Chapter 3

Family-Sponsored Immigration

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(Imm. Fund., Rel. #31, 10/10) 3–1
§ 3:1 Introduction

One of the principal objectives of the Immigration and Nationality Act (INA) is family reunification. The high priority assigned to this objective is readily apparent in the preference given to the family members of U.S. citizens and permanent residents in immigrating to the United States. This family-oriented priority also manifests itself in the fact that many forms of relief from removal are available only to close relatives of U.S. citizens and permanent residents.¹

No numerical limitations are placed on the immigration of immediate relatives of U.S. citizens to this country. “Immediate relatives” include spouses and children of U.S. citizens, parents of adult U.S. citizens, and certain widows and widowers of deceased citizens and their children.

The family-sponsored preference system consists of four preference categories; visas allotted to the family-sponsored system are completely separate from the visa allotment for employment-based immigration.

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¹ See discussion infra.
The first family-sponsored preference in the system is for unmarried sons and daughters of citizens. Second preference is divided into two subcategories: The family 2A preference subcategory is for spouses or children (unmarried and under the age of twenty-one) of permanent residents, and the family 2B preference covers adult unmarried sons and daughters of permanent residents. Seventy-five percent of the family 2A immigrants are exempt from the normal per-country numerical limitations. The third family-sponsored preference includes married sons and daughters of U.S. citizens. Finally, brothers and sisters of adult U.S. citizens are covered by the fourth family-sponsored preference.

Visa availability in the family-sponsored visa preference categories varies widely depending on the prospective immigrant’s country of origin. Natives of the Philippines, Mexico, and India typically face the longest delays in obtaining family-sponsored immigrant visas. The longest delays are in the fourth family-sponsored preference category.

This chapter describes the requirements for qualification as an immigrant relative of a U.S. citizen or permanent resident. It details the necessary documentation for establishing a qualifying relationship, and the procedure for obtaining permanent residence on the basis of the relationship.

§ 3:1.1 Structure of the Family-Sponsored Immigration System and Numerical Limits

[A] Immediate Relatives

Without question, the most favored category of family members under the INA is that of immediate relatives of U.S. citizens. There is no numerical restriction on the number of immediate relatives permitted to immigrate each year to the United States and, accordingly, none of the extended delays commonly faced by other family members of citizens and permanent residents in obtaining permanent residence.

The term “immediate relative” includes:

1. spouses and unmarried minor children of U.S. citizens;
2. parents of citizens when the citizen is at least twenty-one years of age; and
3. certain widows and widowers of citizens and their children.\(^2\)

Besides avoiding the wait for an immigrant visa to become available, “immediate relatives” of U.S. citizens enjoy another significant advantage: Unauthorized employment in the United States,

a failure to continuously maintain legal nonimmigrant status, or a violation of the terms of a nonimmigrant visa does not bar an immediate relative from the privilege of adjusting to permanent resident status.\textsuperscript{3}

The terms “child” and “parent,” discussed in more detail below, are extremely important for determining when a person is an immediate relative of a citizen; the terms are carefully defined in the INA.\textsuperscript{4} The more complicated of these terms is “child.” This term can cover children born in wedlock, stepchildren, legitimated children, children born out of wedlock sponsored by their natural mothers or by natural fathers who have a “bona fide parent-child relationship” with them, adopted children, and orphans who will be adopted by U.S. citizens. In most cases, to be considered a “child” for immigration purposes, the alien must be unmarried and under twenty-one years of age.\textsuperscript{5}

Sons and daughters of citizens who do not qualify as children because they are married or are over the age of twenty-one, or both, must usually qualify for immigration in one of the family-sponsored immigrant preference categories, which are subject to numerical limitations, or on another basis, such as diversity immigration or refugee status. Note, however, that legislation enacted in 2002 provides for continued classification of certain aliens as children in cases where the aliens “age out” (turn twenty-one years of age) while awaiting immigration processing.\textsuperscript{6}

The term “parent” does not include the natural father of the child if the child was born out of wedlock and the father has disappeared, abandoned, or deserted the child or if the father has in writing irrevocably released the child for emigration and adoption.\textsuperscript{7}

\textbf{NOTE:} The terms “child” and “parent” are also important in determining eligibility for all of the family-sponsored preference categories, as discussed below. The term “spouse” is also extremely important in determining eligibility for immediate relative status, as well as for determining eligibility for status as the spouse of a permanent resident in the second family-sponsored preference.\textsuperscript{8}

\begin{itemize}
\item 3. INA § 245(c), 8 U.S.C. § 1255(c).
\item 4. INA § 101(b)(1) and (2), 8 U.S.C. § 1101(b)(1) and (2).
\item 5. INA § 101(b)(1), 8 U.S.C. § 1101(b)(1).
\item 7. INA § 101(b)(2), 8 U.S.C. § 1101(b)(2).
\item 8. A full discussion of who is a “spouse” for purposes of immigration benefits is included in section 3:2.2, infra.
\end{itemize}

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Widows and widowers of citizens can qualify for classification as “immediate relatives” only if the following conditions are met:

1. The couple had been married at the time of the citizen spouse’s death;
2. The couple was not legally separated at the time the citizen spouse passed away;
3. The alien spouse has not remarried since the citizen spouse’s death; and
4. The widow or widower files the petition for immediate relative classification within two years of the date of the spouse’s death.9

Note that only direct beneficiaries of immediate relative petitions may immigrate on that basis; the derivative children and spouses of immediate relatives seeking to immigrate may not be included as part of the principal alien’s immigrant visa petition. There are two exceptions to this rule. The children of the alien spouse of a deceased citizen may be included in the petition filed by the alien spouse on Form I-360, and are entitled to derivative classification even if they do not qualify as immediate relatives. Similarly, the children of a self-petitioning spouse of a U.S. citizen/abuser are also entitled to derivative classification. As will be seen below, in some instances an alien may qualify independently for classification as an immediate relative; for example, the child of an alien spouse who qualifies as the immediate relative of a citizen may himself or herself qualify as the stepchild or adopted child of the citizen and therefore be eligible as the beneficiary of a separate immediate relative petition filed by the citizen. In other cases, however, the alien spouse will need to file a separate petition for his or her child in the second family-sponsored preference once the alien spouse has become a permanent resident through the citizen spouse’s immediate relative petition.10

[B] Overall Cap on Family-Based Immigration

An overall cap is placed on the number of family members permitted to immigrate in each fiscal year (beginning October 1). That cap includes immediate relatives of U.S. citizens; because immediate relatives of citizens are permitted to immigrate in unlimited numbers, excessive demand for visas by immediate relatives of citizens can lead to a decrease in visas available to other relatives eligible for family-sponsored immigration. The overall family-based cap is also reduced

10. 8 C.F.R. § 204.1(a)(5).
by the number of persons admitted as parolees under section 212(d)(5) who did not depart or were not granted permanent residence in the second preceding fiscal year. A floor is placed on that decrease, however, so that a minimum number of annual visas is available to those other relatives. Therefore, the overall numerical cap is flexible; once the floor on minimum available visas for other relatives is reached because of excessive demand by immediate relatives of citizens, the overall cap will rise with any further excessive demand for visas by those immediate relatives.

The overall cap for family-sponsored immigrants is set at 480,000. The overall cap can be enhanced by the addition of visa slots from the previous fiscal year unused in the employment-based preferences.

[C] Family-Based Preferences

Under the INA, the minimum level of annual immigration for the four family-sponsored preferences is set at 226,000. The first family-sponsored preference category is set aside for unmarried sons and daughters of U.S. citizens. This preference applies to those sons and daughters of citizens who are twenty-one or older, because unmarried sons and daughters under twenty-one qualify as immediate relatives of citizens, as described above. In order to qualify as a son or daughter, however, the alien must have at one time been a child of the petitioner as that term is defined by the INA.11 Up to 23,400 immigrant visas under the annual numerical allotment for the family-sponsored preferences are assigned to the first preference. This allotment is not affected by whether the annual visas assigned to the family-sponsored preferences are at or above the floor;12 the reason is that any visas assigned to the family-sponsored preferences above the floor are allotted to the second family-sponsored preference for family members of permanent residents. The first family-sponsored preference may receive an increased allotment in a given fiscal year if there are unused visas from the fourth family-sponsored preference for that fiscal year; in practice, such an increased allotment is unlikely to occur.

The second family-sponsored preference, for spouses and unmarried sons and daughters of permanent residents, is allotted up to 114,200 immigrant visas annually, plus any “spill down” from the first family-sponsored preference category. In addition, the second preference will receive any visas in excess of the 226,000 visas set aside as the minimum worldwide number of visas available to aliens qualifying in all four family-sponsored preferences. Under a complicated formula,

12. As described supra.
at least 77% of the annual visas for the second family-sponsored preference must be allocated to spouses and unmarried minor children of permanent residents (the 2A family-sponsored preference). The other 23% are allotted to other unmarried sons and daughters of residents who are twenty-one or older (the 2B family-sponsored preference).

In an effort to reduce the substantial backlogs historically encountered in the second preference by natives from certain high-demand countries, 75% of the 2A preference visas are exempted from the normal per-country limitations. These visas are issued in the order of the priority dates assigned to aliens qualified for such classification, regardless of the alien’s country of birth.\footnote{INA § 202(a)(4)(A), 8 U.S.C. § 1152(a)(4)(A).} When a country’s natives use a proportion of the 2A visas unrestricted by per-country limits at least as large as the total number of visas that would normally be available to that country’s natives in the entire 2A preference, its natives will not have access to any of the 25% of 2A visas available under per-country limits.

Up to 23,400 immigrant visas are available annually in the third family-sponsored preference to married sons and daughters of U.S. citizens, whether those sons or daughters are over or under the age of twenty-one. In addition, any visas not required for aliens in the first and second family-sponsored preferences are available to this preference; as a practical matter, it is unlikely that any such visas will be available.

Finally, 65,000 immigrant visas are allocated each year to the fourth family-sponsored preference for brothers and sisters of U.S. citizens when the citizen is at least twenty-one. The alien brother or sister can be any age, and can be married or unmarried. In order to qualify for immigration, however, the alien and citizen siblings must each at one time have been a “child” of a common parent.\footnote{Beltre v. Kiley, 420 F. Supp. 87 (S.D.N.Y. 1979); In re Heung, 15 I. & N. Dec. 145 (B.I.A. 1974).} Any visas that have not been used in the first three family-sponsored preferences are available to aliens in the fourth preference; as a practical matter, it is unlikely that any such visas will be available. Note that waiting periods for a visa of ten years or more are typical in the fourth family-sponsored preference.

Those aliens who are spouses or children as defined in the INA (for example, unmarried and under twenty-one) of an alien qualified for immigration in one of the four family-sponsored preferences can also immigrate in that preference as “derivative” immigrants.\footnote{INA § 203(d), 8 U.S.C. § 1153(d).}
The derivative immigrants are assigned visas from the same preference as the principal alien. To be eligible for derivative classification, the requisite relationship between the principal alien and his or her immediate family members must have existed at the time the principal alien is admitted to permanent residence. For example, a child who was adopted after the principal alien’s lawful admission to permanent residence does not qualify for derivative classification. Spouses and children of aliens qualified as immediate relatives of citizens cannot, as a general rule, immigrate as derivative immigrants; each person eligible for immediate relative status must be the beneficiary of his or her own immigrant visa petition.

§ 3:1.2 Summary of Procedure

[A] USCIS Petition

In order for an alien to immigrate based on a close family relationship to a citizen or resident, it must first be demonstrated that the alien is eligible for immigration—that is, that a qualifying family relationship exists. It is the role of USCIS to determine eligibility and approve the alien as an intending immigrant. In most family-sponsored immigrant visa cases, the U.S. citizen or permanent resident must file an immigrant visa petition on Form I-130, Petition for Alien Relative, on behalf of the immediate relative or other family member. The citizen or resident is considered the petitioner and the alien is considered the beneficiary of the petition. The principal exceptions to this rule relate to alien widows or widowers of deceased citizens who are self-petitioning, U.S. citizens seeking immediate relative status on behalf of an orphan, and certain spouses who have been battered by a permanent resident or U.S. citizen spouse and who are self-petitioning.17

The petition must be accompanied by evidence of the close family relationship upon which immigration benefits are sought:

1. the sponsor is a citizen or permanent resident; and
2. there is a qualifying family relationship between the sponsor and the relative.

The type of evidence that is necessary depends on the type of relationship to be established, and if a parent-child relationship is

16. As noted supra.
17. The special procedures applicable to such groups are discussed in sections 3:3.5 to 3:3.7, infra.
important to the qualification of the alien for residence, on the manner in which the alien (or citizen or resident, if applicable) qualifies as a child under the INA. Similarly, if a widow or widower wishes to establish an immediate relative relationship, he or she must present documentation relating to the deceased spouse’s citizenship and the couple’s spousal relationship at the time of death.

**[B] Adjustment of Status or Immigrant Visa Processing**

Concurrent filing of the immigrant visa petition and the application for permanent residence is permissible in certain family-sponsored residence cases, if the sponsored alien is in the United States and an immigrant visa is immediately available. As a practical matter, because immigrant visas are always available to immediate relatives of citizens, most immediate relatives who have been admitted following inspection are able to file adjustment-of-status applications together with the sponsor’s petition. The major advantage of adjusting status is the ability to obtain permanent resident status without leaving the country to get an immigrant visa at a U.S. consulate. Separate fees and supporting documents are required for the adjustment application. If the adjustment of status is approved, the alien will be admitted to permanent residence and the alien will be given temporary evidence of such status until he or she is processed for an alien registration receipt card (the so-called green card). Note that certain classes of aliens are ineligible for adjustment of status even if they are in the United States and a visa is immediately available to them, for example, J-1 exchange visitors who are subject to the two-year foreign residence requirement of section 212(e) of the INA.

In cases in which an immigrant visa is not immediately available in one of the four family-sponsored preferences, the alien is not present in the United States or is ineligible to adjust to permanent resident status, the immigrant visa petition must be filed separately with USCIS as a preliminary step to obtaining permanent residence. If the petition is approved, it is forwarded by USCIS to the National Visa Center (NVC) unless the immigrant visa petition is for a person who is eligible for adjustment of status and a visa is available in the immediate future, in which case, USCIS will retain the petition. The NVC handles immigrant visa petitions in several different

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18. 8 C.F.R. § 245.1(b)(3).
19. The requirements and procedures governing adjustment of status are discussed in detail in sections 2:10.2 and 2:10.3, supra.
ways, depending on whether an immigrant visa is immediately available to the alien at the time that the INS approves the petition, and whether the alien is applying for adjustment of status. If an immigrant visa is not currently available, but the alien intends to adjust to permanent resident status, the petition will be held by the NVC. If the visa subsequently becomes available and the alien remains eligible for adjustment of status, USCIS will retrieve the approved petition from the NVC when it receives the adjustment application. In all other cases, the NVC handles the initial steps in the immigrant visa process. Immigrant visa processing at a U.S. consulate abroad is the alternative route through which a beneficiary of an approved immigrant visa petition may complete the process in obtaining permanent resident status.

If an immigrant visa is not currently available for the beneficiary, the petition is stored at the NVC and a letter is sent to the applicant, advising that further processing will be undertaken when the applicant’s place on the immigrant visa waiting list is reached. If the immigrant visa petition is approved in the United States, an immigrant visa is available for immediate issuance, and the petitioner indicated that the beneficiary intends to visa process at a consular post abroad, the NVC will send a processing fee bill for Form I-864, the Affidavit of Support, as well as Form DS-3032, Choice of Agent and Address to the applicant. Once the I-864 processing fee is paid, NVC will send the I-864 forms and instructions to the petitioner. When the NVC receives Form DS-3032 from the applicant, NVC will mail the Immigrant Visa fee bill to the agent of choice. Once the IV fee bill is paid, NVC will send the Instruction Package of forms and information to the agent. This is the package of information notifying the intending immigrant of the documents that must be obtained and the steps that must be taken before an immigrant visa interview can be scheduled.

Once the documents required in the Instruction Package are assembled, the next step will differ depending on which consular post will adjudicate the case. Some applicants will be asked to send their documentation to the NVC, which will prescreen the documents before forwarding the case to the post abroad. Once the prescreening is completed, the NVC will send the Appointment Package to the applicant, including the visa appointment letter and instructions for obtaining a medical examination. Other applicants will be asked to hold most documents requested in the Information Package. When all of the documents listed in the Instruction Package are gathered, the applicant may notify the consular post that he or she is ready to proceed, and the consular post will send the Appointment Package to the applicant.
NOTE: Whether the family-sponsored immigrant is applying for adjustment of status or is obtaining an immigrant visa abroad, most family-sponsored immigrants must submit a legally binding affidavit of support, Form I-864, as part of their applications for immigrant visas or adjustment of status. The affidavit must be executed by the sponsor on behalf of the intending immigrant. In addition, documentation must be submitted that the sponsor has the means to support the intending immigrant at an income that is at least 125% of the federal poverty guidelines. The sponsor’s obligations under the affidavit continue until the alien becomes a U.S. citizen or until he or she has worked in the United States for a period of ten years. These requirements were established by the IIRIRA. While affidavits of support were required under prior law, such affidavits were not legally binding on the petitioner. Moreover, evidence that the petitioner had an income that was at or above the poverty guidelines was sufficient.20

§ 3:2 Definition of Qualifying Relationships

§ 3:2.1 Child-Parent

The determination as to whether an alien qualifies for immigration based on a family relationship often will depend on whether there exists a child-parent relationship. For example, if the widowed parent of a seventeen-year-old, unmarried alien marries a U.S. citizen, the alien becomes the stepchild of the citizen under the INA, and therefore is a “child” for immediate relative purposes.21 Similarly, proving the existence of a parent-child relationship is a key element in establishing eligibility in the 2A family-sponsored preference for those children of permanent residents who are unmarried and under twenty-one.

Even in cases not directly involving “children,” however, such as when adult or married sons and daughters seek to immigrate in either the first, 2A, or third family-sponsored preference, it must be

20. The affidavit of support requirements applicable in family-based cases are discussed in section 3:4.1, infra.
established that the son or daughter was classifiable at one time as a child.22 Therefore, if the seventeen-year-old child in the example above is already married at the time of his or her parent’s remarriage to a U.S. citizen and remains married through his or her eighteenth birthday, he or she will not qualify as a “stepchild” under the INA and therefore will never be able to qualify as a “son” or “daughter” of the citizen for immigration purposes.

Seven subcategories of the term “child” are set out in the INA:

1. children born in wedlock;
2. stepchildren, whether or not born out of wedlock, if the marriage creating the step relationship occurs before the child turns eighteen;
3. children legitimated by the age of eighteen, provided the child is in the legal custody of the legitimating parent at the time of legitimation;
4. children born out of wedlock of a natural mother, or of a natural father, if there exists a bona fide parent-child relationship between the father and child;
5. children who are adopted before the age of sixteen, if the child has been in the legal custody of, and has resided with, the adopting parent(s) for at least two years;
6. orphans under the age of sixteen on whose behalf an immediate relative petition has been filed, provided that a number of conditions have been met and procedures followed by the citizen parent or parents; and
7. Convention adoptees23 under the age of sixteen on whose behalf an immediate relative petition has been filed, provided certain complex and technical requirements are met.24

Until the mid 1990s, the issue of whether an alien child was “legitimate” or “illegitimate” was extremely important in cases involving children born out of wedlock. A legitimate child was a child of both the natural mother and father. An illegitimate child was regarded as the child of its natural mother, while a natural father could confer immigration benefits on an illegitimate child only if the father has or had a bona fide relationship with the child. Legislation

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23. “Convention adoptees” are discussed below in further detail.
24. INA § 101[b][1], 8 U.S.C. § 1101[b][1].
enacted in 1995 removed the terms "legitimate" and "illegitimate" from the INA and replaced them with the terms "child born in wedlock" and "child born out of wedlock." Because of this statutory change, it has no longer been necessary to determine whether a child born out of wedlock is regarded as legitimate or illegitimate. Whether a child was legitimate at birth was a highly complex and obscure determination resting on the law of the jurisdiction of the birth at the time of birth; changes to the law after the child’s birth also raised complicated issues. Under the 1995 amendments, a natural mother may confer immigration benefits on a child whether or not the child was born out of wedlock as under prior law. A natural father may confer immigration benefits on a child if:

(1) the child was born in wedlock;

(2) a child born out of wedlock is legitimated prior to the age of eighteen (see discussion below); or

(3) the natural father has or had a bona fide parent-child relationship with the child born out of wedlock.\(^{25}\)

The 1995 amendments also rendered moot the substantial case law that had developed defining the terms “legitimate” and “illegitimate.” Under the second subcategory of section 101(b)(1) of the INA,\(^{26}\) some children who were born out of wedlock at birth may qualify as “children” if they are legitimated before their eighteenth birthdays. Legitimation can occur in one of two ways: (1) the law of the jurisdiction where the child was born can retroactively eliminate all distinctions between legitimate and illegitimate children prior to the time the alien reaches the age of eighteen;\(^ {27}\) or (2) the father can legitimate the child under the law of the child’s or father’s place of residence, again if done prior to the time the child turns eighteen. In both cases, the child must be in the legal custody of the father at the time of legitimation. In some jurisdictions, a child can be legitimated by the marriage of his or her parents. If the marriage occurs before the child turns eighteen, the child will be deemed legitimated for immigration purposes as well.\(^ {28}\) Legitimation for purposes of making an alien a “child” under the INA can also occur by judicial fiat or through acknowledgment of the child by the natural father, as long as the act of acknowledgment erases all disabilities of illegitimacy.\(^ {29}\) With

\(^{25}\) See discussion infra.
\(^{26}\) 8 U.S.C. § 1101(b)(1).
\(^{27}\) In re Clahar, 18 I. & N. Dec. 1 [B.I.A. 1981].
regard to the legal-custody requirement, the Board of Immigration Appeals (BIA) has held that legal custody will be assumed at the time of legitimation, as long as no affirmative evidence to the contrary is presented.\textsuperscript{30}

The INA also permits the conferral of immigration benefits based on a relationship between an illegitimate child and his or her natural father if the father has or had a bona fide parent-child relationship with the person. Evidence of a bona fide parent-child relationship may include proof of financial support, as well as other documented actions that reflect the existence of such a relationship. A blood relationship must also be established by clear and convincing evidence.

An alien also can qualify as a “child” for immigration purposes if a step relationship is created with a parent before the child reaches the age of eighteen. Under this rule, a child born out of wedlock whose father marries a U.S. citizen before the child turns eighteen can be sponsored for immigration by the citizen stepparent, to whom the alien is a “child,” even if the child could not be sponsored by the father because of the lack of a bona fide parent-child relationship.\textsuperscript{31} In fact, it has been repeatedly held that the stepparent need not have taken an active parental interest in the stepchild; as long as the bare requirements as set forth in the statute are met—a step relationship created by marriage to a natural parent before the child, whether or not born out of wedlock, reaches eighteen—the alien child is considered to be a “child” under the INA.\textsuperscript{32}

Certain aliens who have been adopted before they reached the age of sixteen are also considered “children” for immigration purposes. Such persons must have been legally adopted under the law of the place of adoption, and must have been in the legal custody of, and residing with, the adopting parent(s) for at least two years.\textsuperscript{33} Under the statute, the requisite two-year period of legal custody and residence may take place either prior to or after the formal adoption.\textsuperscript{34} The issue of legality of the adoption is fairly straightforward in jurisdictions with codified adoption laws or in countries, such as those governed by Islamic law, in which adoption is not recognized.\textsuperscript{35} Some jurisdictions recognize “customary” adoptions, however; in cases in which the alien was

\begin{itemize}
  \item \textsuperscript{30} In re Rivers, 17 I. & N. Dec. 419 [B.I.A. 1980].
  \item \textsuperscript{31} See discussion infra.
  \item \textsuperscript{33} INA § 101[b][1][E], 8 U.S.C. § 1101[b][1][E] (1991).
  \item \textsuperscript{34} In re Ho, 19 I. & N. Dec. 582, 583 n.1 [B.I.A. 1988]; In re Repuyan, 19 I. & N. Dec. 119, 120 [B.I.A. 1984].
\end{itemize}
adopted in this manner, it is necessary to conduct a thorough analysis of local law and custom to determine

1. whether the local authorities have established prerequisites for customary adoption to be recognized;

2. whether the customary adoption creates substantial legal rights and obligations sanctioned by the government; and

3. whether the proper rituals or procedures were followed to form the adoptive relationship.36

**NOTE:** The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption ("Hague Convention")37 impacts the ability of children to qualify as an "adopted child" under section 101(b)(1)(E). Specifically, USCIS may not approve a Form I-130 on behalf of an adopted child under section 101(b)(1)(E) that is filed by a citizen who is habitually resident in the United States on behalf of a child, son, or daughter who is habitually resident in a Hague Convention country unless the citizen completed the adoption of the child before April 1, 2008. If the citizen adopted the child from a Hague Convention country on or after April 1, 2008, a Form I-130 under section 101(b)(1)(E) may be approved only if the citizen establishes that, at the time of the adoption, either the U.S. citizen was not habitually resident in the United States or the child was not habitually resident in the other Hague Convention country. If the adoption by the U.S. citizen occurred before April 1, 2008, the Hague Convention requirements do not apply even if the U.S. citizen was habitually present in the United States or the child was habitually present in a Hague Convention country at the time of adoption. In addition, a permanent resident may file a Form I-130 on behalf of an adopted child under section 101(b)(1)(E) even if the child is habitually resident in a Hague Convention country provided the two-year custody and joint resident requirements are met.


Another subcategory of “children” consists of alien orphans under the age of sixteen who will be adopted by U.S. citizens. The statute specifically provides that an alien is an eligible orphan if both parents have died or disappeared, or if the alien has been abandoned by, deserted by, or separated from the parents. If one parent is surviving, it must be demonstrated that parent is incapable of supporting the alien and has irrevocably released the alien for adoption. A child is considered as having only one “surviving parent” if one parent has died and a step relationship has not been formed (that is, the surviving parent has not remarried). Statutory amendments enacted in 1995 permit a mother to be considered a “sole” parent if:

1. the child was born out of wedlock;
2. the child has not been legitimated under the law of the child’s residence or domicile or under the law of the natural father’s residence or domicile while the child was in the legal custody of the legitimating parent;
3. the child has not acquired a stepparent; and
4. the natural father has disappeared, deserted, or abandoned the child or the father has in writing irrevocably released the child for emigration and adoption.

The amendment permits the adoption of alien children who were born out of wedlock but were regarded as “legitimate” under the laws of the country of birth. Under prior law, such children were ineligible for “orphan” status. The orphan child must be adopted by a U.S. citizen and spouse jointly or by an unmarried U.S. citizen of at least twenty-five years of age.

The child must have been adopted abroad or be coming to the United States for adoption. If the child was adopted abroad, the parent or parents must have personally observed the child prior to or during the adoption proceedings. If the foreign adoption is invalid for immigration purposes, the child must be readopted in the United States. If the child is coming to the United States for adoption, the petitioner must establish that he or she has complied with the preadoption requirements, if any, of the child’s proposed residence. The state of proposed residence must also allow readoption if any foreign adoption is invalid for immigration purposes. Lastly, the USCIS must be satisfied that proper care will be furnished to the child if he or she is admitted to the United States. In accordance with this legislative

38. INA § 101[b][1][F], 8 U.S.C. § 1101[b][1][F].
39. 8 C.F.R. § 204.3(b).
mandate, immigration rules provide that an evaluation (home study) of the petitioner’s suitability as a parent must be made before the child may be accorded orphan status.\footnote{8 C.F.R. § 204.3(e).}

**NOTE:** The Hague Convention impacts the ability of children to qualify for “orphan” children benefits under section 101(b)(1)(F). Specifically, as of April 1, 2008, the Convention and section 101(b)(1)(G) govern the immigration of any child who is habitually resident in a Convention country and who is adopted, or will be adopted, by a U.S. citizen who is habitually resident in the United States. It is no longer possible for a child who is habitually resident in a Convention country and who is, or will be, adopted by a U.S. citizen habitually resident in the United States to immigrate under INA section 101(b)(1)(F) as an orphan. A child may immigrate as an orphan under section 101(b)(1)(F) only if the child does not habitually reside in a Convention country. In addition, USCIS has indicated that it will continue to process orphan petitions that were pending on April 1, 2008.

On December 12, 2007, the United States deposited its instrument of ratification for the Hague Convention. In accordance with the terms of the Hague Convention, the treaty entered into force in the United States on April 1, 2008. As of that date, the Hague Convention governs the requirements and procedures of all incoming adoption cases where children are emigrating to the United States from a foreign country that is a party to the Hague Convention. Cases subject to the Hague Convention include adoption cases initiated by a U.S. citizen in the child’s country of residence, provided the child will be adopted in a foreign state that is a party to the treaty or is immigrating from such a foreign state to be adopted in the United States. The Hague Convention requirements do not apply if the child does not habitually reside in a Convention country or the adoptive parents do not habitually reside in the United States.

Section 101(b)(1)(G) of the INA, added by legislation enacted in 2000,\footnote{Section 302 of the Intercountry Adoption Act, Pub. L. No. 106-279, 114 Stat. 825.} governs the immigration of children who are adopted, or are
coming to the United States to be adopted, by U.S. citizens under the Hague Convention. USCIS rules implementing the Hague Convention were issued in October 2007.42 A Convention adoptee may qualify for immigration benefits if:

(1) the child is habitually resident in a country that is a party to the Hague Convention;

(2) the child is under sixteen years of age when the immediate relative petition is filed;

(3) the child has:
   (a) two living parents who are incapable of providing proper care for the child,
   (b) one sole or surviving parent because of the death, disappearance, abandonment or desertion by the other parent, or
   (c) a legal custodian other than a birth parent (for example, an adoptive parent or institution);

(4) the parent[s], legal guardians, or institutions freely give their written irrevocable consent to terminate their legal relationship with the child, and to allow the child to be adopted and to emigrate;

(5) at least one of the adoptive parents must be a U.S. citizen, the parents must be habitually resident in the United States, the parents (if married) must adopt the child jointly, and the parents must be suitable for adoption; and

(6) the child must have been the subject of a full and final foreign adoption which is effective for immigration purposes, or the prospective adoptive parents must have custody of the child for emigration and adoption in the United States in accordance with the laws of the foreign-sending country, and appropriate steps must have been taken to secure the child’s adoption in the United States.

Prospective adoptive parents must also comply with local laws regarding adoptions. Attempts at circumventing these laws will lead to rejection of the USCIS petition, since reports issued by the central authority of the sending country are now required under the Hague Convention. Also note that most prospective adoptive parents seeking

to complete an adoption use the services of an adoption agency. Under the Hague Convention, adoption services may only be provided by individuals who, or agencies that, are authorized by the DOS to provide these services. DOS rules issued in February 2006 establish the accreditation and approval standards for agencies and persons, the requirements applicable to potential accrediting entities, and a framework for the agency’s oversight of accrediting entities, agencies, and persons.\(^{43}\)

To be considered a “Convention adoptee,” the child must be habitually resident in a country that is a party to the Hague Convention, and the child must be under sixteen years of age when the immediate relative petition is filed. Unlike the orphan statute, there is no provision for the adoption of older siblings of a Convention adoptee. On the other hand, the Hague Convention permits the adoption of a child who has two living parents provided the natural parents are incapable of providing proper care for the child. Adoption of a child of a single living parent is permitted provided the child has one sole or surviving parent because of the death, disappearance, abandonment, or desertion by the other parent. Adoption is also permitted from a person (such as an adoptive parent) or institution that has legal custody of the child. In all cases, the parent(s), legal guardians, or institutions must freely give their written irrevocable consent to terminate their legal relationship with the child, and to allow the child to be adopted and to emigrate.

NOTE: The child will ordinarily be deemed to be habitually resident in the country of the child’s citizenship.\(^{44}\) If the child lives in a country other than the country of citizenship, the child will be considered habitually resident in that country only if the child’s status is sufficiently stable for that country properly to exercise jurisdiction over the child’s adoption or custody. USCIS will defer to the determination of that other country’s central authority on this issue. If the child’s presence in a country other than the country of citizenship is only temporary, the child will be deemed to be habitually resident in the country of citizenship.

\(^{44}\) 8 C.F.R. § 204.303(b).
As a matter of jurisdiction, the prospective adoptive parent must be habitually resident in the United States. In addition, only a U.S. citizen may file a petition to seek immediate relative status for a Convention adoptee. If the petitioner is married, the petitioner must file the petition jointly with his or her spouse. The spouse of the U.S. citizen does not need to be a U.S. citizen to file the petition. An unmarried U.S. citizen petitioner must be at least twenty-five years of age to file the petition.

**NOTE:** To permit broad availability of the Hague Convention procedures, the USCIS rules provide that, in addition to U.S. citizens who are actually domiciled in the United States, a U.S. citizen who has been living abroad will also be deemed to be “habitually resident” in the United States if the U.S. citizen will be returning to establish a domicile in the United States on or before the date of the child’s admission with an immigrant visa. The U.S. citizen who is living abroad will also be considered to be habitually resident in the United States, for purposes of a Convention adoption, if the U.S. citizen will be bringing the child to the United States after the child’s adoption and before the child’s eighteenth birthday, so that the child may be naturalized under INA section 322.

A prospective adoptive parent(s) cannot file for a Convention adoptee if the parent(s):

1. filed a prior Form I-800A that USCIS denied;
2. filed a prior Form I-600A that USCIS denied;
3. filed a prior Form I-800 that USCIS denied;
4. filed a prior Form I-600 that USCIS denied.

This bar against filing a subsequent Form I-800A or Form I-800 expires one year after the date on which the decision denying the prior Form I-800A, I-600A, I-800, or I-600 became administratively final.

To immigrate as a Convention adoptee, the child must have been the subject of a full and final foreign adoption that is effective for

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45. 8 C.F.R. § 204.303[a].
46. 8 C.F.R. § 204.307[c].
immigration purposes, or the prospective adoptive parents must have custody of the child for emigration and adoption in the United States in accordance with the laws of the foreign-sending country, and appropriate steps must have been taken to secure the child’s adoption in the United States. If the child has not been adopted abroad or the adoption is not effective for immigration purposes (for example, the decree does not list both parents in the case of a married prospective adoptive parent), the parent[s] must intend to adopt the child in the United States. In such circumstances, the following requirements must be satisfied: (1) a competent authority of the foreign state must approve the child’s emigration to the United States for the purpose of adoption by the prospective adoptive parent or parents [as reflected in a legal custody grant issued to the prospective adoptive parent[s]];\(^{47}\) and (2) the petitioner must comply with all preadoption requirements, if any, of the state of the child’s proposed residence, except those requirements which cannot be complied with prior to the child’s arrival in the United States because of state law.\(^{48}\)

The Hague Convention restricts the ability of the prospective adoptive parents to have contact with the prospective adoptee’s parents or other custodians. To implement this provision, the USCIS rules provide that a Form I-800 must be denied if any such contact occurred before the contact was legally permitted.\(^ {49}\) Generally, contact is permitted only after USCIS has approved a Form I-800A and after the Convention country has determined that the child is eligible for intercountry adoption and that the necessary consents to adoption have been given. Earlier contact is permitted only if permitted by the competent authority of the Convention country, or the petitioner had, before the adoption, a familial relationship with the child’s parents. In the case of a child who was adopted without compliance with these requirements, if the other Convention country voids the adoption and allows the child to be adopted again after complying with the Hague Convention, any contact that had occurred will be considered to have been approved.

The Hague Convention rules, like the orphan rules, prohibit child-buying. The USCIS rules provide that neither the petitioner, nor any individual or entity acting on behalf of the petitioner may pay, give anything of value to any individual or entity or request, receive, or accept from any individual or entity, any money or anything of value to induce or influence any decision concerning:

\(^{47}\) 8 C.F.R. § 204.301.
\(^{48}\) 8 C.F.R. § 204.305.
\(^{49}\) 8 C.F.R. § 204.309(b)(2).
§ 3:2.2  Spouse

Another important relationship for purposes of family-sponsored immigration is that of husband and wife. Spouses of citizens qualify as immediate relatives who can immigrate regardless of any numerical limitation, while spouses of permanent residents can qualify as immigrants in the 2A preference subcategory. Although alien spouses of persons qualifying as immediate relatives on the basis of a parent-child relationship are ineligible for derivative status, spouses of other aliens qualified for immigration in one of the family-sponsored preference categories can immigrate as derivative immigrants.\(^{53}\)

Whether an alien qualifies as a spouse depends upon three factors:

1. The validity of the marriage under the law of the jurisdiction where it was performed;
2. Whether the marriage was entered into in order to confer an immigration benefit on the alien (a sham marriage); and
3. The current status of the marriage.

The only legally sanctioned marriage defined by the INA to be invalid for immigration purposes is one in which the two parties were

\(^{50}\) 8 C.F.R. § 204.304(a).


\(^{52}\) Except where he or she is protected by the provisions of the Child Status Protection Act; see section 3:1.1[A], supra.

\(^{53}\) As discussed supra.
not physically in the presence of each other at the time of the marriage ceremony, unless the marriage was subsequently consummated.\textsuperscript{54} Other marriages may be invalid at their inception because one of the parties lacked legal capacity or because the marriage is against the law of the jurisdiction.\textsuperscript{55}

The most common impediment to a valid marriage, however, is the objection that one of the parties lacked capacity to marry because of the invalidity of a prior divorce. Any prior divorce must meet the legal standards of the jurisdiction where the divorce decree is entered, and must be recognized in the jurisdiction where the subsequent marriage occurs.\textsuperscript{56} While all U.S. divorces are considered valid,\textsuperscript{57} determining the validity of divorces in foreign jurisdictions is often a complicated task.\textsuperscript{58} This difficulty can be compounded when the foreign jurisdiction recognizes “customary” divorces and marriages; in such instances, it is necessary to study the actual facts of the divorce or marriage procedure or ceremony to determine whether the proper ritual was followed.\textsuperscript{59}

Even if a marriage is valid at its inception, it may be considered sham for immigration purposes if it was entered into to confer an immigration benefit on the alien. The general authority to investigate the bona fides of a marriage relationship for purposes of conferring an immigration benefit appears in section 204(b) of the INA. The basic test in all cases will be whether the parties entered into the marriage sharing the intention to establish a life together. Thus, the fact that the couple is presently divorced or separated does not necessarily negate the validity of the marriage for immigration purposes, although such circumstances may raise questions as to the bona fides of the marriage. In addition to this general investigatory authority, section 204(c) of the INA bars the approval of a visa petition for a person who previously obtained, or attempted or conspired to obtain, immigration benefits by reason of a marriage determined to have been entered into for purpose of evading the immigration laws.

Several other provisions added by the Immigration Marriage Fraud Amendments of 1986 (IMFA) are also designed to combat sham

\textsuperscript{55} In re Agoudemos, 10 I. & N. Dec. 444 (B.I.A. 1964) [not of legal age]; In re T., 8 I. & N. Dec. 529 (B.I.A. 1960) [incest].
\textsuperscript{57} In re Pajarillo, 12 I. & N. Dec. 743 (B.I.A. 1968).
\textsuperscript{58} See, e.g., In re Luna, 18 I. & N. Dec. 385 (B.I.A. 1983); In re Zorrilla, 18 I. & N. Dec. 378 (B.I.A. 1983) [Dominican divorce law].
\textsuperscript{59} In re Dabaase, 16 I. & N. Dec. 39 (B.I.A. 1976), aff’d, 627 F.2d 117 [8th Cir. 1980] (per curiam) [customary divorce in Ghana], as modified by In re Kumah, 19 I. & N. Dec. 290 (B.I.A. 1985) [requiring evidence of official Ghanaian divorce decree before undertaking fact analysis].
marriages. First, the INS cannot approve the spousal second preference petition of permanent residents who have been accorded their status based on a prior marriage unless:

1. a period of five years has elapsed after the alien acquired the permanent resident status;
2. the alien establishes through clear and convincing evidence that the prior marriage was not entered into for purposes of evading the immigration laws; or
3. the prior marriage was terminated through the death of the petitioner’s spouse.\(^{60}\)

Second, an immigrant visa petition cannot be approved for an alien who has married after commencement of removal proceedings until the alien has resided outside of the United States for two years after the marriage.\(^{61}\) The alien can obtain a “bona fide marriage” waiver of the foreign residence requirement if the alien establishes by clear and convincing evidence that:

1. the marriage was entered in good faith and in accordance with the laws of the place where the marriage took place;
2. the marriage was not entered into for the purpose of procuring the alien’s entry as an immigrant; and
3. no fee or other consideration was given (other than a fee or other consideration to an attorney for assistance in preparing petitions) for the filing of a petition on behalf of the alien.\(^{62}\)

In order to establish that the marriage is bona fide, the following types of evidence must be submitted:

1. documentation showing joint ownership of property;
2. lease showing joint tenancy of a common residence;
3. documentation showing commingling of financial resources;
4. birth certificates of children born to the petitioner and beneficiary; and
5. affidavits of third parties having knowledge of the bona fides of the marital relationship.\(^{63}\)

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\(^{60}\) INA § 204(a)(2)(A).
\(^{61}\) INA § 204(h).
\(^{62}\) INA §§ 245(e)(3) and 204(h).
\(^{63}\) 8 C.F.R. § 204.2(a)(1)(iii)(E).
Because it may take some time for adjudication of the waiver, the alien will likely need to seek a continuance of the removal hearing.

Finally, under IMFA, aliens who obtain an immigration benefit on the basis of a marriage entered into within two years of the time the benefit is conferred will be granted conditional resident status for a period of two years. Before this period ends, the couple must file a joint petition to remove the conditional basis of the alien’s residence; failure to do so results in automatic termination of the alien’s resident status.\(^{64}\) When the conditional resident is unable or unwilling to obtain the cooperation of the citizen or resident spouse or parent, he or she will be required to file an application for waiver of the joint petition requirement.\(^{65}\)

There generally is no requirement that a marriage currently be viable in order for it to be the basis for conferring immigration benefits. In most cases, as long as the couple entered into a bona fide marriage and have neither divorced nor legally separated pursuant to a formal written instrument, they will be considered spouses for immigration purposes.\(^{66}\)

§ 3:3 Preparation of the Petition and USCIS Processing

§ 3:3.1 Petition Package

[A] Generally

Generally, the U.S. citizen or permanent resident relative through whom the alien qualifies for immigration must submit a petition to USCIS to establish the eligibility of the alien for immediate relative or preference classification. The principal exceptions to this rule relate to widows or widowers of U.S. citizens and battered spouses or children of U.S. citizens or permanent residents who may file petitions on their own behalf.

The petition may, under certain circumstances, be filed in conjunction with an application by the alien for adjustment to permanent resident status.\(^{67}\) Filing the petition is a necessary preliminary step to obtaining permanent residence; USCIS must first adjudicate the alien’s eligibility for immigration under the family-sponsored visa

\(^{64}\) INA § 216(c), 8 U.S.C. § 1186(c).

\(^{65}\) Id. The requirements for filing the joint petition, or, in appropriate cases, the waiver application, are discussed in detail in section 3:5, infra.


\(^{67}\) See discussion infra.
allocation system before the alien may actually apply for an immigrant visa or for adjustment of status to permanent resident.

Petitions for family-sponsored preference classification and, in most cases, for immediate relatives, are made on Form I-130. The procedures differ for alien widows or widowers of deceased citizens who are self-petitioning, U.S. citizens seeking immediate relative status on behalf of an orphan, U.S. citizens seeking immediate relative status on behalf of Convention adoptees, and certain spouses who have been subject to abuse by a U.S. citizen or permanent resident spouse and who are eligible for self-petition benefits.\(^68\)

In most cases, the I-130 petition must be accompanied by proof of two facts:

1. The citizenship or permanent resident status of the petitioner or person through whom immigrant status will be acquired; and

2. The qualifying relationship between the petitioner and the alien.

As a general rule, supporting documents must be in the form of primary evidence, if available.\(^69\) When it is established that primary evidence is not available, secondary evidence may be accepted. To determine the availability of primary documents, USCIS will refer to the DOS’s Foreign Affairs Manual. If the Foreign Affairs Manual shows that primary documents are generally available but the petitioner claims that his or her document is not available, a letter from the appropriate registrar stating that the document is not available must be obtained before USCIS will accept secondary evidence. Thus, a letter from the appropriate registrar attesting to the fact that a primary document to support a family preference petition is not available is required whenever the Foreign Affairs Manual indicates that primary documents are generally available. USCIS permits the petitioner to submit copies of all documents required to establish either of these facts, although it reserves the right to request submission of originals.\(^70\) Certification of the copies of documents by an attorney or by USCIS is no longer required.

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\(^{68}\) The special procedures for obtaining immediate relative classification for an alien widow or widower are discussed in section 3:3.5, infra. Procedures applicable to U.S. citizens seeking immediate relative status for orphans are covered in section 3:3.6, infra. Procedures applicable to U.S. citizens seeking immediate relative status on behalf of Convention adoptees are described in section 3:3.7, infra. The self-petitioning procedures applicable to certain battered spouses of permanent residents or U.S. citizens are discussed in section 3:3.8, infra.

\(^{69}\) 8 C.F.R. § 204.1(f)(1).

\(^{70}\) 8 C.F.R. § 204.1(f)(2).
[B] Evidence Regarding Petitioner

With regard to proof of U.S. citizenship or lawful permanent resident status, various alternative forms of evidence may be presented. Primary evidence of U.S. citizenship or lawful permanent resident status includes:

1. a birth certificate that establishes petitioner’s birth in the United States;
2. an unexpired U.S. passport issued initially for a full ten-year period to a petitioner over the age of eighteen as a U.S. citizen;
3. an unexpired U.S. passport issued initially for a full five-year period to the petitioner under the age of eighteen as a U.S. citizen;
4. a statement of a consular officer that the petitioner is a U.S. citizen with an unexpired passport;
5. if a naturalized citizen, the certificate of naturalization;
6. if a citizen through birth to one or more U.S. citizen parents, a certificate of citizenship, if one was issued;
7. DOS Form FS-240, Report of Birth Abroad of a Citizen of the United States, relating to the petitioner; or
8. if a lawful permanent resident, the petitioner’s alien registration receipt card, Form I-551.\(^{71}\)

Secondary evidence of the petitioner’s U.S. citizenship or lawful permanent resident status includes:

1. a baptismal certificate with the seal of the church, showing the date and place of birth in the United States and the date of baptism;
2. affidavits sworn to by persons who are familiar with the events of birth of the petitioner and who were living at the time of the event to which they attest;
3. early school records (preferably from the first school) showing the date of admission to the school, the child’s date and place of birth, and the names and places of birth of the child’s parents;
4. census records showing the name, place of birth, and date of birth or age of the petitioner;

\(^{71}\) 8 C.F.R. § 204.1(g)(1).
when the petitioner is a member of the U.S. armed forces serving outside of the United States, a statement from the “appropriate authority of the armed forces” stating that the petitioner’s personnel records show him or her to be born in the United States (such evidence may be submitted only if it is determined that it would cause unusual delay or hardship to obtain documentary proof of birth in the United States); or

(6) temporary evidence of lawful permanent resident status in the form of an “ADIT” stamp in a valid passport or on an I-94.  

NOTE: With regard to affidavits, this form of evidence must give identification information about the person making the affidavit (name, age, relationship to the person for whom the affidavit is being made), full information about the event in question, and the basis for the person’s knowledge of the event.

NOTE: Legislation enacted in July 2006 bars convicted sex offenders from petitioning for family members. Specifically, the law amends the INA to prevent both U.S. citizens and lawful permanent residents who have been convicted of a “specified offense against a minor” from successfully petitioning for family members. The law permits the Secretary of the DHS to waive the bar if, in his sole discretion, he determines that the petitioner poses no risk to the alien relative for whom a petition is being filed. If a petitioner’s background check reveals any sexual or kidnapping offenses outlined under the new law, a request for evidence will be issued for all police arrest records and court disposition documents, and the petitioner will be scheduled for fingerprinting.

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72. 8 C.F.R. § 204.1(g)(2).
74. See USCIS Interoffice Memorandum from Michael Aytes, Assoc. Dir., Domestic Operations, Guidance for Adjudication of Family-Based
Proving the underlying relationship on which eligibility to immigrate is founded can be much more complex than proving the petitioner’s status. The type of evidence that must be submitted with the petition varies depending on the type of relationship involved and the facts of each particular case. When a petition is filed on behalf of a spouse, it must be accompanied by a certificate of marriage between the petitioner and the beneficiary and, if applicable, proof that all previous marriages of both spouses were terminated. Divorce decrees or death certificates are the typical kinds of evidence presented for the latter. In addition, in spousal cases the I-130 petitioner must submit a color photograph of each spouse (passport-style) and a completed G-25A biographic information form for each spouse.

When a petition is filed by the mother of a child, the mother should submit a copy of the child’s birth certificate showing her name; if no birth certificate is available, the petitioner must submit suitable alternative documentation, together with a certificate of unavailability from the registrar of births. If the name of the mother or child on the birth certificate differs from that on the petition, perhaps through a subsequent marriage, she must submit evidence of the name change.

If the father is submitting the petition on behalf of his child born in wedlock, or if a stepparent is filing a petition on behalf of a stepchild, he must submit the child’s birth certificate as well as the parents’ marriage certificate and, if applicable, proof of termination of the parents’ prior marriages. If the natural father is submitting the petition on behalf of a child born out of wedlock, the petitioner must submit evidence that he is, in fact, the child’s natural father. Such evidence may include the child’s birth certificate or church records relating to the child’s birth, local civil records, or witness affidavits. In addition, the natural father must submit proof that:

1. a bona fide family relationship exists, such as through evidence of financial support and cohabitation (a bona fide parent-child relationship must be or have been established while the child is or was unmarried and under twenty-one years old), or

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75. 8 C.F.R. § 204.2(a)(2).
76. 8 C.F.R. § 204.2(c)(2)(i).
77. Id.
78. 8 C.F.R. § 204.2(c)(2)(iii).
(2) the child was “legitimated” under the law of the father’s residence or the child’s residence before the child’s eighteenth birthday and the father had legal custody of the child at the time of legitimization.

With regard to the first alternative, USCIS has suggested that the requisite bona fide relationship can be demonstrated through the existence of emotional and/or financial ties or a genuine interest in the child’s upbringing. Among other things, the father should show evidence that he and the child actually lived together or that the father held the child out as his own. The Service has indicated that it considers contemporaneous evidence of financial or emotional ties to be the most persuasive, such as money order receipts and canceled checks, income tax returns, correspondence between father and child, or notarized affidavits of friends, neighbors, school officials, and others with knowledge of the relationship.79

In sibling petition cases in which both parties were born in wedlock and the relationship is claimed through a common mother, the petitioner should submit his or her birth certificate as well as that of the beneficiary and the sibling’s common mother. If necessary, the petitioner should also submit evidence of name changes. If the relationship is claimed through a common father, both siblings’ birth certificates should be submitted as well as the parents’ marriage certificate, and, if applicable, proof of legal termination of the parents’ prior marriages.80 A half brother or half sister may file a fourth family-sponsored preference petition on behalf of his or her step-sibling as well.81 When the petition is being filed on behalf of a brother or sister on the basis of a relationship with a common mother and different fathers, the petitioner must submit his or her birth certificate and that of the sibling, showing a common mother. Similarly, if the sibling relationship is based on a common father and different mothers, birth certificates showing a common father, and if applicable, the petitioner’s parents’ marriage certificate, and proof of legal termination of prior marriages, if any, must be submitted. If either the petitioner or the beneficiary was born out of wedlock and the common parent is the father, additional evidence showing legitimation prior to the child’s turning eighteen and legal custody by the father at the time of legitimation, or evidence of a bona fide parent-child relationship, must be demonstrated.82

79. Id.
80. 8 C.F.R. § 204.2(f)(2)(i).
81. 8 C.F.R. § 204.2(f)(2)(iv).
82. 8 C.F.R. § 204.2(f)(2)(iii).
In filing a petition on behalf of his or her mother, the petitioner must submit his or her birth certificate showing the mother’s name; if the name is different from that appearing on the petition, evidence of the name change must also be submitted. If the petition is submitted on behalf of the father and the petitioner was born in wedlock, the petitioner should submit his or her birth certificate, a copy of the parents’ marriage license, and, if applicable, proof of termination of any of the parents’ previous marriages. In the case of a petition on behalf of a stepparent, the petitioner should submit his or her birth certificate and his or her parents’ (or stepparents’) marriage certificate, if applicable. Finally, if the petition is filed by a person born out of wedlock on behalf of his or her natural father, the petitioner should provide evidence of natural parenthood, and evidence showing legitimization prior to the child’s turning eighteen and legal custody by the time of legitimization or evidence of a bona fide parent-child relationship.\footnote{83}{8 C.F.R. § 204.2(e)(2)(iii).}

When the petitioner and beneficiary are related by adoption, a certified copy of the adoption decree must be submitted, showing that the child was adopted before he or she reached the age of sixteen. In addition, it must be shown that the child has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years; legal custody occurring prior to the adoption will satisfy the residence requirement.\footnote{84}{8 C.F.R. § 204.2(e)(iv).}

\section*{§ 3:3.2 Filing the Petition}

[A] Generally

Under revised instructions announced in November 2007, stand-alone I-130s must be filed with a designated Chicago “Lockbox” address. Under prior guidelines, such petitions were filed with the USCIS service center with jurisdiction over the petitioner’s place of residence. The change is effective December 3, 2007. As of April 30, 2008, all stand-alone I-130s submitted to any location other than the Chicago Lockbox have been rejected. Petitions filed with the Chicago Lockbox will be routed to, and adjudicated at, the appropriate USCIS service center based on the petitioner’s place of residence in the United States. Two separate post office box addresses have been established that correspond to the appropriate USCIS service center (either the Vermont or California Service Centers), which will process and adjudicate the petition.

\footnote{83}{8 C.F.R. § 204.2(e)(2)(iii).}
\footnote{84}{8 C.F.R. § 204.2(e)(iv).}
[B] Special Filing Situations

There are two special filing situations:

(1) If the U.S. citizen petitioner is currently residing outside of the United States and is filing the I-130 on behalf of a spouse, child, or parent, the petition should be filed with the U.S. consulate with jurisdiction over the petitioner’s present foreign residence; and

(2) If the beneficiary is present in the United States and a visa is immediately available to the alien (that is, the petitioner is a U.S. citizen filing on behalf of an immediate relative), the beneficiary may be eligible for adjustment of status and can file the petition and the application for adjustment of status simultaneously.

Under current DOS guidelines, when the U.S. citizen petitioner in an immediate relative case presents a petition at a U.S. consular post with jurisdiction over the present residence of the petitioner abroad, the post has jurisdiction to approve the petition. To demonstrate residency in a consular district, petitioning U.S. citizens must be able to prove that they have permission to reside in the consular district and that they have been doing so continuously for at least the six months prior to filing the petition. Individuals who are in-country on a temporary basis—such as students and tourists—do not meet the residency standard. Exceptions to the residency requirement will be made only in emergency cases (such as cases raising life and death issues or health and safety concerns) and cases determined to be in the national interest. Most cases will not fall into one of these classifications and the petitioner will be required to file in a USCIS office in the United States. Two examples of petitions which may be accepted under these standards are: (1) when the beneficiary is a very young child who would be unexpectedly left without a caretaker; and (2) when the petitioner is in the U.S. military or is otherwise a U.S. government employee assigned overseas who is awaiting a transfer order and needs to petition for immigrant classification of their spouse and minor children at posts overseas. Note that the immediate relative petition can only be filed at a consular post that issues immigrant visas. In addition, this procedure is inapplicable in countries where a USCIS office is located (for example, Germany, Austria, England, Mexico, the Philippines, Korea, India, Thailand, Honduras). In the latter cases, the petition may be filed with a USCIS overseas office, provided the petitioner is residing in the country in which the USCIS office is located.
NOTE: The petitioner must have a domicile in the United States before an immigrant visa can actually be issued. This is because only petitioners who have U.S. domicile may file an Affidavit of Support, Form I-864, and this form is required in all family-based cases. A U.S. citizen living abroad who is working abroad for the U.S. government, a U.S. corporation, or certain research or international organizations will be considered to have a domicile in the United States. Otherwise, the citizen who is abroad must establish that he or she did not, in fact, give up his or her U.S. domicile (that is, the citizen has maintained a U.S. residence, their visit abroad is temporary and they have maintained sufficient ties in the United States). In cases in which the petitioner has clearly not maintained a domicile in the United States, he or she will need to reestablish the U.S. domicile before the case can be finalized and an immigrant visa issued to the family member.

When an immigrant visa is immediately available to an alien who is physically present in the United States, the immediate relative or preference petition can be processed simultaneously with an application for permanent residence if the alien is eligible for “adjustment of status.” In this case, the petition is filed with the National Benefits Center at the appropriate Chicago “Lockbox” address. As of April 1, 2005, all adjustment applications for family-based immigrants must be filed with the NBC for intake and initial processing, including processing of employment authorization documents (EADs) and advance paroles. After initial processing, the adjustment applications will be returned to the local offices for interviews.

NOTE: As a practical matter, a concurrent I-130/I-485 filing is only permissible in cases involving immediate relatives of U.S. citizens, since immigrant visas are always immediately available in these cases. Even in immediate relative cases, however, the beneficiary must otherwise be eligible for adjustment. Waiting lists for immigrant visas exist, on the other hand, in all other I-130 cases and, therefore, an adjustment application cannot be concurrently filed in family preference cases. In the latter cases, the I-130 must be filed as a stand-alone petition. The beneficiary may later file an adjustment application or pursue immigrant visa processing abroad when an immigrant visa number becomes available.
Upon submission of the completed petition and supporting documentation to USCIS, the agency will begin its investigation and adjudication of the merits of the petition. In cases involving blood relationships, USCIS can require the petitioner, beneficiary, and other family members to take blood tests. A refusal to submit to a blood test will not constitute a basis for denial if a legitimate religious objection is established. When such objections are established, alternate forms of evidence may be considered based upon documentation already submitted. Blood tests will be required only after other forms of evidence have proven inconclusive. In cases in which USCIS suspects a sham marriage, it can interview the parties, together and separately, to determine the bona fides of the marriage. In addition, a field examination can be conducted, with a USCIS agent visiting the couple’s residence to question neighbors and see the domicile. As a practical matter, however, since the enactment of IMFA and the creation of the conditional resident classification for recently married spouses of U.S. citizens immigrating to this country on the basis of their marriages, USCIS has deemed it more appropriate to conduct an in-depth review of the bona fides of the marriage at the time the alien seeks to remove his or her conditional basis for permanent residence, and, if necessary, interview the couple to determine the legitimacy of the marriage.

During the adjudication process, the USCIS sometimes will request that additional evidence be submitted. Such requests are made on Form I-797C and are commonly known as requests for evidence or RFEs. Note that a USCIS rule finalized in April 2007 removes the fixed time period provided for applicants and petitioners to respond to an RFE. Specifically, the USCIS removed the standard twelve-week response period in favor of a policy of flexible response times. The maximum response time remains twelve weeks for an RFE; however, when determining an appropriate response time, USCIS will consider such factors as the type of evidence requested, the availability of the evidence, and whether it is new or additional evidence. Extensions beyond the authorized response time will not be permitted. The rule does not contain a specific presumptive minimum time frame for responses, leaving it to the discretion of USCIS. If the USCIS receives an RFE response that does not contain all requested evidence, it will treat the submission as a request for a decision on the record.

85. 8 C.F.R. § 204.2(c)(2)(vi).
86. See discussion infra.
April 2007 rule also allows USCIS to deny incomplete applications without issuance of an RFE.

Legislation enacted in July 2006 amends the INA to prevent both U.S. citizens and lawful permanent residents who have been convicted of a “specified offense against a minor” from successfully petitioning for family-based visas. Specified offense against a minor” is defined as an offense against a minor that involves kidnapping, false imprisonment, solicitation to engage in sexual conduct, use in a sexual performance, solicitation to practice prostitution, video voyeurism, 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 law permits the Secretary of the DHS to waive the bar if, in his or her sole discretion, he or she determines that the petitioner poses no risk to the alien with respect to whom the petition is filed. USCIS guidance states that, if a petitioner’s background check reveals any sexual or kidnapping offenses outlined under the new law, a request for evidence will be issued for all police arrest records and court disposition documents, and the petitioner will be scheduled for fingerprinting. If the adjudicator determines that the petitioner was convicted of a specified offense against a minor, the adjudicator must further evaluate the risk to the beneficiary by reviewing evidence of rehabilitation as well as any other relevant evidence. The guidance advises that, in the case of a child beneficiary who will be living with the petitioner, there is an assumption of risk to the beneficiary. If the adjudicator determines that the petitioner does pose a risk to the beneficiary, the adjudicator must deny the petition and specifically state his or her reasons for so finding. If the adjudicator finds that the petitioner poses no threat to the beneficiary, then the adjudicator must seek guidance and consent from USCIS headquarters, regulation and product management division, before approving the petition. Of course, any such offense committed by a permanent resident may lead to an investigation by the DHS and the initiation of removal proceedings.

When the I-130 petition is approved, the petitioner will be notified of the approval. If the petition was filed in conjunction with an application for adjustment of status that is also approved, USCIS Form I-181B, which is used to notify the alien of his or her admission

to permanent residence, is also sent to the alien. This notice in the past contained temporary evidence of admission to residence, but was not considered a secure enough document. Now, therefore, it simply states that the processing of the alien’s case is complete. The alien must travel with his or her passport to the USCIS office involved in order to receive temporary evidence of resident status stamped into his or her passport. While the alien is admitted into resident status from the date of approval of the case, he or she cannot travel as a resident until the stamp is placed in the passport.90

If the petition was filed alone, and the petitioner indicated that the alien will apply for an immigrant visa abroad, the petitioner will be notified of the approval and that the petition approval has been sent to the NVC, which will handle the preliminary steps in immigrant visa processing. If the petition indicated that the alien will apply for adjustment of status in the United States, the approval notice will notify the petitioner either that (1) a visa is now immediately available and the alien should proceed to file an application for adjustment of status, or (2) a visa is not immediately available and the petition approval will be sent to the NVC or held by the Service Center.

If the petition is denied, the petitioner may file an appeal, which is made to the BIA; this appeal procedure is in contrast to denials of employment-based preference petitions, which are appealed to the USCIS’s Administrative Appeals Office. The Board renders the final administrative decision on the petition.91

§ 3:3.4 Post-Filing Issues

[A] Age-Out Protection

Legislation enacted in 2002 provides for important protection for children who “age out”—turn twenty-one years of age—while awaiting processing of their permanent residence papers.92 Under prior law, a permanent residence application, either through an adjustment of status application or an application for an immigrant visa, had to be acted upon and an immigration status granted before the applicant reached a cutoff age. When a child was applying as the dependent of a parent, for instance, the child had to remain a “child” under immigration law up to and including the date that the final benefit is granted.

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90. See chapter 2, supra, for a full description of the process when an adjustment application is approved.
91. 8 C.F.R. § 204.1(a)(3)(H).
With regard to children of U.S. citizens, the CSPA provides that the
determination of whether an alien son or daughter of a U.S. citizen is
under twenty-one years of age and thus an immediate relative child is
made at the time an immigrant visa petition is filed on the child’s
behalf. In cases in which a legal permanent resident naturalizes after
filing a family second-preference petition on behalf of a child, the
determination of whether the son or daughter remains a “child” for
purposes of immediate relative classification is made as of the date of
the parent’s naturalization; therefore, if the son or daughter is under
twenty-one at the time of the naturalization, he or she may be
classified as an immediate relative child. This provision deals with
family-based second-preference petitions filed by permanent residents
who subsequently become U.S. citizens through naturalization. In
such cases, the new law provides that if the second-preference petition
on behalf of the alien child is converted to an immediate relative
petition based upon the parent’s naturalization, the child’s eligibility
for immediate relative status will be determined based upon the date of
his or her parent’s naturalization. Where the son or daughter is
married at the time a U.S. citizen parent files a family-based immi-
gration petition but later divorces, the son’s or daughter’s age is
determined at the time of the divorce; therefore, if the son or daughter
is under twenty-one at the time of the divorce, he or she may be
classified as a child. This provision covers situations in which a U.S.
citizen files a third-preference petition for a married son or daughter
and this son or daughter later divorce. In such cases, if the original
third-preference petition is later converted to an immediate relative
petition on the basis of the son’s or daughter’s divorce, the child’s
eligibility for immediate relative status will be determined based upon
his or her age on the date of the divorce.

The CSPA also extends age-out protection to: (1) the children of
lawful permanent residents (that is, persons seeking classification in the
2A preference category); and (2) children who are accompanying or
following to join family-sponsored immigrants (that is, children eligible
for derivative benefits). For purposes of determining whether a child
qualifies for age-out protection under this section, the adjudicator must
establish the alien’s age as of the date a visa becomes available for the
alien (or for the alien’s parent in derivative cases), minus the number of
days that the petition was pending. If the child is entitled to age-out
protection using this formula, he or she must seek to acquire permanent
resident status within one year of visa availability.

The CSPA provides that the age-out protections took effect upon
enactment (August 6, 2002) and apply to:

(1) cases where the petition was filed on or after August 6, 2002;

(2) cases where the petition was filed prior to August 6, 2002, but
was still pending on that date; and
cases where the petition was approved prior to August 6, 2002, but only if a final determination has not been made on the individual’s application for a visa or adjustment of status prior to that date.

Most of the complex issues arise with regard to cases within group 3 (that is, cases in which the petition was approved prior to August 6, 2002).

With regard to cases where the petition was approved prior to August 6, 2002, the USCIS initially interpreted the effective date provisions of the CSPA to include a requirement that the application for adjustment of status must have been filed before August 6, 2002. The BIA rejected this interpretation ruling that the CSPA provisions apply to an individual whose visa petition was approved before the August 6, 2002 effective date of the CSPA but who filed an application for adjustment of status after that date where the beneficiary was under the age of twenty-one when the immediate relative petition was filed on his behalf. The USCIS has adopted the BIA’s ruling. The guidance also permits those individuals who were ineligible under the prior policy to file a new adjustment application. Under certain circumstances, the guidance also permits those individuals who were previously denied for CSPA to file motions to reopen or reconsider without a filing fee.


When a petitioner in family 2A cases obtains naturalization while the I-130 petition is pending, the beneficiary preference is upgraded to that of an immediate relative of a U.S. citizen. This development should be reported to the service center as soon as possible. Since a visa number would then be available, the service center would place the I-130 in the priority adjudication queue.

The CSPA also includes automatic conversion provisions. The law provides that, if the son or daughter is determined to be twenty-one years of age or older at the time the visa number becomes available, notwithstanding the age-out protection under the law, his or her case is automatically converted to a petition in the appropriate family-based category (for example, a second-preference 2B petition for an adult son or daughter of a permanent resident or a first-preference petition for an unmarried adult son or daughter of a U.S. citizen). In

addition, the alien retains the priority date associated with the original petition.

A separate automatic conversion provision covers family second-preference (2B) petitions filed on behalf of unmarried adult sons and daughters of permanent residents. The legislation provides that such a petition is automatically converted to a first-preference petition (unmarried son or daughter of a U.S. citizen) when the petitioner parent naturalizes after the filing and the beneficiary retains the original priority date. The son or daughter may decline the automatic conversion benefit.

NOTE: This opting-out provision addresses the problem encountered by Filipino family 2B applicants (adult sons or daughters of permanent residents) whose parents naturalize. Automatic conversion from family 2B to family first preference at the time of the parent’s naturalization disadvantages these beneficiaries because the cutoff date for Filipino first preference is earlier than the cutoff date for Filipino family 2Bs.

The BIA has held that a derivative beneficiary of a fourth-preference visa petition (the child of a sibling of a U.S. citizen) who has aged out may not automatically convert her status to that of the beneficiary in the second-preference (2B) category (based on a subsequently filed petition submitted by the fourth-preference immigrant upon admission to permanent residence). The practical result of this decision is that the priority date established by the earlier fourth-preference petition cannot be carried over to the second-preference petition, which will result in significant delays in processing.

[C] Nonimmigrant Benefits for Family Members

Finally, legislation enacted in 2000 (the LIFE Act) created a non-immigrant category for immediate relatives of U.S. citizens with pending permanent residence papers. Because the “immediate relatives” of U.S. citizens (spouses, minor children, parents) are not subject to an annual cap on entry as are all other family-sponsored immigrants, an immigrant visa is considered to be immediately

available to these individuals. In reality, however, due to USCIS and consular processing delays, it may still take up to a year for these family members who are outside of the country to enter the United States. The LIFE Act addresses this problem by expanding the “K” visa category to include spouses, and any accompanying minor children, of U.S. citizens who are the beneficiaries of an immigrant petition and are awaiting approval of the petition outside of the United States.

[D] Death of the Petitioner

Under legislation enacted in October 2009, widows or widowers who were married to a U.S. citizen for less than two years at the time of the citizen spouse’s death can now file a self-petition for permanent residence for themselves and their children.\(^7\) Previously, only widows or widowers married for at least two years at the time of the citizen spouse’s death could file such petitions.\(^8\) The law also provides that, if an immediate relative I-130 petition for the spouse was pending or already approved at the time of the citizen’s death, the petition will be converted to a widow(er)’s Form I-360 if, on the date of the Form I-130 petitioner’s death, the couple was married and the widow(er) would be otherwise eligible to file a widow(er)’s Form I-360 [for example, if they were not separated at the time of the citizen’s death]. This provision addresses the problem of the so-called widow-penalty cases.

Under long-standing policy, the government’s view was that once the petitioning spouse died, the widow(er) was no longer legally a “spouse” for purposes of adjudicating a pending I-130 petition. As a result, the I-130 spousal petition could not be approved if the petitioner died while the petition was pending. In addition, if the I-130 petition had already been approved but the petitioner spouse died before adjustment of status or admission with an immigrant visa, the approved petition was automatically revoked. In such instances, the beneficiary could request a reinstatement of the approval, and USCIS, in its discretion, could grant such a request for humanitarian reasons. No avenue of immigration relief existed, however, for the surviving spouse of a deceased U.S. citizen if the surviving spouse and the U.S. citizen were married less than two years at the time of the citizen’s death and (1) the immigrant petition filed by the citizen on behalf of the surviving spouse had not been adjudicated by USCIS at the time of the citizen’s death, or (2) no petition was filed by the citizen


\(^8\) The revised standards for widow(er) benefits and the transition cases are discussed in detail in section 3:3.5, infra.
before the citizen’s death. These were the “widow-penalty” cases. The problem had caused a split among the circuit courts. Several federal circuit courts held that an I-130 spousal petition survived the death of the U.S. citizen petitioning spouse. Within these circuits, USCIS had stated that pending immediate-relative petitions for spouses could be approved and those already approved should not be revoked. For cases outside these circuits, DHS would grant deferred action relief for two years to surviving spouses of U.S. citizens who died before the second anniversary of their marriage and were not eligible for widow(er) benefits.

Section 568(c) of the October 2009 law removes the requirement under prior law that the alien and the deceased spouse must have been married for at least two years at the time of the citizen’s death to be eligible for self-petition benefits as a widow(er). INA section 201(b)(2)(A) now states that the widow(er) must have been the spouse of a U.S. citizen at the time of the citizen’s death. All other requirements for widow(er) status apply. Section 568(c) also provides that, if an immediate relative I-130 petition for the spouse was pending or already approved at the time of the citizen’s death, the petition will be converted to a widow(er)’s Form I-360 if, on the date of the Form I-130 petitioner’s death, the couple was married and the widow(er) would be otherwise eligible to file a widow(er)’s Form I-360 (for example, if they were not separated at the time of the citizen’s death).

The new law applies to immediate relative I-130 cases that were pending on or after the date of enactment (either an I-130 petition or a related adjustment application may be pending). As a result, if an I-130 petition (or related adjustment application) was pending with the USCIS on or after October 28, 2009, the petition will be converted to a widow(er)’s Form I-360 petition and adjudicated as such under the revised standards as described above. If eligible for widow(er) status, the spouse may then have an immigrant visa or adjustment application processed to completion. Under existing law, unmarried minor children of a qualifying widow(er) are eligible for derivative status and may accompany or follow to join the principal alien to the United States. As a result, section 568(c) will also benefit children of newly eligible widows(ers).

99. Freeman v. Gonzalez, 444 F.3d 1031 (9th Cir. 2006); Taing v. Napolitano, 567 F.3d 19 (1st Cir. 2009); Lockhart v. Napolitano, 561 F.3d 611 (6th Cir. 2009).

NOTE: A separate provision in the new law covers “transition cases,” that is, cases in which the citizen spouse died before the date of enactment (October 28, 2009) who did not have a pending I-130 petition on the date of enactment. In these cases, any immigrant whose U.S. citizen spouse died less than two years after the marriage (that is, those newly eligible immigrants under the law) and has not remarried may file a self-petition on Form I-360 within two years of the law’s enactment (that is, by October 28, 2011).  

Under USCIS guidelines, a Form I-130 will be deemed “pending” on October 28, 2009, if the deceased citizen had filed an I-130 petition on or before that date but:

1. USCIS has not adjudicated the petition;
2. USCIS denied the petition but granted a motion to reopen or reconsider so that the petition is again pending;
3. USCIS denied the Form I-130 but has not yet ruled on a motion to reopen or reconsider;
4. USCIS denied the I-130 petition but the alien’s appeal from that decision is pending before the BIA or the period for appeal has not expired; or
5. USCIS or BIA decision denying the Form I-130 is the subject of pending litigation before a federal court.

As a general rule, any Form I-130 that was filed on a widow(er)’s behalf prior to the citizen spouse’s death that is deemed “pending” as of October 28, 2009 (as described above) will automatically convert to a Form I-360 and be adjudicated as a widow(er) petition under the INA, as revised by section 568(c). If the Form I-130 was approved before the U.S. citizen petitioner’s death, it will automatically convert to an approved I-360. Unmarried minor children of the widow(er) will also

101. This provision is discussed in section 3:3.5, infra.
be eligible to seek an immigrant visa or adjustment of status based on
the approved Form I-360.

Section 568(c) also applies to I-485 cases that were pending on
October 28, 2009. These cases will be automatically converted to
widow(er) cases and adjudicated as such. Pending I-485 cases include
cases filed before the deceased citizen’s death and:

1. USCIS has not adjudicated the application;

2. USCIS denied I-485 but a motion to reopen has been granted;

3. I-485 denied but USCIS has not yet ruled on a motion reopen
   or reconsider; or

4. I-485 is the subject of litigation before a federal court.

If a widow(er) with an approved I-130 and a pending I-485 left the
United States voluntarily after his or her petitioning U.S. citizen
spouse died, and thus “abandoned” his or her adjustment application,
the approved I-130 is converted to an approved Form I-360, so that the
widow(er) may apply for an immigrant visa abroad.

If the widow(er) entered the United States as a K-1 fiancé(e) and
filed an I-485 after marrying the deceased U.S. citizen, he or she will
be deemed the beneficiary of a Form I-360 widow(er) petition.

If the surviving spouse was already granted deferred action
and received an employment authorization document on that basis,
USCIS will not terminate the deferred action or the EAD. Instead, any
Form I-360 that was filed to obtain deferred action and had not yet
been adjudicated as a deferred action request will be considered to be
an I-360 widow(er) petition. If the prior I-360 was already approved as
delayed action request, USCIS will, on its own motion, reopen the
Form I-360 and adjudicate it as an I-360 widow(er) petition.

The child of a widow(er) whose Form I-360 is approved may be
included in the widow(er) petition as long as he or she meets the
definition of “child” under the INA. Where the deceased citizen filed a
Form I-130 for his or her spouse that was pending at the time of his or
her death and the Form I-130 can now be adjudicated as a Form I-360
widow(er) petition, the child(ren) of the widow(er) will be included in
the Form I-360. An individual qualifies as the “child” of a widow(er)
depending on his or her age when the visa petition was filed. If a
widow(er) has an unmarried son or daughter who was under
twenty-one when the deceased citizen filed the Form I-130, that
individual will still be considered under twenty-one for purposes of
the widow(er)’s Form I-360.

With regard to pending I-130 cases that may benefit from
section 568(c), special consideration is provided with regard to two
inadmissibility grounds. First, for purposes of section 212(a)(9)(B)(i)
(the three-/ten-year bar for unlawful presence), the guidance states that, if the alien remained in the United States while awaiting the outcome of Form I-130, he or she will be deemed not to have accrued any unlawful presence. Second, for purposes of section 212(a)(9)(A) (rendering inadmissible persons who have been removed unless consent to reapply granted), the guidance states that USCIS should generally exercise discretion favorably and grant an application for consent to reapply if the converted Form I-360 case is approved under section 568(c), the alien is otherwise admissible, and the case does not present significant adverse factors.

If the surviving spouse remarried after the death of the citizen spouse, the spouse is ineligible for survivor benefits under section 568(c) regardless of whether the subsequent marriage ended due to a divorce or the death of the subsequent spouse. In addition, if the spouse was legally separated or divorced from the U.S. citizen spouse at the time of his or her death, the spouse is ineligible for survivor benefits under section 568(c).

Separate from the new protection for spouses of deceased citizens, the October 2009 legislation adds section 204(l) to the INA, which creates survivor benefits for other beneficiaries of petitions filed prior to the death of the petitioner or principal immigrant, so long as the beneficiary or derivative beneficiary resided in the United States at the time of death and continues to reside in the United States. Similar to age-out protection, the new survivor benefits allow relatives to obtain immigration benefits notwithstanding the death of the petitioner/sponsor or principal applicant/beneficiary, which, under prior law, would have resulted in the denial of the petition or application. These benefits will cover principal immigrants in family-based cases in the event of the petitioner’s death, provided there was a pending or approved I-130 petition on behalf of the principal immigrant at the time of the petitioner’s death. The law also protects spouses and children of principal family-based preference immigrants (that is, derivative beneficiaries) in the event of the principal immigrant’s death, provided there was a pending or approved I-130 petition on behalf of the principal immigrant at the time of his or her death.

Specifically, these benefits will cover:

1. children and parents of U.S. citizens, provided there was a pending or approved immediate relative I-130 petition on behalf of the child or parent at the time of the petitioner’s death;

2. unmarried sons and daughters of U.S. citizens, provided there was a pending or approved family-based first-preference (FB-1) I-130 petition on behalf of the son or daughter at the time of the petitioner’s death;
spouses and minor children of permanent residents, provided there was a pending or approved family-based second-preference (FB-2A) I-130 petition on behalf of the spouse or child at the time of the petitioner’s death;

unmarried adult sons and daughters of permanent residents, provided there was a pending or approved family-based second-preference (FB-2B) I-130 petition on behalf of the son or daughter at the time of the petitioner’s death;

married adult sons or daughters of U.S. citizens, provided there was a pending or approved family-based third-preference (FB-3) I-130 petition on behalf of the son or daughter at the time of the petitioner’s death;

brothers or sisters of U.S. citizens, provided there was a pending or approved family-based fourth-preference (EB-4) I-130 petition on behalf of the brother or sister at the time of the petitioner’s death; and

spouses and children of principal family-based immigrants (that is, derivative beneficiaries) in the event of the principal immigrant’s death, provided there was a pending or approved I-130 petition on behalf of the principal immigrant at the time of his or her death.

Section 204(l) permits these family members to have their petitions, adjustment applications, and related applications (such as waiver applications) adjudicated notwithstanding the death of the family-based petitioner (in the case of beneficiaries listed in I-130 petitions) or the principal immigrant (in the case of family- and employment-based derivative beneficiaries). In other words, the death of the qualifying relative will not prevent adjudication of the petition (if still pending), the adjustment-of-status application, and any related applications and waivers. The new law states that section 204(l) may not be interpreted to “. . . limit or waive any ground of removal, basis for denial of petition or application, or other criteria for adjudicating petitions or applications . . . other than ineligibility based solely on the lack of a qualifying family relationship. . . .” As a result, the family member must be otherwise eligible for the benefit sought. For example, a family member seeking adjustment of status under INA section 245(a) based on approval of the I-130 petition must be otherwise eligible for adjustment. The only exception is made with regard to the affidavit of support requirement as discussed below.

There are two further limitations. First, to be eligible for survivor benefits, the family member must have been residing in the United States as of the qualifying relative’s death and the family member...
must continue to reside in the United States (presumably at the time of adjudication of the petition and/or adjustment application). In addition, the law provides that the petition and/or adjustment application may be denied if the DHS determines, in its discretion, that approval would not be in the public interest.

Finally, a conforming amendment, section 568(e) waives the affidavit of support requirement under INA section 213A for family members who are eligible for survivor benefits under section 204(l). This provision principally benefits family-based immigrants and derivative beneficiaries of family-based immigrants who are otherwise required to submit a legally binding affidavit of support.

§ 3:3.5 Special Procedures for Widows/Widowers

Legislation enacted in October 2009 removes a requirement that the alien and the deceased spouse must have been married for at least two years at the time of the citizen’s death to be eligible for self-petition benefits as a widow(er).\textsuperscript{103} INA section 201(b)(2)(A) now states that the widow(er) must have been the spouse of a U.S. citizen at the time of the citizen’s death. All other requirements for widow(er) status apply. As revised, therefore, a spouse qualifies for widow(er) status if:

(1) he or she was married to a U.S. citizen at the time of the citizen’s death;

(2) his or her spouse was a U.S. citizen at the time of death [there is no requirement that the deceased spouse must have been a citizen for a specified length of time];

(3) the petition for widow(er) status is filed within two years of the citizen spouse’s death;

(4) the widow(er) and citizen spouse were not legally separated at the time of the citizen’s death; and

(5) the widow(er) spouse has not remarried.

Spouses eligible for widow(er) status and their derivative children are exempted from the affidavit of support requirement under INA section 213A.

With regard to cases in which the citizen spouse died before the date of enactment (October 28, 2009) who did not have a pending I-130

\textsuperscript{103} See § 568(c) of FY 2010 Homeland Security Appropriations Act (H.R. 2892), Pub. L. No. 111-83 (Oct. 28, 2009).
petition on the date of enactment, the law provides that any immigrant whose U.S. citizen spouse died less than two years after the marriage and has not remarried may file a self-petition on Form I-360 within two years of the law’s enactment (that is, by October 28, 2011). The law also provides that if an immediate relative I-130 petition for the spouse was pending or already approved at the time of the citizen’s death, the petition will be converted to a widow(er)’s Form I-360 if certain conditions are met. This provision addresses the problem of the so-called widow-penalty cases.\textsuperscript{104}

A widow or widower must file Form I-360 to petition for classification as an immediate relative.\textsuperscript{105} A petition submitted by a widow or widower must be accompanied by evidence of the dead spouse’s citizenship and primary evidence of the relationship in the form of a marriage certificate issued by civil authorities, proof of the termination of any prior marriages, and the U.S. citizen’s death certificate issued by civil authorities.\textsuperscript{106} A letter from the appropriate registrar stating that the document is not available must be obtained before USCIS will accept secondary evidence. Such secondary evidence may include:

1. evidence of the marriage or termination of prior marriages such as tribal records, religious documents, census records, or affidavits; and

2. evidence of the citizen’s death, such as religious documents, funeral service records, obituaries, or affidavits.

Unlike other family members of immediate relatives, unmarried minor children of a qualifying widow or widower are eligible for derivative status and may accompany or follow to join the principal alien to the United States.\textsuperscript{107} A separate visa petition on behalf of the child is not required. Instead, the child should be included in the petition of the widow or widower. There is no basis under law under which a widow(er) petition may be filed on behalf of a child seeking classification as an immediate relative.\textsuperscript{108} The Form I-360 may only be filed by the widow(er). The widow(er) petition must be accompanied by evidence of the parent-child relationship.\textsuperscript{109} Derivative benefits do

\textsuperscript{104}. The effect of the law on pending and approved I-130 cases is discussed in more detail in section 3:3.4, supra.

\textsuperscript{105}. 8 C.F.R. § 204.1(a).

\textsuperscript{106}. 8 C.F.R. § 204.2(b)(2).

\textsuperscript{107}. 8 C.F.R. § 204.2(b)(4).

\textsuperscript{108}. In re Minkova, Int. Dec. 3421 [B.I.A. 1999].

\textsuperscript{109}. Evidence required to establish the existence of a parent-child relationship is discussed in section 3:3, supra.
not extend to an unmarried or married adult son or daughter of an alien widow or widower.

If the widow(er) is currently residing outside the United States, the petition should be filed with the USCIS overseas office with jurisdiction over the alien's place of residence. If no USCIS overseas office exists with jurisdiction over the alien’s place of residence, the petition may be filed with the U.S. consulate with jurisdiction over the alien’s place of residence. If the widow(er) is in the United States and is eligible for adjustment of status, the petition and the application for adjustment of status may be filed simultaneously with the National Benefits Center at the appropriate Chicago “Lockbox” address. If the widow(er) is in the United States and he or she is ineligible for adjustment of status or does not intend to apply for adjustment of status, the petition should be filed with a USCIS lockbox facility in Phoenix or Dallas (depending on the petitioner’s location).

When the petition is approved, the petitioner will be notified of the approval. If the petition was filed in conjunction with an application for adjustment of status which is also approved, Form I-181B, which is used to notify the alien of his or her admission to permanent residence, is also sent to the alien. If the petition was filed alone, and the petition indicated that the alien will apply for an immigrant visa abroad, the petitioner will be notified of the approval and that the petition approval has been sent to the National Visa Center (NVC) which receives all approved immigrant visa petitions adjudicated by the USCIS Service Centers. As noted, a special provision in the October 2009 law covers “transition cases”—that is, cases in which the citizen spouse died before October 28, 2009, who did not have a pending I-130 petition on the date of enactment. In these cases, any immigrant whose U.S. citizen spouse died less than two years after the marriage (that is, those newly eligible immigrants under the law) and has not remarried may file a self-petition on Form I-360 within two years of the law’s enactment (that is, by October 28, 2011). USCIS issued guidance addressing section 568(c) in December 2009. The memorandum explains that this amendment applies equally to aliens seeking immigrant visas abroad and aliens in the U.S. seeking to adjust status. The memorandum further explains that section 568(c) relates only to the impact of the citizen’s death on the alien’s eligibility for widow(er) status. All other requirements for approval of a widow(er) petition remain in force. In addition, the surviving spouse must still be admissible as an immigrant to obtain adjustment of status or an immigrant visa.

110. See Surviving Spouses Memorandum, supra note 102.
If the citizen spouse died before October 28, 2009, and the widow(er) is newly eligible under the law (that is, married to the citizen for less than two years at the time of death) and did not have a Form I-130 pending on October 28, 2009, the widow(er) has until October 28, 2011, to file a Form I-360 for himself or herself and his or her unmarried minor children. A widow(er) whose citizen spouse died on or after October 28, 2009, will have two years from the date of the citizen spouse’s death to file his or her Form I-360. In addition, the child of a widow(er) newly eligible whose Form I-360 is approved may be included in the widow(er)’s petition as long as he or she meets the definition for “child” under the INA. An individual qualifies as the “child” of a widow(er) depending on his or her age when the visa petition was filed.

If the surviving spouse remarried after the death of the citizen spouse, the spouse is ineligible for survivor benefits under section 568(c) regardless of whether the subsequent marriage ended due to a divorce or the death of the subsequent spouse. In addition, if the spouse was legally separated or divorced from the U.S. citizen’s spouse at the time of his or her death, the spouse is ineligible for survivor benefits under section 568(c).

§ 3:3.6 Special Procedures for Orphans

Special requirements and procedures that are applicable in orphan cases are set forth in section 204.3 of title 8 of the Code of Federal Regulations. These procedures underwent substantial revision in August 1994. The petition process for an orphan involves two separate determinations.111 The first determination concerns the advanced processing application, which focuses on the ability of the prospective adoptive parents or the adoptive parents to provide a proper home environment and on their suitability as parents. This determination is designed to protect the orphan and is based primarily on the home study report and fingerprint checks. The second determination concerns the orphan petition, which focuses on whether the child is an orphan. The prospective adoptive parents or adoptive parents may submit the documentation necessary for each of these determinations separately or at one time, depending on whether the orphan has been identified. An orphan petition cannot be approved unless there is a favorable determination on the advanced processing application; a favorable determination on the advanced processing application, however, does not guarantee that the orphan petition will be approved.

111. 8 C.F.R. § 204.3(a)(2).
NOTE: These procedures are inapplicable if the child to be adopted is habitually resident in a Hague Convention country.112 In the latter cases, section 101(b)(1)(G) governs the immigration of the child to be adopted by a U.S. citizen. The procedures described in this section only apply to a child who may immigrate as an orphan under section 101(b)(1)(F), that is, a child who does not habitually reside in a Convention country.

[A] Application for Advance Processing

If the prospective parents have not identified a child for adoption, or are going abroad to locate a child for adoption, an application for advance processing may be filed prior to filing an orphan petition.113 In such situations, only information concerning the prospective parents is required. If the application is approved, it is valid for eighteen months. If a child is located and identified for adoption during such time, a petition for the child can be filed without having to submit documentation concerning the petitioner; only documentation concerning the child must be submitted with the petition when an application for advance processing has already been approved.114

The following papers must be submitted with an application for advance processing not filed in conjunction with an orphan petition:

1. USCIS Form I-600A (application for advance processing);
2. evidence of petitioner’s U.S. citizenship and, if petitioner is married and the married couple is residing in the United States, evidence of the spouse’s U.S. citizenship or lawful immigration status;
3. a copy of petitioner’s marriage certificate if the petitioner is currently married;
4. evidence of legal termination of all previous marriages for the petitioner and/or spouse, if previously married;
5. evidence of the petitioner’s age if the petitioner is unmarried;

112. The Hague Convention requirements are discussed in section 3:2.1, supra. The procedures regarding the immigration of a child to be adopted under the Hague Convention are discussed in section 3:3.7, infra.
113. 8 C.F.R. § 204.3(c).
114. 8 C.F.R. § 204.3(d)(1).
evidence of compliance with preadoption requirements, if any, of the state of the orphan’s proposed residence in situations in which the child will be adopted in the United States;

(7) a home study with a favorable recommendation (the home study must be submitted with the application or within one year of the filing date of the application); and

(8) the appropriate filing fee.  

All of the required evidence must be submitted at the time of filing, with one exception. The one exception applies to the home study report, which may be submitted with the application for advance processing or within one year of the filing date of the application. The application for advance processing will not be processed until the home study is received, however. If the application for advance processing is approved, the evidence submitted with the application need not be submitted again with the orphan petition, unless significant changes have occurred in the facts underlying the approved application. In the latter case, an amendment to the home study report is required.

If the applicant resides in the United States, the Form I-600A must be filed with the Dallas Lockbox facility address, which will route the petition to the National Benefits Center for final processing. U.S. citizens outside of the United States may file the Form I-600A at a U.S. embassy, U.S. consulate, or USCIS office abroad that has jurisdiction. If the application for advance processing is approved, the prospective adoptive parents will be advised in writing. The application and supporting documents will be forwarded to the overseas site (USCIS overseas office or visa-issuing consular post) where the orphan resides. The validity period of an approved application is eighteen months from its approval date. During this time, the prospective adoptive parents must file an orphan petition for an identified orphan.

[B] Orphan Petition

The papers that need to be filed in order for an identified orphan to be classified as an immediate relative differ depending on whether an application for advance processing has previously been filed. The following papers must be submitted with an orphan petition:

115. 8 C.F.R. § 204.3(c)(1).
116. 8 C.F.R. § 204.3(c)(2).
117. 8 C.F.R. § 204.3(e)(9)(ii).
118. 8 C.F.R. § 204.2(h)(3).
when an application for advance processing has already been approved:

1. USCIS Form I-600, petition to classify orphan as an immediate relative;
2. A copy of the approval notice of the application for advance processing;
3. The orphan’s birth certificate, or if such a certificate is not available, an explanation together with other proof of identity and age;
4. Evidence that the child is an orphan as appropriate to the case;
5. Evidence that the child has been adopted abroad and the foreign adoption is effective for immigration purposes, or the prospective adoptive parents have, or a person or entity working on their behalf has, custody of the orphan for emigration and adoption in accordance with the laws of the foreign sending country and appropriate steps have been taken to secure the child’s adoption in the United States;
6. An amended home study, if required; and
7. The appropriate filing fee.\(^{119}\)

A petitioner may file an application for advance processing concurrently with an orphan petition in situations in which an orphan has already been identified and a prior application for advance processing has not been approved. In such cases, the petitioner must submit both the documentation required for the advance processing application and the orphan petition, as discussed above.

Note that, when the application for advance processing is filed in conjunction with an orphan petition for an orphan who has already been identified, only Form I-600 must be filed.

Filing procedures vary according to whether an application for advance processing has been approved.\(^{120}\) If an application for advance processing has already been approved, the orphan petition may be filed with the U.S. office that approved the application for advance processing, or the USCIS overseas office located in the country of the child’s residence abroad (provided the petitioner is physically present abroad when filing the petition). If no USCIS overseas office is located in the country of the child’s residence abroad,
the petition may be filed with the U.S. consulate (immigrant visa-issuing post) with jurisdiction over the child’s residence abroad (provided the petitioner is physically present abroad when filing the petition). If the application for advance processing is being filed concurrently with the orphan petition, the rules governing the filing of an initial advance processing application are applicable; these rules are discussed above.

If the orphan petition is approved by a USCIS office in the United States, the prospective adoptive parents will be notified of the approval in writing. In addition, telegraphic notification will be sent to the immigrant visa-issuing post with jurisdiction over the child’s residence abroad; the petition and the supporting documentation will also be sent to the consular post for immigrant visa processing. In cases in which the orphan petition is approved by an overseas USCIS office located in the country of the orphan’s residence, an approved petition and supporting documentation will be forwarded to the immigrant visa issuing post having jurisdiction over the child’s residence abroad for immigrant visa processing. When the orphan petition is approved at an immigrant visa-issuing post, the post can initiate immigrant visa processing.

NOTE: Legislation enacted in 2000 permits foreign-born children, including adopted children, to acquire citizenship automatically if they meet certain requirements. Under the law, most foreign-born children adopted by U.S. citizens will automatically acquire U.S. citizenship on the date they immigrate to the United States. The USCIS will automatically provide certificates of citizenship to certain adopted children. The certificates will be produced and mailed to the parents without an application or fee. Children who are required to complete their adoption in the United States or must be re-adopted in the United States will not benefit from the streamlined process. In these cases, the parents must make a formal application for a certificate of citizenship on behalf of the child.

121. 8 C.F.R. § 204.3(h)(8).
122. 8 C.F.R. § 204.3(h)(9).
123. 8 C.F.R. § 204.3(h)(10).
§ 3:3.7  

Special Procedures for Convention Adoptees

[A]  Generally

Like the orphan petition process, the process for obtaining Convention adoptee status involves two key determinations. A U.S. citizen who wants to adopt a child habitually resident in a Convention country must first obtain a determination that he or she (and his or her spouse, if married) will provide proper care to a Convention adoptee. The most critical item of evidence in making this determination is the home study. The prospective adoptive parents work with an adoption service provider to obtain a home study. Under the Hague Convention, home study preparers must be authorized under the regulations to issue home study reports. Once the prospective adoptive parents have obtained a favorable home study, the next step is to file Form I-800A with USCIS.

The second determination focuses on whether the child qualifies as a Convention adoptee as that term is defined under U.S. immigration laws. If USCIS approves the Form I-800A, the prospective adoptive parents may arrange for the submission of the approval notice, the home study and other supporting evidence, to the central authority of the Convention country in which they hope to adopt a child or to any entity or individual delegated central authority functions. If the central authority proposes a child for an adoption placement, the central authority will prepare a report addressing the factors that make the child eligible for adoption as a Convention adoptee. Once the prospective adoptive parents have received this report and have decided to accept the placement, they would file Form I-800, with the report and other supporting evidence.

If the child qualifies as a Convention adoptee and is eligible to be adopted, the USCIS or DOS officer will grant a provisional approval of the I-800 petition. Once provisional approval is granted, the prospective adoptive parent may file a visa application. A DOS officer will then notify the central authority of the Convention country that the prospective adoptive parents may proceed with the adoption, or with obtaining the grant of custody for purposes of adoption. The prospective adoptive parents will then either complete the adoption in the Convention country or else obtain custody of the child for the purpose of bringing the child to the United States for adoption. Once this step is accomplished, the DOS officer will perform a final verification of compliance with the Hague Convention and the implementing statute. If the adoption or grant of custody complies with the Convention and the statute, the officer would then, on behalf of USCIS, grant final approval of the I-800 petition and issue the appropriate visa.
[B] Petitioner’s Suitability for Adoption

Under the USCIS rules, a U.S. citizen seeking to have the USCIS accord immediate relative status to a child on the basis of a Convention adoption must, as a preliminary matter, file a Form I-800A, along with the supporting documentation, filing fee, and biometrics fee for each adult member in the family. Unlike the orphan procedure, which allows for the “concurrent” filing of the Form I-600A by filing a Form I-600 supported by a home study and other evidence that would be filed with a Form I-600A, the prospective adoptive parent(s) in a Convention adoption case must file a Form I-800A, and may file the Form I-800 only if the Form I-800A is approved. USCIS rules require denial of a Form I-800 if it is filed before a Form I-800A has been approved.

Form I-800A must be filed with the following supporting evidence:

(1) Evidence that the applicant is a U.S. citizen, or, in the case of a married applicant, evidence either that both spouses are citizens or, if only one spouse is a U.S. citizen, evidence of that person’s citizenship and evidence that the other spouse is either a U.S. national or an alien who holds a lawful status.

(2) A copy of the current marriage certificate, if married.

(3) If the applicant has been married previously, proof of termination of all prior marriages, such as a death certificate or divorce or dissolution decree.

(4) If the applicant is not married, evidence to establish that he or she is at least twenty-four years old (for example, a birth certificate).

(5) A written description of the pre-adoption requirements, if any, of the state of the child’s proposed residence in cases where it is known that any child the applicant may adopt will be adopted in the United States, and of the steps that have already been taken or that are planned to comply with these requirements.

(6) A favorable home study that meets the regulatory requirements, that was completed no more than six months from the date of the I-800A filing, and that bears the home study preparer’s original signature.

Applicants are required to submit Form I-800A and all supplements to Form I-800A to the USCIS Dallas Lockbox facility for initial

125. 8 C.F.R. § 204.310.
processing. The forms will then be routed to, and adjudicated by, the National Benefits Center. USCIS will arrange for the fingerprinting of the prospective adoptive parents and any additional adult household members once the Form I-800A is filed with an Applicant Support Center (ASC). An approval notice, on Form I-797, will be issued if USCIS approves the Form I-800A. The initial approval period for a Form I-800A in a Convention case will be fifteen months from the date USCIS received the initial FBI response for the fingerprints of the prospective adoptive parents and any additional family members. Under the USCIS rules, the prospective adoptive parent(s) will be able to request an extension of the approval period for an additional fifteen months. There is no limit to the number of times the approval of a Form I-800A may be extended. Approved I-800A applications are sent from the NBC to the National Visa Center (NVC); they are not sent directly to an overseas consular post.

[C] Child’s Status As a Convention Adoptee

Once USCIS has approved a Form I-800A and the prospective adoptive parents have identified a child who may qualify for immigration as a Convention adoptee, the next step is to file Form I-800. After approval of the I-800A, the prospective adoptive parents may arrange for the submission of the approval notice, the home study and other supporting evidence, to the central authority of the Convention country in which they hope to adopt a child or to any entity or individual delegated central authority functions. If the central authority proposes a child for an adoption placement, the central authority will prepare a report addressing the factors that make the child eligible for adoption as a Convention adoptee. Once the prospective adoptive parents have received this report and have decided to accept the placement, they would file Form I-800, with the report and other supporting evidence.

After a child has been identified for adoption, the prospective adoptive parents must file Form I-800 to determine whether the child qualifies for immigration as a Convention adoptee. There is no fee required for the first Form I-800 filed for a child on the basis of an approved Form I-800A. The prospective adoptive parents may file the Form I-800 only if the Form I-800A has been approved and remains valid. Form I-800 must be filed before the child’s sixteenth birthday. The prospective adoptive parents must file the Form I-800 before they adopt or obtain custody of the child. The petitioner must specify

126. 8 C.F.R. § 204.312(e).
127. Id.
128. 8 C.F.R. § 204.309(b)(1).
on the Form I-800 either that: (1) the child will seek an immigrant visa, if the Form I-800 is approved, because the child will reside in the United States with the petitioner after the child's admission to the United States on the basis of the proposed adoption; or (2) the child will seek a nonimmigrant visa, in order to travel to the United States to obtain naturalization under section 322 of the INA, because the petitioner intends to complete the adoption abroad and the petitioner and the child will continue to reside abroad immediately following the adoption, rather than residing in the United States with the petitioner (this option is not available if the child will be adopted in the United States). \(^{129}\)

The petitioner must submit the following evidence with the I-800 form:

1. Unexpired Form I-800A approval notice.
2. The “Article 16” report issued by the central authority (or an individual or entity delegated central authority functions) in the foreign state specifying the child’s name and date of birth, the reasons for making the adoption placement, and establishing the child’s eligibility for adoption.
3. A copy of the child’s birth certificate, or secondary evidence of the child’s age.
4. A copy of the irrevocable consent(s) signed by the legal custodian(s) and any other individual or entity who must consent to the child’s adoption (unless the law of the country of the child’s habitual residence provides that their identities may not be disclosed, so long as the central authority of the country of the child’s habitual residence certifies in its report that the required documents exist).
5. A statement signed under penalty of perjury by the adoption service provider certifying that the Article 16 report is a true, correct, and complete copy of the report obtained from the central authority of the Convention country.
6. A summary of the information provided to the petitioner concerning the child’s medical and social history.
7. A statement from the adoption service provider indicating that all of the pre-placement preparation and training has been completed.

\(^{129}\) 8 C.F.R. § 204.313(b).
If the child will be adopted in the United States, a report issued by the primary adoption service provider detailing its plan for post-placement duties.

If the child will be adopted in the United States, evidence of compliance with any pre-adoption requirements established by the state of the child’s proposed residence.

If the child may be inadmissible under any provision of section 212(a) for which a waiver is available, a properly completed waiver application for each such ground.

Either a Form I-864W, Intending Immigrant’s I-864 Exemption, or a Form I-864, Affidavit of Support. 130

Petitioners are required to submit the Form I-800 package to the USCIS Dallas Lockbox facility for initial processing. After the filing package is received by the Lockbox facility, it will be routed to the National Benefits Center for final adjudication.

[D] Provisional and Final Approval of the Petition

The USCIS will issue a provisional approval notice if the officer determines that there is no basis for denial of the petition, the child qualifies as a Convention Adoptee, and that the proposed adoption or grant of custody will meet the Convention requirements. 131 The provisional approval will state that the child will, upon adoption or acquisition of custody, be eligible for classification as a Convention adoptee. If the child will apply for an immigrant or nonimmigrant visa, the officer will forward the notice of provisional approval, the Form I-800, and all supporting evidence to the State Department. If the child will apply for adjustment of status, the USCIS will retain the record of proceeding.

To obtain final approval of a provisionally approved Form I-800, the petitioner must submit to the consular post with jurisdiction of the child’s application for an immigrant or nonimmigrant visa, or to the USCIS office with jurisdiction of the child’s adjustment-of-status application, a copy of the following document(s):

The adoption decree or administrative order from the competent authority in the Convention country showing that the petitioner has adopted the child if the child was adopted abroad [in the case of a married petitioner, the decree or order must show that both spouses adopted the child]; or

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130. 8 C.F.R. § 204.313(d).
131. 8 C.F.R. § 204.313(g).
(2) If the child will be adopted in the United States:

(a) the decree or administrative order from the competent authority in the Convention country giving custody of the child for purposes of emigration and adoption to the petitioner or to an individual or entity acting on behalf of the petitioner (in the case of a married petitioner, an adoption decree that shows that the child was adopted only by one spouse will be deemed to show that the petitioner has acquired sufficient custody to bring the child to the United States for adoption by the other spouse),

(b) if not already provided before the provisional approval, a statement from the adoption service provider, summarizing the plan for monitoring of the placement until the adoption is finalized in the United States, and

(c) if not already provided before the provisional approval, a written description of the pre-adoption requirements that apply to adoptions in the state of the child’s proposed residence and a description of when and how, after the child’s immigration, the petitioner intends to complete the child’s adoption.\(^\text{132}\)

With regard to consular processing, the regulations provide that a completed visa application form, any supporting documents, and any required fees must be submitted to the consular officer for a provisional review of visa eligibility. If it appears, based on the available information, that the child is admissible, the consular officer must annotate the visa application. If the petition has been provisionally approved and the visa application has been annotated, the consular officer must notify the country of origin that the steps required by the Convention have been taken. After the consular officer has received appropriate notification from the country of origin that the adoption or grant of legal custody has occurred and any remaining requirements have been fulfilled, the rules provide that the consular officer must affix to the adoption decree or grant of legal custody a certificate so indicating. After the consular officer issues the certification, the consular officer must finally adjudicate the petition and visa application in accordance with standard procedures.

In the case of an alien child who is in the United States and who is eligible both for approval of a Form I-800 and for adjustment-of-status, the USCIS office with jurisdiction to adjudicate the child’s

\(^\text{132}\) 8 C.F.R. § 204.313(h).
adjustment-of-status application also has jurisdiction to grant final approval of the Form I-800 upon receiving the State Department certificate required by statute as discussed above.

A denial of the petition may be appealed to the Administrative Appeals Office.\textsuperscript{133}

\textbf{§ 3:3.8 Self-Petitioning by Battered Spouses}

[A] Generally

Battered spouses of U.S. citizens and permanent residents may also file their own immediate relative or preference petitions.\textsuperscript{134} To qualify, the alien spouse must be a person of “good moral character,” must have entered the marriage in good faith, must have resided in the United States with the citizen/permanent resident spouse, and must have been battered or subjected to “extreme cruelty” by the citizen/permanent resident spouse. The law provides identical self-petition benefits to:

(1) battered children of a U.S. citizen or permanent resident;

(2) certain adult sons and daughters who were victims of incest and child abuse; and

(3) certain elderly abuse victims.

The self-petition provisions for battered family members were enacted in 1994;\textsuperscript{135} the 1994 law was reauthorized in 2000 and 2006.\textsuperscript{136} The 2000 and 2006 statutes also removed or relaxed many of the most onerous requirements previously applicable to self-petitioners. Most notably, the 2000 law removed an earlier requirement that the self-petitioner establish that his or her removal would result in extreme hardship to the alien or child of the alien.

[B] Eligibility for Self-Petition Benefits

To qualify for self-petitioning benefits under the 1994 legislation, as amended, several requirements must be met. First, the self-petitioner must be a spouse, child, or parent of a U.S. citizen or permanent resident, or fall within a statutory exception. The self-petitioning

\textsuperscript{133} 8 C.F.R. § 204.314.
\textsuperscript{134} INA § 204(a)(1).
\textsuperscript{135} See Pub. L. No. 103-322 (Sept. 1, 1994).
spouse must be legally married to the U.S. citizen/resident abuser when the petition is filed unless the self-petitioner can establish one of the following:

1. the marriage to a U.S. citizen or permanent resident is not legitimate because of the bigamy of the abuser, but the self-petitioner believed that the marriage was legitimate, a marriage ceremony was actually performed, and he or she entered the relationship in good faith, or

2. the self-petitioner was the spouse of a citizen or permanent resident within the past two years, but

   a. the marriage was terminated within the past two years and the termination was “connected” to domestic violence;

   b. the abuser lost his or her citizenship or permanent resident status within the past two years or renounced his or her citizenship within the past two years and the loss of status or renunciation was “related” to domestic violence; or

   c. the U.S. citizen abuser died within the past two years.

A child who is seeking self-petitioning benefits must establish that he or she is the child of a U.S. citizen or permanent resident. If the parent is no longer a U.S. citizen or permanent resident, it must be established that the parent lost his or her citizenship or resident status within the past two years or renounced citizenship status within the past two years and that such loss or renunciation was related to an incident of domestic violence. The child must be unmarried, less than twenty-one years of age and otherwise qualify as the abuser’s child when the self-petition is filed. Keep in mind that a 2006 amendment protects child abuse and incest victims by allowing them to self-petition up to age twenty-five so long as the child abuse was at least one central reason for the filing delay. The 2006 law also removes the two-year custody and residency requirement for abused adopted children by allowing adopted children to obtain permanent residency even if they have not been in the legal custody of, and have not resided with, the adoptive parent for at least two years, if the child has been battered or subject to extreme cruelty by the adoptive parent or by a family member of the adoptive parent. Finally, the law requires that the self-petitioner must have been a child of the abuser when the abuser was a U.S. citizen or permanent resident [in cases in which the abuser lost his citizenship or resident status or renounced his or her citizenship].

As noted, elderly abuse victims may also self-petition if they have been battered or subjected to extreme cruelty by their adult U.S. citizen...
son or daughter. In these cases, the self-petitioner must establish that he or she is the parent of the abuser and would qualify for immigration benefits as a parent, that is, the abuser is a U.S. citizen and is over twenty-one years of age.

Second, the self-petitioning spouse, child, or parent must be eligible for immigrant classification as the spouse, child, or parent of a citizen or permanent resident. An exception applies to a self-petitioning spouse who may show, as an alternative, that he or she would have been eligible for such classification but for the bigamy of the citizen or permanent resident who the alien intended to marry.

Third, the self-petitioner must have resided with the abuser (if applying from abroad, the abuse, or a portion of the abuse, must have occurred in the United States). The self-petitioner is not required to be present in the United States when the petition is filed. A self-petition may be filed from abroad provided the abuse, or a portion of the abuse, occurred in the United States. Spouses, children, or parents of U.S. government employees and U.S. military personnel living abroad are eligible to self-petition even if all of the abuse occurred outside the United States. In addition, the self-petitioner must have lived with the abuser but the joint residence could have been shared abroad. If the self-petitioner is currently residing abroad, however, he or she will need to show that at least a portion of the abuse occurred in the United States.

Fourth, the self-petitioner (or the self-petitioner’s child) must have been abused by the citizen or lawful permanent resident spouse, parent, or son or daughter. With regard to self-petitions filed by spouses, the qualifying abuse must have taken place during the marriage (or during the relationship intended by the alien to be legally a marriage in case of bigamy by the abuser). Instances of abuse that occurred at other times (that is, prior to or after the marriage or intended marriage) are not qualifying abuses. The qualifying abuse must have been committed by the citizen or permanent resident spouse, parent, or son or daughter. Furthermore, only abuse perpetrated against the self-petitioner or self-petitioner’s child is qualifying. Abuse by a person other than the citizen or permanent resident spouse or parent is not qualifying, unless it was shown that the citizen or permanent resident willfully condoned or participated in the abusive acts. Similarly, acts aimed at persons other than the self-petitioner (or the self-petitioner’s child) are not considered qualifying unless it can be established that these acts were undertaken to perpetrate extreme cruelty on the self-petitioner (or the self-petitioner’s child). In addition, the qualifying abuse must have been sufficiently aggravated to have reached the level of battery or extreme cruelty. Such acts include, but are not limited to, acts or threatened acts of violence such as
forceful detention which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (in the case of minors), or forced prostitution, are also considered acts of violence.

Fifth, self-petitioners must be persons of good moral character. Self-petitioning spouses and parents and self-petitioning children who are fourteen years of age or older must provide evidence showing that they have been persons of good moral character for the three years immediately preceding the date the self-petition is filed. The USCIS, however, may examine the self-petitioner’s conduct prior to that period if there is reason to believe that the self-petitioner may not have been a person of good moral character in the past. Self-petitioning children under fourteen years of age are not required to submit evidence of good moral character, as such children will be presumed to be persons of good moral character. The 2000 law amends the good moral character requirement by providing that a battered spouse or child remains eligible for self-petition benefits notwithstanding the fact that he or she has engaged in proscribed conduct, provided: (1) a waiver of inadmissibility or deportability is available for such conduct; and (2) the act or conviction was connected to the abuse.

Sixth, in spousal cases, the self-petitioner spouse must have entered the marriage in good faith (in cases involving bigamy by the abuser, the self-petitioner must have intended to enter the marriage in good faith). A self-petition cannot be approved if the self-petitioner married the abuser (or intended to marry the abuser) solely to obtain immigration benefits. A spousal self-petition will not be denied, however, solely because the self-petitioner and the abuser are not living together and the marriage (or the relationship intended by the alien to be legally a marriage) is no longer viable. The key factor in determining whether a person entered a marriage (or intended marriage) in good faith is whether he or she intended to establish a life together with the spouse at the time of the marriage. The person’s conduct after marriage (or the relationship intended by the alien to be a marriage) is relevant only to the extent that it bears upon his or her subjective state of mind at the time of the marriage (or intended marriage).

[C] Applying for Self-Petition Benefits

A battered spouse/child petition must be submitted on USCIS Form I-360. The following supporting documentation must be submitted with the Form I-360:

(1) Evidence of the abuser’s U.S. citizenship or lawful permanent resident status and evidence of the self-petitioner’s relationship to the abuser. In cases in which the self-petition is being filed by a spouse on behalf of a child that is being abused by a
U.S. citizen spouse or permanent resident, evidence must also be submitted establishing the parent-child relationship between the self-petitioner and the child. In spousal cases, if the self-petitioner is not legally married to the abuser or is no longer married to the abuser, evidence must be submitted establishing that: (a) the marriage was not legitimate because of the bigamy of the abuser but the self-petitioner believed that the marriage was legitimate, a marriage ceremony was actually performed, and he or she entered the relationship in good faith (see evidence of good-faith marriage discussed below), or (b) the marriage was terminated in past two years and the termination was “connected” to domestic violence. If the abuser is no longer a citizen or permanent resident, evidence must be submitted showing that the abuser lost his or her citizenship or permanent resident status in the past two years or renounced his or her citizenship within the past two years and that the loss of status or renunciation was “related” to domestic violence. If the citizen abuser has died, a death certificate must be submitted (the certificate must reflect that the U.S. citizen died in the past two years).

(2) In cases in which the marriage (or the intended marriage) took place while the self-petitioner was in removal proceedings, or in cases in which the permanent resident/abuser spouse acquired permanent residence within the past five years based on a marriage to a citizen or permanent resident, evidence that the marriage between the self-petitioning spouse and the abuser spouse was entered into in good faith must be submitted. In cases in which the permanent resident spouse’s prior marriage ended due to the death of the prior spouse, a death certificate should be submitted, if available.

(3) Evidence that the self-petitioner has resided with the abuser. Evidence of residency with the abuser may include employment records, utility receipts, school records, birth certificates of children born to the spouses, deeds, mortgages, rental records, insurance policies, or similar documents. A self-petitioner may also submit affidavits to establish residency with the abuser.

(4) Evidence that the self-petitioner (or his or her child) has been abused by a U.S. citizen/permanent resident spouse, parent, or son or daughter. In addition, if the self-petitioner is currently living outside the United States and is applying for self-petition benefits from abroad, evidence must be submitted to establish that at least a portion of the abuse
occurred in the United States (unless the self-petitioner is a spouse or child of a U.S. government employee or U.S. military personnel). Evidence of abuse may include reports and affidavits from police, judges and other court officials, medical personnel, school officials, clergy, social workers, and other social service agency personnel. Persons who have obtained an order of protection against the abuser or taken other legal steps to end the abuse should submit copies of the legal documents. Evidence that the abuse victim sought safe haven in a battered women’s shelter or similar refuge may be relevant, as may be a combination of documents, such as a photograph of the visibly injured self-petitioner, supported by affidavits.

(5) Evidence that a self-petitioning spouse, parent, or child over fourteen years of age has been a person of good moral character for the three years immediately preceding the date the self-petition is filed. Primary evidence of good moral character is the self-petitioner’s affidavit. The affidavit should be accompanied by a local police clearance or a state-issued criminal background check from each locality or state in the United States in which the self-petitioner resided for six or more months during the relevant three-year period. Self-petitioners who lived outside the United States during this time should submit a police clearance, criminal background check, or similar report issued by the appropriate authority in each foreign country in which he or she resided for six or more months during the relevant three-year period. Affidavits from persons who can knowledgeably attest to the self-petitioner’s good moral character may also be considered by the Service.

(6) Evidence that the self-petitioning spouse entered the marriage with the abusive spouse in good faith. In cases involving bigamy by the abuser, the evidence must establish that the self-petitioner intended to enter the marriage in good faith.

Self-petitions filed on Form I-360 by battered spouses, children, or parents must be mailed directly to the Vermont Service Center. If the self-petitioner is in the United States, an immigrant visa is immediately available and the self-petitioner is otherwise eligible for adjustment, the petition and the adjustment of status application may be filed simultaneously with the VSC.
NOTE: Persons with approved self-petitions may adjust their status under the normal adjustment provision, even if the self-petitioner entered the United States without inspection and notwithstanding the limitations imposed by INA section 245(c) (for example, overstayed period of admission or period of unauthorized employment).

When the self-petition is approved, the petitioner will be notified of the approval. If the petition was filed in conjunction with an application for adjustment of status that is also approved, Form I-181B, which is used to notify the alien of his or her admission to permanent residence, is also sent to the alien. If the petition was filed alone, and the petition indicated that the alien will apply for an immigrant visa abroad, the petitioner will be notified of the approval and that the petition approval has been sent to the National Visa Center (NVC), which receives all approved immigrant visa petitions adjudicated by the USCIS Service Centers.

NOTE: Self-petitioners with approved petitions who are not eligible for adjustment of status because a visa number is not immediately available (that is, persons seeking self-petition benefits as the battered spouse/child of a permanent resident) may be eligible for deferred action. If the alien is placed in deferred action, the VSC will notify the alien that he or she should apply for an employment authorization document (EAD) on Form I-765.

§ 3:4 Application for Residence: Visa Processing or Adjustment of Status

Once eligibility for immigration has been established through approval of a family-sponsored immigrant visa petition, an alien can make an application for permanent residence. If the alien is outside the United States or is in the United States but ineligible for adjustment of status, this application must be made at a U.S. consulate.

137. INA § 245(a).
abroad. Other aliens, while physically present in the United States and eligible for adjustment of status, may prefer to apply for their immigrant visas at a U.S. consulate. The procedure for obtaining the immigrant visa at a U.S. consulate is known as “visa processing.” In all of these cases the petition is filed alone and the approval forwarded to the NVC, which will forward the petition to the U.S. consulate when an immigrant visa becomes immediately available. At this point, the alien will be permitted to apply for an immigrant visa at the U.S. consulate. Note that an alien does not become a lawful permanent resident until an immigration inspector actually admits the alien into the United States with his or her immigrant visa.

Some aliens who are already physically present in the United States are permitted to “immigrate” without having to leave the United States. This procedure is called “adjustment of status.” Because adjustment of status is considered a privilege, this process is more restricted. For example, persons who entered without inspection, engaged in unauthorized employment, or failed to maintain lawful status in the United States are ineligible for adjustment of status under the normal standards set forth in section 245(a) of the INA. Exceptions are made for immediate relatives of U.S. citizens who remain eligible for adjustment of status even if they engaged in unauthorized employment or failed to maintain lawful status during all prior U.S. visits. Apart from adjustment of status under the normal standards, some aliens ineligible for adjustment under section 245(a) may be eligible for adjustment of status under a special adjustment status enacted in 1994. These adjustment applicants must pay a substantial penalty to be accorded the privilege of adjustment. Only intending immigrants who had labor certification applications or immigration visa petitions filed on their behalf by April 30, 2001 remain eligible for adjustment under section 245(i) [persons for whom petitions or labor certifications were filed between January 15, 1998 and April 30, 2001, must also show that they were present in the United States on December 21, 2000].

Family-sponsored immigrants may file their immigrant visa petitions concurrently with their adjustment applications provided an immigrant visa is immediately available [abused spouses or children who are self-petitioning, however, must first obtain petition approval before they may file an adjustment application]. If an immigrant visa is not immediately available, the petition must be filed separately, and the adjustment application can be filed later when an immigrant visa becomes available. The petition will be sent to the NVC or held by
USCIS depending on whether or not an immigrant visa will be available in the immediate future. An alien becomes a permanent resident when the adjustment-of-status application is approved, and he or she will be given temporary evidence of such status and processed for an alien registration receipt card (the so-called green card) at the time of approval.

The choices between immigrant visa processing and adjustment of status, when a choice is available, have previously been discussed.140 Most family-based intending immigrants must seek immigrant visas abroad if they entered without inspection, engaged in unauthorized employment, or otherwise failed to maintain valid status. The principal exceptions are with regard to immediate relatives of U.S. citizens who remain eligible for adjustment of status under section 245(a) despite periods of unauthorized employment or violations of status. In addition, intending immigrants who had labor certification applications or immigration visa petitions filed on their behalf by April 30, 2001 may file for adjustment under section 245(i) of the INA, as noted above.

The requirements and procedures governing immigrant visa processing and adjustment of status are discussed in detail in section 2:10, above. While the procedures are nearly identical for employment-based and family-based immigrants, one important exception is the requirement that most family-sponsored immigrants submit a legally binding affidavit of support, Form I-864, as part of their applications for immigrant visas or adjustment of status. The affidavit must be executed by the sponsor on behalf of the intending immigrant. In addition, documentation must be submitted that the sponsor has the means to support the intending immigrant at an income that is at least 125% of the federal poverty guidelines. The sponsor’s obligations under the affidavit continue until the alien becomes a U.S. citizen or until he or she has worked in the United States for a period of ten years. These requirements were established by IIRIRA. While affidavits of support were required under prior law, such affidavits were not legally binding on the petitioner. Moreover, evidence that the petitioner had an income that was at or above the poverty guidelines was sufficient. The affidavit of support requirements applicable in most family-based cases are discussed below.

140. See section 2:10, supra.
§ 3:4.1 Affidavit of Support Requirement

[A] Generally

The public charge ground for inadmissibility was significantly revised by IIRIRA. Specifically, IIRIRA provides that a family-sponsored alien is inadmissible under the public charge exclusion ground unless the person petitioning for the alien’s admission (and any additional sponsors) has executed an affidavit of support that meets the requirements of section 213A of the INA.141 A person applying for an immigrant visa or adjustment of status based on approval of an employment-based petition filed by a relative of the alien (or by an entity in which such relative has a significant ownership interest) is also inadmissible unless the relative files an affidavit of support that meets the standards set forth in section 213A. An ownership interest of 5% or more constitutes a “significant ownership interest.” Family members who are accompanying or following to join a beneficiary covered by the affidavit of support requirement must also submit an affidavit of support.

The provision does not apply to the alien spouses or children of U.S. citizens or permanent residents who have been abused by the citizen or resident and are self-petitioning, nor do they apply to an alien widow(er) of a U.S. citizen and the alien’s children. Also not covered by the affidavit of support requirement are immigrants under the diversity program, as well as most employment-based immigrants, that is, those who will be working for someone other than a relative or an entity in which a relative has at least a 5% ownership interest.

In addition, an affidavit of support is not required if, at the time the alien seeks permanent residence through admission or adjustment of status, the alien can show that his or her admission or adjustment will automatically confer citizenship under INA section 320. This provision permits foreign-born children—including adopted children—to acquire citizenship automatically if they meet certain requirements. In addition, family-based immigrants who can be credited with forty qualifying quarters of employment in the United States are also not subject to the affidavit of support requirement.

Under a rule issued in June 2006,142 family-based applicants who are not required to submit an affidavit of support must complete Form I-864W, noting the grounds under which they are exempt. The preparer must indicate the basis for exemption in Part 2 of the form. Such a basis may include:

141. See INA § 212(a)(4)(C), as amended by IIRIRA § 531(a).
an immigrant who can be credited with forty qualifying quarters of employment in the United States;

an immigrant who is a child and will become a U.S. citizen immediately upon admission to the United States or adjustment under the CCA;

an immigrant seeking an immigrant visa or adjustment as a self-petitioning widow(er); and

an immigrant seeking an immigrant visa or adjustment as a self-petitioning battered spouse or child of a U.S. citizen or permanent resident.

Section 213A of the INA, as added by IIRIRA, sets forth specific requirements for affidavits of support. The law provides that an affidavit of support submitted on behalf of an alien described above may not be relied on by the DOS or USCIS unless the affidavit is executed as a contract

in which the sponsor agrees to provide support to maintain the sponsored alien at an annual income that is not less than 125% of the federal poverty guidelines, until the alien becomes a U.S. citizen or until the alien (or the alien’s parent or spouse) has worked in the United States for ten years (that is, forty qualifying quarters);

that is legally enforceable against the sponsor by the sponsored alien, the federal government, any state, or by any other entity that provides any means-test public benefit to the alien; and

in which the sponsor agrees to submit to the jurisdiction of any federal or state court.

The legally binding affidavit of support is filed on Form I-864 or Form I-864EZ.

The petitioner or any person who accepts joint and several liability with the petitioner must also demonstrate the means to maintain an annual income equal to at least 125% of the federal poverty guidelines. The required annual income is to be calculated according to the size of the sponsor’s household (including family and non-family dependents) plus the total number of other aliens being sponsored.

[B] Eligible Sponsors

Only certain classes of individuals may serve as sponsors and may complete the affidavit under the agency guidelines. For immediate relatives and family-based immigrants, the family member petitioning for the intending immigrant must be the sponsor. For employment-based immigrants, the petitioning relative or a relative with a
significant ownership interest (5% or more) in the petitioning entity must be the sponsor. If the petitioner cannot meet the income requirements, a joint sponsor may submit an additional affidavit of support (see discussion below). Even when a joint sponsor is obtained, however, the petitioning family member must also submit an affidavit of support in every case.

The petitioner must also submit an affidavit on behalf of a beneficiary’s family members who are entitled to derivative status. The only exception to this rule exists when the sponsor dies after the principal alien has immigrated but before derivative family members who are following to join have immigrated. In these cases, any qualified person may serve as the sponsor for the derivative family members. Under prior law, the death of the sponsor before the principal alien had immigrated did not excuse the filing of an affidavit of support. In these cases, the principal alien and derivative family members were not eligible for immigration based on the deceased petitioner’s filing. However, the Family Sponsor Immigration Act of 2002 remedies the situation of a principal alien whose sponsor has died. Under INA section 213A(f)(5), a person other than the original petitioner may sponsor the foreign national if USCIS has reinstated the petition for humanitarian reasons following the death of the petitioner. INA section 213A(f)(5)(B) now allows certain family members to become substitute sponsors if a petitioner dies following approval of the visa petition, but before the foreign national obtains permanent residence. An exception to the affidavit of support rule is not recognized when the sponsor relinquishes his or her legal permanent resident status or if the sponsor and the principal immigrant divorce after the principal alien has immigrated but before all following to join dependents have immigrated.

A sponsor or joint sponsor must also be:

1. a U.S. citizen or permanent resident,
2. at least eighteen years of age, and
3. domiciled in the United States.

The sponsor must be a natural person; it cannot be a corporation or other entity, such as charitable or religious organizations that often sponsor refugees.

USCIS will use the generally accepted definition of the term “domicile,” that is, the place where a person has a residence that he or she intends to maintain for the foreseeable future. Residence is defined as one’s place of general abode, that is, the place

where one actually lives, regardless of intent. To be considered as
having a principal residence in the United States, individuals must
demonstrate that their visit abroad is temporary and that they have
maintained sufficient ties to the United States. One can demonstrate
sufficient ties through a combination of actions such as voting in state
or federal elections, paying U.S. income taxes, maintaining property, a
residence, or a permanent mailing address in the United States, and
maintaining bank accounts or investments in the United States. Permanent resident sponsors must also demonstrate that they have
maintained their permanent resident status.

A lawful permanent resident who is living abroad is considered to
have a domicile in the United States if he or she has applied for
and obtained preservation of residence benefits available to certain
residents who are working abroad for the U.S. government, a U.S.
corporation, or certain research institutions or international organiza-
tions. Certain residents who perform religious duties abroad are also
eligible for preservation of residence benefits. A U.S. citizen living
abroad who is working abroad for the U.S. government, a U.S.
corporation, or certain research or international organizations will
be considered to have a domicile in the United States. Otherwise, the
permanent resident or citizen who is abroad must establish that he or
she did not, in fact, give up his or her U.S. domicile.

In cases in which the sponsor has clearly not maintained a domicile
in the United States, the question is when the sponsor can be deemed
to have reestablished U.S. domicile. To do this, the sponsor must take
a credible combination of steps to make the United States his or her
principal place of residence. This would include finding employment
in the United States, finding a place to live, registering children in U.S.
schools, etc. The sponsor should also have made other arrangements
to relinquish residence abroad.

NOTE: If the petitioner is unable to qualify as a sponsor
because he or she does not meet the domicile requirement, a
joint sponsor cannot be authorized, which means that the
applicant will not be able to qualify for an immigrant visa.
Therefore, these regulatory requirements for sponsorship also
serve effectively as new substantive requirements for who
may petition for an alien relative. Petitioners under the age of
eighteen or those who are not domiciled in the United States
will not be able to successfully sponsor an alien beneficiary
until they have reached age eighteen and/or have
become domiciled in the United States.
[C] Income Requirements

A sponsor must be able to demonstrate the means to maintain an income of at least 125% of the federal poverty guidelines. Sponsors on active duty in the armed forces who are petitioning for their spouse or child need only demonstrate the ability to maintain an income of at least 100% of the poverty level. The sponsor must meet the 125% requirement at the time that the immigrant visa or adjustment-of-status application is made.

The required annual income is to be calculated according to the size of the sponsor’s household. Under the immigration rules, the sponsor’s household includes:

1. the sponsor;
2. the sponsor’s spouse;
3. all of the sponsor’s children other than (a) a stepchild who does not reside with the sponsor, is not claimed by the sponsor as a dependent for tax purposes, and is not seeking to immigrate based on the stepparent/stepchild relationship, or (b) children who have reached the age of majority under the law of the place of domicile and whom the sponsor did not claim as dependents on the sponsor’s federal income tax return for the most recent tax year;
4. other persons (whether related to the sponsor or not) whom the sponsor has claimed as dependents on the sponsor’s federal income tax return for the most recent tax year, even if such persons do not have the same principal residence as the sponsor;
5. all prospective immigrants being sponsored under current Form I-864 (including the principal alien and all family members accompanying or following to join him or her);
6. all immigrants for whom the sponsor has already filed Forms I-864, provided the sponsor’s support obligation under the prior I-864 form has not terminated; and
7. relatives of the sponsor (parents, siblings or adult children) not listed as dependents but who have the same principal residence as the sponsor and whose income will be relied on to meet the requirements of INA section 213A (as evidenced by completion of Form I-864A).

In calculating the household size, no individual should be counted more than once. In addition, if the intending immigrant’s spouse or child is a citizen or already holds the status of an alien lawfully admitted for permanent residence, then the sponsor should not
include that spouse or child in determining the total household size, unless the intending immigrant’s spouse or child is a dependent of the sponsor. Note that a divorced sponsor’s dependent children are members of his or her household, even if they live part of the time with the other parent. A child need not be considered part of the sponsor’s household for purposes of the affidavit of support if the sponsor can show that he or she has been relieved of any legal obligation to support the child. Note also that a petitioner can limit the number of sponsored immigrants listed on the affidavit of support to the number of people who actually intend to immigrate at that time, but the principal applicant must be one of the sponsored immigrants. This would enable the petitioner to reduce the household size and face a lower minimum income requirement. The petitioner could later file another affidavit of support on behalf of the principal applicant’s other eligible dependents when his other financial situation has improved. There is one important restriction: the sponsor cannot exclude any of the principal’s immediate family members who are residing in the United States.

Income earned by the following individuals may be used in calculating household income:

(1) the sponsor, and

(2) the sponsor’s spouse and any other person included in determining the sponsor’s household size if the spouse or other person is at least eighteen years old.

To rely on the income of these other persons to meet the income threshold, the sponsor must include with the affidavit of support Form I-864A. This written contract provides that each person whose income the sponsor will rely on has agreed:

(1) to assist the sponsor in supporting the sponsored immigrant(s);

(2) to be held jointly and severally liable for payment of any reimbursement obligation that the sponsor may incur; and

(3) to submit to the personal jurisdiction of any competent court.

The person signing the Form I-864A does not need to be a U.S. citizen or permanent resident. If one of the individuals on whose income the sponsor is relying is the sponsored immigrant, the sponsored immigrant need not sign Form I-864A, unless the sponsored immigrant’s income will be used to determine the sponsor’s ability to support a spouse or child who is immigrating with the sponsored immigrant.

In the past, USCIS rules provided that only income from persons (including the sponsored alien) living in the sponsor’s residence for the prior six months could be counted. Imposing a requirement that the sponsored alien had to be part of the sponsor’s household for
six months, however, created problems of timing in filing the alien’s adjustment-of-status or immigrant visa application. The June 2006 rule, however, eliminated the requirement that the household member(s) and sponsoring relative live together for at least six months before being able to sign the I-864A.

The household income may not include the income of an intending immigrant unless the intending immigrant is either: (1) the sponsor’s spouse, or (2) has the same principal residence as the sponsor. In addition, the sponsor may rely on the income of other relatives not listed as dependents (parents, siblings or adult children) only if they have the same principal residence as the sponsor and they complete Form I-864A. Proof of these issues must be submitted with the affidavit.

A credible offer of employment may not be counted in determining compliance with the 125% income requirement. However, in cases in which the sponsor has just barely reached the 125% requirement and an issue remains about whether the sponsored alien might become a public charge, a credible offer of employment may be influential in overcoming the remaining doubts on the public charge issue.

NOTE: In determining the income of an individual, adjudicators will rely on the “Total Income” entry in the individual’s federal income tax return, including a joint income tax return.

If the sponsor’s total household income is equal to or higher than the minimum income requirement for the sponsor’s household size (which is based on the federal poverty guidelines), the income requirement is satisfied and no other steps need be taken. Only the current year’s income (that is, the sponsor’s total household income for the year in which the intending immigrant filed the application for an immigrant visa or adjustment of status) will govern in determining compliance with the 125% requirement. In general, the sponsor’s affidavit of support will be considered sufficient if the reasonably expected household income for the year in which the intending immigrant filed the application for an immigrant visa or adjustment of status meets or exceeds 125% of the federal poverty line for the sponsor’s household size under the poverty guidelines in effect on the date the intending immigrant filed the application for an immigrant visa or for adjustment of status. The sponsor’s household income for the year in which the intending immigrant filed the application for an immigrant visa or adjustment of status will be given the greatest
evidentiary weight. Any tax return and other information relating to the sponsor’s financial history will serve as evidence tending to show whether the sponsor is likely to be able to maintain his or her income in the future.

If the projected household income for the year in which the intending immigrant filed the application for an immigrant visa or adjustment of status meets the applicable income threshold, the affidavit of support may still be held to be insufficient, if it is reasonable to infer on the basis of specific facts that the sponsor will not be able to maintain his or her household income at a level sufficient to meet his or her support obligations. The specific facts may include a material change in employment or income history of the sponsor, joint sponsor or household member, the number of aliens included in Forms I-864, or other relevant facts.

As a result, the consular officer or USCIS adjudicator may still take into account an immigrant’s ability to provide for him or herself and any special circumstances, such as the need for medical treatment or other financial obligations in determining whether the alien is likely to become a public charge. Thus, an immigrant who presents an I-864 from a sponsor who barely meets the 125% requirement may convince the consular officer that he or she will not become a public charge based on the alien’s ability to support himself or herself. On the other hand, an applicant who presents an I-864 that clearly fulfills the 125% requirement may still be refused a visa or denied adjustment on public charge grounds if there are anticipated medical or other costs on behalf of the immigrant which the sponsor does not appear capable of meeting. In addition, the credibility of a particular sponsor may be called into question if the sponsor failed to provide support to an alien for whom the sponsor had previously filed an affidavit. Past or present receipt of public benefits by the sponsor or a member of the sponsor’s household does not reflect on the sponsor’s credibility, although it may raise questions about whether the sponsor has the means to maintain the applicant at 125% of the poverty level. Public cash benefits received by the sponsor cannot be counted toward meeting the 125% income threshold, but receipt of other means-tested benefits, such as Medicaid, is not disqualifying for sponsorship purposes.

The June 2006 rules provide that if more than one year passes between the filing of the Form I-864 and the interview or examination of the intending immigrant concerning the intending immigrant’s application for an immigrant visa or adjustment of status, and the consular officer or USCIS adjudicating officer determines that the particular facts of the case make the submission of additional evidence necessary to the proper adjudication of the case, then the officer may direct the intending immigrant to submit additional evidence. In this case, the sufficiency of the Form I-864 and any
Form I-864A will be determined based on the sponsor’s or joint sponsor’s reasonably expected household income in the year the adjudicating officer makes the request for additional evidence, and based on the evidence submitted in response to the request for additional evidence and on the poverty guidelines in effect when the request for evidence was issued.

[D] Use of Assets

If the petitioner is unable to demonstrate the means to maintain income equal to at least 125% of the poverty line, the petitioner and/or the sponsored immigrant(s) must demonstrate significant assets that are available for the support of the sponsored immigrant(s), or a joint sponsor must execute an additional Form I-864.

The sponsor or the sponsored immigrant(s) may demonstrate that he or she owns significant assets that would effectively provide for the support of the sponsored immigrant(s), even if the sponsor’s household income is below the minimum income level. The sponsor may also rely on the assets of any person included in the household size [as discussed above]. For the assets of a household member, other than the immigrant(s) being sponsored, to be considered, the household member must complete and sign Form I-864A.

Normally, the value of the assets (minus any liability) must be five times the difference between the sponsor’s household income and the federal poverty figure for the sponsor’s household size. The June 2006 rule modifies this formula for immediate relatives and orphans. If the petitioner is a U.S. citizen and the intending immigrants are his spouse and/or child, then the net value of the assets only needs to be three times the difference between the household income and the federal poverty line for the sponsor’s household size.

Any type of asset can be used if it is readily convertible to cash within one year. USCIS will look most favorably on liquid assets, such as savings deposits, stocks, bonds, and certificates of deposit, but other property, such as an automobile (current book value) or real estate will also be considered, as long as it can be sold within a year. Note that if the assets are located outside the United States, these assets may be counted only if it is demonstrated that the assets can be taken out of the country where they are located, and that they are convertible to cash within one year.

[E] Joint Sponsors

If the petitioner is unable to satisfy the minimum income requirements, through proof of household income or assets, a joint sponsor must be found. To be a joint sponsor, an individual must execute a separate Form I-864 and must accept joint legal responsibility with the petitioning sponsor and have an income and/or assets, based on his or
her household size, that meets or exceeds 125% of the poverty level. Note that the sponsor and the joint sponsor cannot add their income together to meet the minimum income level. The joint sponsor must satisfy the minimum income requirement independently. Note also that a filing by a joint sponsor does not eliminate the obligation of the petitioning sponsor to file his or her own affidavit of support.

The June 2006 rule clarifies that an intending immigrant may not have more than one joint sponsor. If, however, the joint sponsor’s household income is not sufficient to meet the income requirement with respect to the principal intending immigrant and derivative family members, then the joint sponsor may specify on the Form I-864 that the Form I-864 is submitted only on behalf of the principal intending immigrant and those accompanying family members specifically listed on the Form I-864. The remaining accompanying family members will then be inadmissible under the public charge ground unless a second joint sponsor submits a Form I-864 on behalf of all the remaining family members who seek to accompany the principal intending immigrant and who are not included in the first joint sponsor’s Form I-864. The rule also specifies that there may not be more than two joint sponsors for the family group consisting of the principal intending immigrant and the accompanying spouse and children who will accompany the principal intending immigrant. Each joint sponsor must meet the 125% income requirement for the beneficiary’s family members that are listed on their Form I-864. Different joint sponsors may file affidavits of support on behalf of individual family members who follow to join the principal immigrant.

[F] Procedural Considerations

As noted, the affidavit of support is submitted on Form I-864 or I-864EZ. Form I-864 requires detailed information on the sponsor’s household size and income. Form I-864EZ may be used by petitioning sponsors who will rely only upon their own employment to meet the income requirement. The form may be submitted by the sponsor in lieu of Form I-864. The form is much simpler to fill out than the I-864 form. Sponsors may use the shorter Form I-864EZ if all of the following conditions apply:

1. the sponsor is the person who filed or is filing the Form I-130 for the relative being sponsored;
2. the relative being sponsored is the only person listed on the I-130 petition; and
3. the income the sponsor is using to satisfy the 125% income requirement is based entirely on his or her salary or pension and is shown on one or more Forms W-2 provided by the sponsor’s employer[s] or former employer[s].
In cases in which the immigrant will seek a visa abroad, the National Visa Center (NVC) will mail the forms directly to the petitioner or the attorney of record at the time the NVC sends the agent designation form to the visa applicant. The form must be submitted within one year of its signature by the sponsor. If the form is submitted within that one-year time frame, it will remain valid indefinitely. Updated supporting documentation may be required if more than twelve months pass between the time the affidavit was completed and the adjustment or immigrant visa interview (as discussed above).

Copies of the original affidavit can be submitted with the applications of the family members of the principal alien listed on the form, provided the family members are immigrating at the same time as the principal immigrant or within six months of the time the principal alien immigrated to the United States. The sponsor does not need to provide copies of the supporting documents for each of the photocopied Forms I-864. Keep in mind, however, that separate I-864 forms must be completed for intending immigrants for whom different Form I-130 family-based petitions were filed.

**NOTE:** Effective January 1, 2001, an immigrant visa applicant will be required to pay a fee for the review of the affidavit of support, Form I-864, when that form is required. The Department will assess one fee for each distinct affidavit of support filed, whether it is filed by the primary sponsor or by a joint sponsor. On the other hand, the fee will be charged only once to a sponsor or joint sponsor who files essentially duplicative affidavits of support in connection with immigrant visa applications for the spouse, parents and children of a petitioner who is required to petition separately for them. The fee will be collected by the NVC before the immigrant case is forwarded to the petitioner or attorney of record. After the bill has been paid, the NVC will send the I-864 Affidavit of Support to the petitioner for completion.

Form I-864A must be completed if the sponsor is relying on income from any other person listed as part of the sponsor’s household to meet the 125% requirement. If one of the individuals on whose income the sponsor is relying is the principal sponsored immigrant, the sponsored immigrant need not submit this contract unless the sponsored immigrant’s income will be used to determine the
sponsor’s ability to support a spouse or child who are accompanying or following to join the sponsored immigrant. This contract must also be completed if the sponsor is relying on the assets of household members other than the assets of the principal sponsored immigrant to satisfy the 125% requirement.

The sponsor must submit evidence establishing that he or she satisfies the 125% requirement. This documentation can be quite extensive. Note the following:

(1) As proof of income, the sponsor must include with the Form I-864:
   (a) either a copy or an IRS-issued transcript of his or her complete federal income tax return for the most recent taxable year (counting from the date of the signing, rather than the filing, of the Form I-864);
   (b) copies of all schedules filed with each return; and
   (c) if the sponsor will submit a copy of the tax return, all Forms W-2 and 1099.

(2) The June 2006 rule provides that the sponsor may, at his or her option, submit tax returns for the three most recent years if the sponsor believes that these additional tax returns may help in establishing his or her ability to maintain an income at the applicable threshold set forth in the poverty guidelines.

(3) The sponsor may also include documentation evidencing his or her current employment and income, or other evidence of the sponsor’s anticipated household income for the current year.

(4) If the sponsor did not file a federal income tax return for the most recent tax year, the sponsor must explain why he or she had no legal duty to file a federal income tax return. If the sponsor claims he or she had no legal duty to file for any reason other than the level of the sponsor’s income for that year, the initial evidence submitted with the Form I-864 must also include any evidence of the amount and source of the income that the sponsor claims was exempt from taxation and a copy of the provisions of any statute, treaty, or regulation that supports the claim that he or she had no duty to file an income tax return with respect to that income. If the sponsor had no legal obligation to file a federal income tax return, he or she may submit other evidence of annual income.

(5) If the sponsor will rely on the income of another household member, that family member must complete an I-864A
contract, unless the family member is an intending immigrant and there is no accompanying child or spouse immigrating with the family member. If the sponsor relies on the income of any individual who has signed Form I-864A, the sponsor must also include evidence of income with respect to that household member.

(6) If the sponsor will include the income of the intending immigrant who is his or her spouse, evidence that the spouse’s income will continue from the current source after obtaining lawful permanent resident status must be provided. He or she does not need to complete Form I-864A unless he or she has accompanying children.

(7) If the sponsor will include the income of the intending immigrant who is not a spouse, evidence that the intending immigrant’s income will continue from the current source after obtaining lawful permanent resident status must be provided and the intending immigrant must provide evidence that he or she is living in the sponsor’s residence.

(8) If the sponsor will rely on the income of a person who is not an intending immigrant and is any person other than the sponsor’s spouse or a claimed dependent, proof must be submitted concerning the relationship to the sponsor and the relative’s residence.

(9) If the sponsor is relying on his or her assets, the assets of household members, or the assets of the sponsored immigrant, the following must be submitted with regard to each asset:

(a) evidence of ownership, location, and value of asset;
(b) evidence of any liens or liabilities, such as a mortgage on real property;
(c) for bank accounts, bank statements for the past year or a letter from the bank delineating the account’s history; and
(d) with regard to personal property, such as furniture or jewelry, an expert appraisal or its current value.

(10) A joint sponsor must submit his or her own Form I-864 and supporting documentation establishing eligibility to serve as a sponsor and ability to support the sponsored alien(s).

In adjustment cases, the Form I-864 and supporting documentation are submitted with the USCIS in conjunction with an adjustment
application. In visa processing cases, until recently, the affidavit was submitted to the consular post at the time of the immigrant visa interview. Now, however, petitioners are instructed to return the affidavit to the NVC for prescreening before it is forwarded abroad to the consular post, which will process the immigrant visa application.

During prescreening, the NVC will verify that the form has been completed, signed and notarized and that the requisite tax returns and other supporting documents are present. If it is determined that one or more of these steps has not been done, the NVC will instruct the petitioner on how to properly complete the form. The NVC will focus only on the technical sufficiency of the I-864. If the I-864 is not technically correct or complete, the NVC will ask the sponsor to correct and complete the I-864 a second time. It will explain what is lacking in the previously submitted I-864. When a correct affidavit is returned to the NVC, it will be sent to the consular post where the applicant will apply for a visa. The NVC will send it with the immigrant visa petition. The NVC will not determine whether the sponsor meets the minimum income requirement or whether the form is otherwise legally sufficient. To assist the post in adjudicating the case, however, the NVC will provide a summary sheet to the post noting household size and income and highlighting possible deficiencies.

When prescreening is completed, the NVC will forward the file to the consular post where the interview will take place. The NVC will also advise the applicant that the file has been sent to post and will note any remaining deficiencies. The NVC may also recommend a joint sponsor in cases where the sponsor will not be able to meet the income requirements on his or her own. The notice will give the applicant one more opportunity to correct deficiencies before the interview date. Presumably, immigrant visa interviews will not be scheduled until the consular post receives the file. Again, prescreening does not ensure that the form and supporting documentation will be accepted for public charge purposes. The final decision regarding the sufficiency of the affidavit will be made by the interviewing consular officer.

[Sponsor’s Legal Obligations]

The affidavit of support makes the sponsor liable to reimburse any governmental agency for means-tested public benefits paid to the sponsored alien. A “means-tested public benefit” is defined as both a federal means-tested public benefit and a state means-tested public benefit. The former is defined as any public benefit funded in whole or in part by funds provided by the federal government that the federal agency administering the funds defines as a federal means-tested public benefit. State means-tested public benefit is defined as any
public benefit for which no federal funds are provided that a state, state agency, or political subdivision of a state defines as a means-tested public benefit. Means-tested benefits may be determined on such bases as income, resources, or the financial need of an individual, household, or unit.

The sponsor’s obligation terminates if:

1. the sponsor or the sponsored immigrant dies;
2. the sponsored immigrant becomes a U.S. citizen;
3. the sponsored immigrant can be credited with forty quarters of work; or
4. the sponsored immigrant ceases to hold permanent resident status and has departed the United States.

Termination of the support obligation does not relieve the sponsor, or the sponsor’s estate, of any liability for reimbursement that accrued before the termination of the support obligation. The sponsor’s divorce from the sponsored alien does not relieve the sponsor of his or her support obligations or liability to suit for reimbursement under the affidavit of support.

Upon notification that a sponsored individual has received any benefit under any means-tested public benefit program, the appropriate federal, state, or local agency may request reimbursement from the sponsor. If the sponsor does not respond within forty-five days after the request for reimbursement, the agency may bring a court action against the sponsor based on the affidavit of support. A court action for reimbursement may also be brought against the sponsor if he or she fails to abide by the repayment terms agreed to between the parties. A sponsored alien may also bring a court action for financial support. There is a ten-year statute of limitations on suits to collect reimbursement.

The sponsor must notify USCIS on Form I-865 of the sponsor’s new address within thirty days of any change of address. If the sponsor fails to do so, the sponsor may be subject to a civil penalty. A state may also require a sponsor to file a change of address with the state, but failure to comply with such a requirement will not subject the sponsor to a civil penalty.

§ 3:5 “Conditional Residence” for Certain Spouses

As noted previously, IMFA was enacted based on a perception that there were a growing number of sham marriages entered into between aliens and citizens or residents for the purpose of obtaining immigration benefits. IMFA creates a special two-year conditional period for recently married spouses of U.S. citizens and permanent residents

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who immigrate to this country on the basis of their marital relationship. Under IMFA, any alien who has been married to a U.S. citizen or permanent resident for less than two years at the time he or she is admitted to this country as a resident is granted conditional resident status for a two-year period. Similarly, any other person who obtains immigration benefits on the basis of this marriage, such as the conditional resident’s children, will also be admitted for a two-year period as conditional permanent residents. The alien’s status as a permanent resident is conditioned on his or her being able to establish at the end of the two-year period that:

1. the marriage forming the basis for permanent residence was entered into in good faith and not for the purposes of procuring entry as an immigrant;
2. the marriage has not been terminated or annulled;
3. the alien has not paid the petitioner a fee to file the petition; and
4. the marriage was entered into in accordance with the laws of the jurisdiction where it took place.

Failure to establish any of the above can result in termination of the alien’s conditional resident status.\footnote{144}{INA § 216(b)(1), 8 U.S.C. § 1186(b)(1).}

\section*{§ 3:5.1 Coverage of Section 216}

Preliminarily, it should be noted that the “conditional residence” rules apply only to alien spouses who are admitted as the direct beneficiaries of immigrant petitions filed on the basis of the marriage. Thus, if the spouse of a U.S. citizen or permanent resident immigrates on the basis of an employment-based immigrant visa (other than as an “alien entrepreneur”), or on the basis of a preference petition filed by another family member, he or she will be granted unconditional permanent resident status, regardless of the date of his or her marriage to the U.S. citizen or resident. Further, alien spouses who immigrate “derivatively”—as part of the family unit when the other spouse is the principal immigrant—are not covered by IMFA.\footnote{145}{FRAGOMEN, DEL REY & BERNSEN, IMMIGRATION LAW AND BUSINESS § 3.4(b)(4), at 3-64 [Fragomen 2008].}

Although alien spouses who are the direct beneficiaries of 2A preference petitions filed by their permanent resident spouses are covered by IMFA, given the sizable backlogs in that preference category, many such persons will have been married for two years by the time they finally receive immigrant visas, and will therefore be

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\item[144.] INA § 216(b)(1), 8 U.S.C. § 1186(b)(1).
\item[145.] FRAGOMEN, DEL REY & BERNSEN, IMMIGRATION LAW AND BUSINESS § 3.4(b)(4), at 3-64 [Fragomen 2008].
\end{enumerate}
\end{footnotesize}
eligible for admission to this country unconditionally as permanent residents.

In determining whether an alien is subject to conditional residence, the date when the alien is actually admitted to this country as an immigrant controls. Thus, if an alien has been married for one year and ten months at the time his or her visa processes, but actually departs for the United States in three months, he or she will be admitted unconditionally as a permanent resident, provided the marriage is bona fide; what counts is that the marriage was over two years old at the time of the alien’s admission to this country. On the other hand, if a spouse immigrates to this country as an immediate relative even one day prior to his or her second wedding anniversary, he or she must be admitted for a two-year period as a conditional resident.

Although the alien’s resident status is conditional, he or she nevertheless possesses the same rights, privileges, responsibilities, and duties as all other immigrants. For example, during the two-year period of conditional residence, the alien may work and travel freely, and he or she may file preference petitions on behalf of close relatives. Further, if the alien successfully removes the conditional basis of his or her residence, he or she will be able to count the two year period toward meeting the “continuous residence” requirements of naturalization. Similarly, like other permanent residents, the alien must file taxes as a resident alien and, if male and of draft age, register with the Selective Service System.

§ 3:5.2 Joint Petition Requirement

Within three months of the second anniversary of his or her admission to the United States, the conditional resident and his or her citizen or permanent resident spouse are required to file Form I-751. In August 2008, USCIS announced that it was revising the filing instructions for the form. As of August 25, 2008, all petitioners filing a Form I-751 must file with the CSC or VSC, depending on the state in which they reside. Improperly filed petitions will be rejected. I-751 petitions filed with the wrong Service Center will also be rejected.

In completing the joint petition, the couple must declare, under penalty of perjury, that:

1. the marriage was valid in the jurisdiction where it took place;

146. INA § 216(g)(1), 8 U.S.C. § 1186(g)(1).
147. 8 C.F.R. § 216.1.
149. 8 C.F.R. § 216.1.
the marriage has not been judicially annulled or terminated;
(3) it was not entered into to procure immigration benefits; and
(4) no fee or other consideration was paid in return for filing the immigrant visa petition.

Among other things, the couple is required to state on the petition all of their places of residence and employment since the alien was admitted as a conditional resident.\textsuperscript{150}

Dependent children who immigrated at the same time as the parent may be included in their parents’ joint petition; those children admitted to this country more than ninety days after their parent, and those whose parent has died since their arrival in the United States, must file an application for waiver of the joint petition filing requirement.\textsuperscript{151}

The couple must file the joint petition within three months prior to the second anniversary of the alien’s admission to this country as a conditional resident. Failure to file the joint petition before the end of the two-year conditional period will automatically terminate the conditional resident’s immigrant status and subject him or her to deportation.\textsuperscript{152} In exceptional cases, USCIS may excuse late filing of the joint petition if “good cause” is shown, and provided that the lapse was due to circumstances beyond the alien’s control, and further provided that the alien has not yet been formally placed in deportation proceedings.\textsuperscript{153}

\textbf{NOTE:} A conditional permanent resident who does not timely file a petition to remove the conditions placed on that status begins to accrue unlawful presence for purposes of the three-/ten-year bar as of the date the conditional status as a lawful permanent resident expires. If a late filing is accepted by USCIS or the immigration judge and the alien’s status is restored to lawful status, the alien will not be considered to have accrued any periods of unlawful presence in the United States. If the late filing is not accepted, however, the period of unlawful presence continues to run from the date the alien’s status as a conditional permanent resident expired.\textsuperscript{154}

\textsuperscript{150} INA § 216(d)(1)(A), (B), 8 U.S.C. § 1186(d)(1)(A), (B).
\textsuperscript{151} 8 C.F.R. § 216.4(a)(2).
\textsuperscript{152} 8 C.F.R. § 216.4(a)(6).
\textsuperscript{153} Id.
\textsuperscript{154} The three-/ten-year bar is discussed in detail in chapter 7, infra.
The joint petition must be supported by evidence establishing that the marriage is not a sham entered into to evade the immigration laws. Among the types of documentation that may be submitted to demonstrate the bona fides of the marriage are evidence of joint ownership of property, such as a deed or mortgage; a lease showing that the alien and citizen spouse are living together in the same residence; financial records showing commingling of financial resources; birth certificates of any children born to the marriage; affidavits from persons with knowledge of the couple and the bona fides of the marital relationship.\footnote{155} 8 C.F.R. § 216.4(a)(5).

Upon receipt of the joint petition, the USCIS Service Center will review the documentation submitted, and if satisfied that the marriage was not entered into for the purpose of evading the immigration laws, may approve the petition without requiring the couple to appear for an in-person interview.\footnote{156} 8 C.F.R. § 216.4(b)(1). Upon approval of the petition, the alien will be notified in writing and will be required to surrender his or her old alien registration receipt card and obtain a new one indicating that he or she is now a lawful permanent resident. If the Service Center is not satisfied that the marriage is bona fide based on the papers submitted, it may deny the petition or forward the petition and supporting documentation to the local USCIS district office having jurisdiction over the couple’s place of residence. The local office will review the papers, and if satisfied, will approve the petition.\footnote{157} 8 C.F.R. § 216.4(b)(3). If it deems necessary, the local office will schedule the couple for an interview to determine the bona fides of the marriage. Failure to appear at the interview will result in automatic termination of the alien’s permanent residence and subject the alien to deportation.\footnote{158} 8 C.F.R. § 216.4(c). At the interview, the couple should be prepared to present additional evidence to support their claim of a bona fide marriage, and be prepared to rebut any derogatory information the Service might possess concerning the couple’s marital status.

If, after the interview, the examiner determines that the marriage was not entered into for bona fide reasons, he or she will issue a written notice of denial. At the same time, the alien will be ordered to surrender his or her alien registration receipt card and his or her status as a permanent resident will be terminated, and the alien placed into deportation proceedings. The alien may not directly appeal an adverse USCIS decision; he or she may only seek review of the decision in removal proceedings.\footnote{159} 8 C.F.R. § 216.4(e).
NOTE: An expired Form I-551 and a receipt showing an I-751 petition has been filed may be used to evidence work authorization and to travel abroad. A conditional resident who files a petition to remove conditions on residence receives a Notice of Action (Form I-797) extending his or her status as a conditional resident for a one-year period and authorizing travel and employment for the same period of time. The I-797 fee receipt sent to the conditional resident after the I-751 filing will state that the “temporary alien registration card is extended for one year,” and that employment and travel is authorized during this one-year period. If a conditional resident whose I-551 has expired and whose I-797 has “expired” or is about to “expire” requests documentation of his or her status for travel or employment purposes, the USCIS officer who is processing the request should first check to see whether a petition to remove conditions is pending. If so, the officer should collect the expired I-551 and issue either: (1) a temporary I-551 stamp with a twelve-month expiration date in the conditional resident’s unexpired foreign passport (if the expiration date of the passport is one year or more); or (2) an Arrival-Departure Record (Form I-94) (arrival portion) containing a temporary I-551 stamp with a twelve-month expiration date and a photograph of the conditional resident.

§ 3:5.3 Waivers of Joint Petition Requirement

Although the conditional resident spouse may have entered into a marriage in good faith, in many instances, through no fault of his or her own, the alien will be unable to comply with the joint petition filing requirements. For example, the alien may be divorced, the marriage may have been annulled, or the petitioning spouse may have died since the conditional resident was admitted to this country. In such cases, a conditional resident wishing to remain permanently in the United States must file an application to waive the joint petition requirement, using the same form used for the joint petition, USCIS Form I-751. The waiver request must be filed within the same ninety-day period for joint petitions.

160. 8 C.F.R. § 216.4[a].
161. Travel and work authorization during the pendency of the waiver request is discussed in section 3:5.2, supra.
USCIS may, in its discretion, waive the joint petition requirement if the alien can establish one of the following:

1. deportation from this country would result in extreme hardship;
2. the alien entered into the marriage in good faith, but the marriage was terminated and the conditional resident was not at fault for failure to file the joint petition; or
3. the alien entered into the marriage in good faith but, during the marriage the alien, or his or her child, was battered by or subjected to extreme cruelty committed by the citizen or permanent resident spouse or parent.

With regard to the second basis for a waiver, the alien spouse must establish that the marriage was entered into in good faith and that he or she is not at fault for failing to file the joint petition. The good-faith waiver must be supported by evidence showing that both parties had good faith in entering the marriage:

1. documentation relating to the degree of shared financial assets and liabilities;
2. the length of cohabitation of the parties;
3. the grounds for which the marriage was terminated. ¹⁶²

Note that establishing good faith is virtually the same showing as required to establish the existence of a bona fide marriage when filing a marriage-based immigrant visa petition.

The alien spouse must also be able to show that he or she was not at fault for failing to file a joint petition. There is no requirement, on the other hand, that the alien spouse show that he or she was not at fault for termination of the marriage. An alien spouse with a bona fide marriage terminated by a no-fault divorce should be eligible to receive the waiver. This basis for a waiver was liberalized substantially by the Immigration Act of 1990; before its amendment, the waiver required a showing that the marriage was terminated by the alien spouse for good cause. That showing usually meant that the alien needed to be the moving party in the divorce action, and that the divorce be granted based on a “fault” judgment; no-fault divorces were not adequate predicates to the grant of waivers.

Under the third ground for a waiver, the alien spouse must show that the marriage was entered into in good faith, but that he or she or a child was subject to abuse perpetrated by the citizen or resident spouse. Note that the marriage need not have been terminated for

¹⁶². 8 C.F.R. § 216.5(e)(2).
this type of waiver to be granted. Immigration rules define “battered” or “cruelty” to include being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury.163 To evidence physical abuse, the alien must submit affidavits or reports issued by police, judges, medical personnel, school officials, and representatives of social service agencies.164 To evidence extreme mental cruelty, the alien must submit an evaluation by a professional recognized by USCIS as an expert in the field.165 Under legislation enacted in 1994, USCIS is instructed to consider “any credible evidence” relevant to the application for a waiver based on the battered spouse/child exception.

Concerning the extreme hardship ground, the rules provide that although a certain degree of hardship is usually associated with any deportation case, only cases that involve extreme hardship will be considered.167 In addition, only factors that arise subsequent to the alien’s entry are relevant in a waiver claim based on extreme hardship.

In the case of the death of the petitioning spouse, the alien spouse only needs to submit a copy of the death certification with the waiver application. The alien spouse need not submit good-faith evidence in conjunction with the waiver application, but USCIS may request evidence on the bona fides of the marriage if it has evidence that the marriage was entered in bad faith.

§ 3:5.4 Special Situations

USCIS has provided guidance in a number of special situations involving I-751 petitions filed by conditional residents including:

(1) where parties are in the process of seeking a divorce;
(2) where conditional residents are subject to final orders of removal, are currently in removal proceedings, have filed untimely petitions, or have filed multiple petitions; and
(3) where the death of the spouse occurs while the I-751 petition is pending.

Guidance on the procedures for adjudicating I-751 petitions before termination of the marriage was issued in July 2009.168 USCIS

163. 8 C.F.R. § 216.5(e)(3)(i).
164. 8 C.F.R. § 216.5(e)(3)(iii).
165. 8 C.F.R. § 216.5(e)(3)(iv).
166. INA § 216(c).
167. 8 C.F.R. § 216.5(e).
adjudicators who encounter an I-751 waiver request based on termination of the marriage, but where the conditional resident is currently legally separated or in pending divorce or annulment proceedings are instructed by the memorandum to issue a request for evidence (RFE) to afford the resident time to complete the divorce or annulment and to provide a copy of the decree. If the conditional resident provides a copy of the decree, the petition may be adjudicated on the merits. However, adjudicators are instructed to deny the I-751 if the conditional resident fails to establish eligibility for the waiver by submitting the necessary decree. In such cases, the adjudicator must forward the case for issuance of a notice to appear and notify the conditional resident that, while not now eligible for the waiver, he or she may be able to establish eligibility for the waiver before the IJ if the marriage is terminated during the removal proceedings.

If the parties have filed the I-751 jointly, however, adjudicators cannot deny the I-751 joint petition solely because the parties have separated or begun divorce or annulment proceedings. Instead, adjudicators are instructed to issue an RFE asking the conditional resident to provide a copy of the final divorce decree or annulment along with a request that the joint petition be treated as a waiver petition. If the resident provides evidence that the proceedings have been finalized, the I-751 may be amended to indicate that the conditional resident is eligible for a waiver of the joint filing requirement based on termination of the marriage and to adjudicate the petition on the merits. If the conditional resident fails to respond to the RFE or the response does not satisfactorily establish the termination of the marriage, the adjudicator must assess the evidence of the bona fides of the marriage to determine if the joint petition should be approved, denied, or relocated to a field office for an in-person interview.

In October 2009, USCIS released guidance on the adjudication of I-751 petitions filed by conditional residents who are subject to final orders of removal, are currently in removal proceedings, have filed untimely petitions, or have filed multiple petitions. Earlier USCIS guidance delegated authority to service center directors to deny an I-751 where the director was satisfied that the marriage was for the purpose of evading U.S. immigration laws, but did not address cases

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169. See USCIS Memorandum from Donald Neufeld, Acting Assoc. Dir., Domestic Operations Directorate, Adjudication of Form I-751, Petition to Remove Conditions on Residence Where the CPR Has a Final Order of Removal, Is in Removal Proceedings, or Has Filed an Unexcused Untimely Petition or Multiple Petitions (Oct. 9, 2009), available at www.uscis.gov/USCIS/Laws/Memoranda/Static%20Files%20Memoranda/Adjudication%20of%20Form%20I-751100909.pdf.
in which the conditional resident has a final order of removal, is in proceedings, has filed multiple petitions, or failed to timely file.

Under the guidance, a conditional resident with a final removal order has been stripped of his or her conditional permanent resident status and therefore can no longer seek to have the conditions on that status removed. Therefore, if the immigration service officer (ISO) determines that a conditional resident is the subject of a final removal order, the ISO is to deny any I-751 regardless of whether it is a jointly filed or is a waiver request petition. The ISO is then to route the file to the U.S. Immigration and Customs Enforcement (ICE) Office of Detention and Removal having jurisdiction over the individual.

If a conditional resident is in removal proceedings and USCIS has not adjudicated the I-751 petition, the IJ cannot review the petition until USCIS first adjudicates it on the merits. In these cases, USCIS should adjudicate the petition. An I-751 petition should not be held in abeyance or denied because the conditional resident is in pending removal proceedings. In addition, if the IJ has administratively closed the proceedings to await USCIS’s decision on the I-751, the ISO is to expedite adjudication and route the file to the ICE.

Where a jointly filed I-751 is not filed until after the second anniversary of the conditional resident’s admission or adjustment, the ISO must determine whether the failure to file timely was based on good cause and extenuating circumstances. USCIS may excuse an untimely filed joint petition only if it is accompanied by a reasonable explanation demonstrating extenuating circumstances. On the other hand, there is no specified filing period for a waiver request petition. Since the I-751 clearly states that a conditional resident may file an untimely joint petition only if he or she includes a written explanation for the failure to file a timely petition and a request that USCIS excuse the late filing, ISOs are instructed that, if the conditional resident did not submit a written explanation for the untimely filing, the ISO is to deny the petition without first sending out an RFE. If the untimely I-751 is accompanied by a request to excuse the late filing, the ISO will evaluate the explanation for good cause and extenuating circumstances. The memorandum explains that the ISO has broad discretion in making this determination and gives as examples of good cause and extenuating circumstances hospitalization, long-term illness, death of a family member, recent birth of a child (especially if there were complications), and a family member in active duty military service.

With regard to multiple filings, the memorandum explains that there are no regulatory limitations on how many times a conditional resident may file an I-751 petition and gives by way of example a conditional resident who files a joint I-751 and then subsequently files an I-751 requesting a waiver. However, the memorandum instructs an ISO who encounters an I-751 that appears identical to an earlier
denied I-751 to defer to the earlier decision and review the new I-751 for additional evidence that may overcome the previous basis for denial. ISOs are also instructed that if a jointly filed I-751 follows an earlier jointly filed I-751 that was denied, they must first determine whether the new filing is timely. The subsequent I-751 will usually be untimely; if it is, the ISO is to review it for good cause and extenuating circumstances and, if none are found, it is to deny the petition as untimely. If the second filing is timely or if good cause and extenuating circumstances are presented, the ISO is to review the petition to determine if the conditional resident has presented additional evidence different from that submitted with the first petition. If there is no different or additional evidence, the ISO is to issue a denial notice incorporating by reference the grounds of the previous denial. If the subsequent I-751 contains additional or different evidence but the ISO finds that it does not establish the bona fides of the marriage, the ISO is to issue a denial notice stating why the evidence fails to establish the bona fides. If the I-751 is denied, the ISO is to route the file to the appropriate unit for issuance of an NTA (assuming the conditional resident is not already in proceedings).

If an ISO is presented with a waiver request subsequent to the denial of a previous waiver request based on the same ground (termination of a marriage entered in good faith, extreme hardship, or battery or extreme cruelty), the ISO is to review the new petition to determine if the conditional resident has presented additional evidence different from the first petition. If there is no additional evidence, the ISO is to issue a denial notice incorporating by reference the failure to establish eligibility for the requested waiver in the first petition. If the subsequent petition is based on the same grounds and contains additional evidence but the ISO finds that the additional or different evidence fails to establish the bona fides of the marriage or eligibility for the waiver, the ISO is to issue a denial notice stating why the evidence fails to establish the bona fides of the marriage or eligibility for the waiver. If the I-751 is denied, the ISO is to route the file to the appropriate unit for issuance of an NTA.

If a subsequently filed waiver request is based on a different ground than the previous request, the ISO is to evaluate the new petition separately from the previous denial. Similarly, if a waiver request petition follows the denial of a jointly filed petition or a jointly filed petition follows the denial of a waiver request, the ISO is to evaluate the new petition separately from the previous denial.

In a 2010 decision, the BIA clarified the need for a waiver request when the petitioner spouse dies during the conditional residence period.\textsuperscript{170} The BIA held that the death of a petitioning spouse during

the two-year conditional period excuses the general requirement that a petition to remove the conditional basis of an alien spouse's status must be "joint" and that a separate waiver under INA section 216(c)(4) is therefore not required if the surviving spouse timely filed an I-751 petition requesting removal of the conditional basis of his or her status and appears for a personal interview. The BIA reasoned that statute expressly exempts from the joint filing and interview requirements alien spouses whose petitioning spouses are deceased. Since the respondent complied with the requirements of INA section 216(c)(1) when she timely filed her I-751 petition to remove conditions on her residence and appeared for her interview, the BIA held that she did not need a section 216(c)(4) waiver in order for her I-751 petition to be adjudicated.