)(C) to reflect enactment of section 568(c) of Public Law 111-83.
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H. Contact Information

Questions regarding this memorandum should be directed to the Office of Domestic Operations through appropriate channels. For cases adjudicated overseas, questions should be directed to the International Operations Division, Programs Branch.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, by any party against the United States, its departments, agencies or entities, its officers, employees, or agents, or any other person.

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National Benefits Center Director
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**Appendix 21-8 Memorandum - Standalone Form I-130 and Jointly Filed Form I-751:
Discretionary Procedures for Petitioning Military Members and Their Dependents [Appendix
added 09-22-2009]**



U.S. Citizenship
and Immigration
Services

SEP 22 2009

HQ 70/6.1.8
HQ 70/6.1.1
AD 09-47

Memorandum

TO: Service Center Directors

FROM: Barbara Velarde
Chief, Service Center Operations

Handwritten signature of Barbara Velarde in black ink.

SUBJECT: Standalone Form I-130 and Jointly Filed Form I-751: Discretionary Procedures for Petitioning Military Members and their Dependents

Additions to *Adjudicator's Field Manual*, Chapter 21.2(b)(1)(C) and 25.1(c)(3) and Appendix 21-7 (AFM Update AD09-47)

1. Purpose

This memorandum provides policy guidance to service centers adjudicating a standalone Form I-130, *Petition for Alien Relative*,¹ or jointly filed Form I-751, *Petition to Remove Conditions on Residence*,² filed by a military member on behalf of his or her alien spouse or child. For purposes of this memo, military member is defined as any United States citizen (USC) or lawful permanent resident (LPR) active duty member of any branch of the U.S. Armed Forces who is currently deployed.³ This includes activated reservists and mobilized National Guardsmen.

The guidance in this memorandum supersedes the Memorandum: *Guidance on the Processing of Form I-751, Petition to Remove Conditions on Residence, Filed by Conditional Permanent Residents Overseas on Official Military or Government Orders*, dated June 2, 2006.

2. Background

When a petitioner files a standalone Form I-130 or jointly filed Form I-751, he or she must provide specific information to establish the bona fides of the relationship between the petitioner and his or her spouse or child. When a military member is the petitioner, service center Immigration Service Officers (ISOs) may use this guidance to determine what types of specific documents military

¹ Standalone I-130s do not include I-130s filed concurrently with Form I-485, *Application to Register Permanent Residence or to Adjust Status*.

² This memorandum only applies to Form I-130 or Form I-751 filed by a military member. It does not restrict nor expand the interview waiver criteria for other petitioners.

³ This includes, but is not limited to, Permanent Change of Station (PCS) orders or Deployment Orders issued to the military member for a permanent tour of duty.

Standalone Form I-130 and Jointly filed Form I-751: Discretionary Procedures for Petitioning Military Members and their Dependents
Additions to *Adjudicator's Field Manual*, Chapter 21.2(b)(1)(C) and 25.1(c)(3) and Appendix 21-7 (AFM Update AD09-47)

members may be able to provide to establish bona fides of the marriage. This guidance will also enable service centers to adjudicate most cases involving military members without having to relocate them to a field office for interview.

3. Guidance

Evidence pertaining to military members

USCIS service centers reviewing a standalone Form I-130 or jointly filed Form I-751 will evaluate every properly filed petition in chronological order by the receipt date.

The ISO will review the file for the following:

- Evidence that the petition involves an active duty military member;
- Evidence establishing that the active duty military member is deployed;
- Evidence of the claimed relationship:
 - If the military member is filing the petition on behalf of an alien spouse, evidence establishing a bona fide marriage between the alien and the military member; and
 - If the military member is filing the petition on behalf of an alien child, evidence establishing a parent-child relationship between the child and the military member.

Military-specific evidence can be deemed as strong evidence towards the bona fides of the marriage.. Such evidence may include but is not limited to the following.

- All pages of the service member's Form DD-1172, "Application for Uniformed Services Identification Card DEERS Enrollment," naming dependents
- Dependent's Military Identification and Privilege Card
- Form DD-1278, "Certificate of Overseas Assignment to Support Application to File Petition for Naturalization"
- Copy of Permanent Change of Station (PCS) orders issued to the service member for permanent tour of duty overseas that specifically name the spouse or child
- Designation of the beneficiary on the military members' Group Life Insurance (SGLI) policy
- Evidence of a Family Service Members' Group Life Insurance (FSGLI) policy
- Evidence of the military member's health insurance policy on behalf of dependent

Standalone Form I-130 and Jointly filed Form I-751: Discretionary Procedures for Petitioning Military Members and their Dependents
Additions to *Adjudicator's Field Manual*, Chapter 21.2(b)(1)(C) and 25.1(c)(3) and Appendix 21-7 (AFM Update AD09-47)

- Documentation showing that the spouse and/or child resides in military base/post housing
- Powers of Attorney life insurance designation (general or specific)
- Military TRICARE medical ID card for usage of military medical facilities
- Leave and Earnings Statement showing: Family Separation Allowance or allotments to dependents
- Living will and/or last will and testament
- Pre-authorization for emergency financial assistance
- A copy of the service member's Record of Emergency Data

Adjudicative actions for I-130 and I-751 petitions filed by military members

If the I-130 or I-751⁴ petition is approvable, the ISO will approve the petition and follow the normal post-adjudication process.

If the ISO cannot approve the petition, and the petition cannot be statutorily denied (for example, because it was based on a non-qualifying relationship), the ISO will send the military member a Request for Evidence (RFE). The ISO will do the following:

- (a) Issue the RFE to the military member's last known (physical or APO/FPO) address.
- (b) If the service center receives a response to the RFE, the ISO will continue the adjudication process.
- (c) If there is no response to the RFE within the appropriate RFE response period (12 weeks), or the RFE is returned as undeliverable, the ISO will place the petition on hold for up to 18 months.
- (d) If 18 months have passed since the service center placed the case on hold, the ISO will deny the petition if the petitioner is no longer in the military; otherwise, the ISO will administratively close the petition. Upon request, the petitioner may, at any time, request to reopen/reactivate the petition at no charge to the petitioner.

⁴ If there is evidence that a conditional permanent resident (CPR) spouse or child has filed an N-400 application, the ISO will not adjudicate any I-751 filed to remove the conditions on that spouse's or child's status. Instead, the ISO will transfer the I-751, and the N-400 if accompanying the I-751, to the appropriate field office for adjudication. For additional guidance, please refer to the memorandum, *Conditional Permanent Residents and Naturalization under Section 319(b) of the Act Revisions to Adjudicator's Field Manual (AFM), Chapters 25 (AFM Update AD09-28)*, dated August 4, 2009. See also AFM chapter 25.1 (k)(2)(d). If there is no N-400 application, the ISO will proceed with adjudication of the I-751 petition.

Standalone Form I-130 and Jointly filed Form I-751: Discretionary Procedures for Petitioning Military Members and their Dependents
Additions to *Adjudicator's Field Manual*, Chapter 21.2(b)(1)(C) and 25.1(c)(3) and Appendix 21-7 (AFM Update AD09-47)

If the service center receives a response from the petitioner, the ISO will do the following:

- a) If the petition is approvable, the ISO will approve the petition and continue with the normal post-adjudication process.
- b) If the evidence submitted is insufficient to support approval, the ISO will place the petition on an overseas hold until the military member returns to the U.S.
- c) If the military member notifies USCIS of his or her return,⁵ the ISO will take the case off hold and relocate it to the appropriate field office. See AFM chapter 21.2 (b)(1).
- d) If 18 months have passed since the service center placed the case on overseas hold, and the military member has not notified USCIS of return to the U.S., the ISO will administratively close the petition. The ISO must notify the petitioner that the case is being administratively closed because USCIS must conduct an interview to proceed with a decision. The notice should advise the petitioner that he or she may, at any time after returning to the U.S., request to reopen/reactivate the petition at no charge to the petitioner.

4. Adjudicator's Field Manual Update:

The AFM is revised to add Chapters 21.2(b)(1)(C) and 25.1(c)(3) and Appendix 21-7.

21.2 Factors Common to the Adjudication of All Relative Visa Petitions.

* * *

(b) Adjudicative Procedures.

* * *

(1) Review of the Petition.

* * *

(C) Discretionary Procedures for Petitioning Military Members and Their Dependents. [Chapter added on (date memo signed)]

When adjudicating a standalone Form I-130 filed by a military member on behalf of his or her alien spouse or child, service center ISOs must follow the steps below:

- Review every properly filed petition in chronological order by the receipt date;

⁵ Notification of return may occur via an AR-11 change of address or direct correspondence.

Standalone Form I-130 and Jointly filed Form I-751: Discretionary Procedures for Petitioning Military Members and their Dependents

Additions to *Adjudicator's Field Manual*, Chapter 21.2(b)(1)(C) and 25.1(c)(3) and Appendix 21-7 (AFM Update AD09-47)

- Determine whether the petition involves an active duty military member (by checking the file for military orders) before issuing a request for evidence (RFE);

Note

The evidence necessary for the issuance of an RFE in this situation includes but is not limited to the list of documents listed in the memo entitled *Standalone Form I-130 and Jointly Filed Form I-751: Discretionary Procedures for Petitioning Military Members and their Dependents*. See Appendix 21-7;

- Review the evidence submitted to determine the nature of the member's deployment; the claimed bona fides of the marriage and relationship to any children involved. See memo entitled *Standalone Form I-130 and Jointly Filed Form I-751: Discretionary Procedures for Petitioning Military Members and their Dependents*. See Appendix 21-7;

The detailed steps that the ISO must follow are listed in Appendix 21-7

25.1 Immigration Marriage Fraud Amendments of 1986.

* * *

(c) Filing of Removal of Conditions.

* * *

(3) Discretionary Procedures for Petitioning Military Members and Their Dependents. [Chapter added on (date memo signed)]

When adjudicating a Form I-751 filed by a military member on behalf of his or her alien spouse or child, service center ISOs must follow the steps below:

- Review every properly filed petition in chronological order by the receipt date;
- Determine whether the petition involves an active duty military member (by checking the file for military orders) before issuing a request for evidence (RFE);

Note

The evidence necessary for the issuance of an RFE in this situation includes but is not limited to the list of documents listed in the memo entitled *Standalone Form I-130 and Jointly Filed Form I-751: Discretionary Procedures for Petitioning Military Members and their Dependents*. See Appendix 21-7;

Standalone Form I-130 and Jointly filed Form I-751: Discretionary Procedures for Petitioning Military Members and their Dependents

Additions to *Adjudicator's Field Manual*, Chapter 21.2(b)(1)(C) and 25.1(c)(3) and Appendix 21-7 (AFM Update AD09-47)

- Review the evidence submitted to determine the nature of the member's deployment; the claimed bona fides of the marriage and relationship to any children involved. See memo entitled *Standalone Form I-130 and Jointly Filed Form I-751: Discretionary Procedures for Petitioning Military Members and their Dependents*. See Appendix 21-7;

If	And the ISO believes	Then
<p>The evidence to support the standalone I-130 is received and all items provided are sufficient</p> <p>The evidence to support the I-751 is received and all items provided are sufficient</p>	<p>that the I-130 petition is approvable</p> <p>that the I-751 petition is approvable</p>	<p>the ISO will approve standalone Form I-130 and continue the normal post adjudication process</p> <p>the ISO will approved the Form I-751 and continue the normal post adjudication process. If there are any interfiled or concurrently filed N-400 applications, the ISO must refer to the 319(b) memorandum for further guidance.</p>

Standalone Form I-130 and Jointly filed Form I-751: Discretionary Procedures for Petitioning Military Members and their Dependents
 Additions to *Adjudicator's Field Manual*, Chapter 21.2(b)(1)(C) and 25.1(c)(3) and Appendix 21-7 (AFM Update AD09-47)

Appendix 21-7 Form I-130 and Form I-751 Adjudication Steps for USCIS Service Center Immigration Services Officers (ISOs) Appendix added [date memo signed]; AD09-47]

If	Then
The ISO cannot approve the petition and the petition cannot be statutorily denied (e.g., the petition is based on a non-qualifying relationship)	The ISO will send the military member an RFE for additional documentation to establish claimed relationships or to address other deficiencies to the military member's last known (physical or APO/FPO) address.
The service center receives a response to the RFE	The ISO will continue the adjudication and post adjudication processes.
The RFE response is still insufficient the ISO will	The ISO will place the petition on an overseas hold until the military member returns to the U.S.
There is no response to the RFE within the appropriate RFE response period (12 weeks)	The ISO will place the petition on hold for up to 18 months.
The response to the RFE is returned as undeliverable the ISO will	The ISO will place the petition on hold for up to 18 months.
Eighteen (18) months have passed since the service center placed the petition on hold	The ISO will either: (a) deny the petition if the petitioner is no longer in the military Or (b) administratively close the petition if the petitioner is still in the military.
The petition is denied	The ISO will reopen and/or reactive the petition upon the petitioner's request (at anytime and at no charge to the petitioner).
The petition is administratively close	The ISO will reopen and/or reactive the petition upon the petitioner's request (at anytime and at no charge to the petitioner).

Standalone Form I-130 and Jointly filed Form I-751: Discretionary Procedures for Petitioning Military Members and their Dependents
 Additions to *Adjudicator's Field Manual*, Chapter 21.2(b)(1)(C) and 25.1(c)(3) and Appendix 21-7 (AFM Update AD09-47)

4. AFM Transmittal Memoranda Revisions. The *AFM* Transmittal Memoranda button is revised by adding new entry, in numerical order, to read:

<p>AD09-47 [dated memo signed]</p>	<p>Chapters:</p> <ul style="list-style-type: none"> • 21.2(b)(1)(C)(2) • 25.1(c)(3) <p>Appendix 21-7</p>	<p>The AFM is updated to add Chapter 21.2(b)(1)(C) and Appendix 21-7. The chapter and appendix set forth adjudicative procedure that Immigration Services Officers must follow when adjudicating standalone Forms I-130.</p> <p>The AFM is updated to add Chapter 25.1(c)(3), "Discretionary Procedures for Military Members and their Dependents.</p>
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5. Use

This memorandum is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of applications. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

6. Contact Information

Questions regarding the operational guidance in this memorandum may be directed through appropriate channels to Felicia Cameron, Program Manager in Service Center Operations Division or Heather Evelyn, Program Manager in Service Center Operations Division.

Originating Office:	<u>Office of Service Center Operations</u>	Originating Official:	<u>Bryan Christian</u>
Contact Officer:	<u>Felicia Cameron</u>	Contact Number:	<u>202-272-8169</u>
Date:	<u>08/04/2009</u>	Suspense Date:	<u>08/12/2009</u>
Subject:	<u>Military Members on the MFAS Terminate Report</u>		

EXECUTIVE SUMMARY:

This memorandum provides guidance to the Service Centers on how to handle military I-751 cases:

• This memorandum provides policy guidance to Service Centers when requesting military-specific documentation through the issuance of a Request for Evidence (RFE) for certain deployed United States citizen (USC) or lawful permanent resident (LPR) military members filing Form I-130, Petition for Alien Relative, and filing Form I-751, Petition to Remove Conditions on Residence.




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Chief Counsel	X			Human Capital				Security			
Chief Information Officer				National Security and Records Verification				Transformation			
Citizenship				Field Operations				Regulatory Management Division			

Reviewer Signature (or Designate)  *assoc. Counsel* Date: 09/03/09

Office: Office of the Chief Counsel *ALD*

Check one:

Concur Concur w/edits Non-Concur (attach explanation)

If notes are attached, check this box

OFFICE OF THE DIRECTOR

Office	Signature	Action			Date
		C	NC	N/A	
Executive Secretariat					
Chief of Staff					
Deputy Director					
Director					

Originating Office: Office of Service Center Operations
Originating Official: Bryan Christian
Contact Officer: Felicia Cameron
Contact Number: 202-272-8169
Date: 08/04/2009
Suspense Date: 08/12/2009
Subject: Military Members on the MFAS Terminate Report

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Chief Financial Officer				Domestic Operations				Refugee, Asylum, International			
Chief Counsel				Human Capital				Security			
Chief Information Officer				National Security and Records Verification				Transformation			
Citizenship				Field Operations	X			Regulatory Management Division			

Reviewer Signature (or Designate) *[Signature]* Date: 1 Sept 2009
Office: DOMO / OFO
Check one:
 Concur
 Concur w/edits
 Non-Concur (attach explanation)
 If notes are attached, check this box

OFFICE OF THE DIRECTOR

Office	Signature	Action			Date
		C	NC	N/A	
Executive Secretariat					
Chief of Staff					
Deputy Director					
Director					

Originating Office: Office of Service Center Operations
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Chief Information Officer				National Security and Records Verification				Transformation			
Citizenship				Field Operations				Regulatory Management Division			
				Service Center Operations	X						

Reviewer Signature (or Designate) _____ **Date:** _____

Office: _____

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 Non-Concur (attach explanation)

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OFFICE OF THE DIRECTOR

Office	Signature	Action			Date
		C	NC	N/A	
Executive Secretariat					
Chief of Staff					
Deputy Director					
Director					

Appendix 21-9 Form I-130 and Form I-751 Adjudication Steps for USCIS Service Center Immigration Services Officers (ISOs) [Appendix added 09-22-2009]

If	Then
The ISO cannot approve the petition and the petition cannot be statutorily denied, e.g., the petition is based on a non-qualifying relationship	The ISO will send the military member an RFE for additional documentation to establish claimed relationships or to address other deficiencies to the military member's last known (physical or APO/FPO) address.
The Service Center receives a response to the RFE	The ISO will continue the adjudication and post adjudication processes.
The RFE response is still insufficient the ISO will	The ISO will place the petition on an overseas hold until the military member returns to the country-regionplaceU.S.
There is no response to the RFE within the appropriate RFE response period (12 weeks)	The ISO will place the petition on hold for up to 18 months.
The response to the RFE is returned as undeliverable the ISO will	The ISO will place the petition on hold for up to 18 months.
Eighteen (18) months have passed since the Service Center placed the petition on hold	The ISO will either: (a) Deny the petition if the petitioner is no longer in the military Or (b) Administratively close the petition if the petitioner is still in the military.
The petition is denied	The ISO will reopen and/or reactive the petition upon the petitioner's request (at anytime and at no charge to the petitioner).
The petition is administratively closed	The ISO will reopen and/or reactive the petition upon the petitioner's request (at anytime and at no charge to the petitioner).

Appendix 21-10 Memorandum - Processing N-400s Filed Under INA 328 and 329 When Applicant Fails to Responds to a Request for Evidence has been superseded by USCIS Policy Manual, Volume 12: Citizenship and Naturalization as of January 22, 2013.