

Chapter 3

Family-Sponsored Immigration

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§ 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 lawful permanent residents (LPRs) 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 LPRs.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, outlined in further detail below. Visas allotted to the family-sponsored system are completely separate from the visa allotment for employment-based immigration.

This chapter describes the requirements for qualification as an immigrant relative of a U.S. citizen or an LPR. 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 Overview of the Family-Sponsored Immigration Structure

[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 LPRs 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

1. See discussion *infra*.

2. INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i).

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 LPR status.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.⁴ The more complicated of these terms is “child.” The term “child” 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 son or daughter must be unmarried and under twenty-one years of age.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 persons as children in cases where they “age out” (turn twenty-one years of age) while awaiting immigration processing.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.⁷

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3. INA § 245(c), 8 U.S.C. § 1255(c).
 4. INA § 101(b)(1), (2), 8 U.S.C. § 1101(b)(1), (2).
 5. INA § 101(b)(1), 8 U.S.C. § 1101(b)(1).
 6. Child Status Protection Act, Pub. L. No. 107-208. See discussion *infra*.
 7. INA § 101(b)(2), 8 U.S.C. § 1101(b)(2).

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 an LPR in the second family-sponsored preference.⁸

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 noncitizen 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 immigrant’s visa petition. There are two exceptions to this rule. The children of the noncitizen spouse of a deceased citizen may be included in the petition filed by the noncitizen 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 discussed below, in some instances an individual may qualify independently for classification as an immediate relative; for example, the child of a noncitizen 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 noncitizen spouse will need to file a separate

8. A full discussion of who is a “spouse” for purposes of immigration benefits is included in section 3:2.2, *infra*.

9. INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i).

petition for his or her child in the second family-sponsored preference once the noncitizen spouse has become a permanent resident through the citizen spouse's immediate-relative petition.¹⁰

[B] Family-Sponsored Preference Categories

The family-sponsored preference system consists of four preference categories:

- (1) The first preference is for unmarried sons and daughters of citizens.
- (2) The second preference is divided into two subcategories:
 - (A) The 2A preference subcategory is for spouses or children (unmarried and under the age of twenty-one) of LPRs.
 - (B) The 2B preference covers adult unmarried sons and daughters of LPRs.

Seventy-five percent of the family 2A immigrants are exempt from the normal per-country numerical limitations.

- (3) The third preference includes married sons and daughters of U.S. citizens.
- (4) The fourth preference covers brothers and sisters of adult U.S. citizens.

Specific qualifications and annual numerical allotment of visas for each of these categories are discussed in further detail below.

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.

[C] Annual Caps and Allotments of Immigrant Visas

[C][1] 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][2] Annual Numerical Allotment for Family-Sponsored 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 individual 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 LPRs. 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 LPRs, 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 persons qualifying in all four family-sponsored preferences. Under a complicated formula, at least 77% of the

11. *In re Coker*, 14 I. & N. Dec. 521 (BIA Jan. 8, 1974).

12. *See* section 3:1.1[C][1], *supra*.

annual visas for the second family-sponsored preference must be allocated to spouses and unmarried minor children of LPRs (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 individuals qualified for such classification, regardless of the individual's country of birth.¹³ 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 persons 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 brother or sister can be any age and can be married or unmarried. In order to qualify for immigration, however, the individual and citizen siblings must each at one time have been a "child" of a common parent.¹⁴ Any visas that have not been used in the first three family-sponsored preferences are available to persons 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.

[D] Derivative Classification

Those individuals who are spouses or children as defined in the INA (unmarried and under twenty-one) of an individual qualified for immigration in one of the four family-sponsored preferences can also

13. INA § 202(a)(4)(A), 8 U.S.C. § 1152(a)(4)(A).

14. *Beltre v. Kiley*, 420 F. Supp. 87 (S.D.N.Y. 1979); *In re Heung*, 15 I. & N. Dec. 145 (BIA Nov. 25, 1974).

immigrate in that preference as “derivative” immigrants.¹⁵ The derivative immigrants are assigned visas from the same preference as the principal immigrant.

To be eligible for derivative classification, the requisite relationship between the principal immigrant and his or her immediate family members must have existed at the time the principal immigrant is admitted to permanent residence. For example, a child who was adopted after the principal immigrant’s lawful admission to permanent residence does not qualify for derivative classification. Spouses and children of individuals qualified as immediate relatives of citizens cannot, as a general rule, immigrate as derivative immigrants;¹⁶ each person eligible for immediate-relative status must be the beneficiary of his or her own immigrant visa petition.

§ 3:1.2 Summary of Procedures

[A] USCIS Petition

In order for an individual to immigrate based on a close family relationship to a citizen or resident, it must first be demonstrated that the individual is eligible for immigration—that is, that a qualifying family relationship exists. It is the role of USCIS to determine eligibility and approve the individual as an intending immigrant.

In most family-sponsored immigrant visa cases, the U.S. citizen or LPR 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 foreign national is considered the beneficiary of the petition. The principal exceptions to this rule relate to 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 LPR; and
- (2) there is a qualifying family relationship between the sponsor and the relative.

15. INA § 203(d), 8 U.S.C. § 1153(d).

16. See section 3:1.1[A], *supra*.

17. The special procedures applicable to such groups are discussed in sections 3:3.5–3:3.7, *infra*.

The type of evidence that is necessary depends on the type of relationship to be established, and if a parent-child relationship is important to the qualification of the individual for residence, on the manner in which the foreign national (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 immigrant is in the United States and an immigrant visa is immediately available.¹⁸ 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 LPR 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 individual will be admitted to permanent residence, and he or she will be given temporary evidence of such status until he or she is processed for a permanent resident card (the so-called green card).

Note that certain classes of persons 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.¹⁹

In cases in which an immigrant visa is not immediately available in one of the four family-sponsored preferences, the individual is not present in the United States or is ineligible to adjust to LPR 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.

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*.

The NVC handles immigrant visa petitions in several different ways, depending on whether an immigrant visa is immediately available to the individual at the time that USCIS approves the petition, and whether he or she is applying for adjustment of status. If an immigrant visa is not currently available, but the individual intends to adjust to LPR status, the petition will be held by the NVC. If the visa subsequently becomes available and the individual 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 LPR status.

If an immigrant visa is not currently available for the beneficiary, then 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, then the NVC will send a processing fee bill for Form I-864 (Affidavit of Support), as well as Form DS-3032 (Choice of Address and Agent), 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 (IV) 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 immigrant becomes a U.S. citizen or until he or she has worked in the United States for a period of ten years.²⁰

§ 3:2 Qualifying Relationships

§ 3:2.1 Child-Parent Relationship

The determination as to whether an individual 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 child marries a U.S. citizen, the child 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 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

20. The affidavit of support requirements applicable in family-based cases are discussed in section 3:4.2, *infra*.

21. INA § 101(b)(1)(B), 8 U.S.C. § 1101(b)(1)(B).

22. *In re Vizcaino*, 19 I. & N. Dec. 644, 645 n.1 (BIA Apr. 15, 1988); *In re Coker*, 14 I. & N. Dec. 521 (BIA Jan. 8, 1974).

therefore will never be able to qualify as a “son” or “daughter” of the citizen for immigration purposes.

[A] Definition of “Child”

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

- (1) a child born in wedlock;
- (2) a stepchild, whether or not born out of wedlock, if the marriage creating the step relationship occurs before the child turns eighteen;
- (3) a child legitimated by the age of eighteen, provided the child is in the legal custody of the legitimating parent at the time of legitimation;
- (4) a child 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) a child who is 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) an orphan 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) a Hague Convention adoptee²³ under the age of sixteen on whose behalf an immediate-relative petition has been filed, provided certain complex and technical requirements are met.²⁴

[B] Conferral of Immigration Benefits by Natural Parents

[B][1] Generally

Until the mid 1990s, the issue of whether a noncitizen 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.

23. “Convention adoptees” are discussed below in further detail.

24. INA § 101(b)(1), 8 U.S.C. § 1101(b)(1).

Legislation 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.”

[B][2] Assisted Reproductive Technology

According to guidance issued by the DOS in January 2014, children born abroad through the use of assisted reproductive technology (ART) will be eligible for U.S. immigration benefits through birth mothers who are either the genetic or the gestational mother, so long as the gestational mother is also the child’s legal mother.²⁶ The previous policy required that a mother have a genetic connection to a child in order to qualify as a parent for the purpose of obtaining immigration benefits. Under the new policy, birth mothers (gestational mothers) who are also the legal parent of the child will be treated the same as genetic mothers for the purposes of immigration benefits.

[B][3] Legitimation

Under the third subcategory of section 101(b)(1) of the INA,²⁷ some children who were born out of wedlock at birth may qualify as “children” if they are legitimated before their eighteenth birthdays.

25. See section 3:2.1[B][4], *infra*.

26. See U.S. Dep’t of State Cable No. 00010952 (Jan. 14, 2014), sent to all diplomatic and consular posts, providing guidance on a policy change related to children born abroad through assisted reproductive technology.

27. 8 U.S.C. § 1101(b)(1)(C).

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 child reaches the age of eighteen;²⁸ 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.²⁹ Legitimation for purposes of making a person 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.³⁰

With 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.³¹

[B][4] Bona Fide Parent-Child Relationship

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.

[C] Step Relationships

An individual 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 noncitizen 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.³² 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

28. *In re Clahar*, 18 I. & N. Dec. 1 (BIA Mar. 24, 1981).

29. *See In re Hernandez*, 19 I. & N. Dec. 14 (BIA Dec. 28, 1983) (N.Y. law).

30. *In re Oduro*, 18 I. & N. Dec. 421 (BIA Aug. 12, 1983); *In re Mourillon*, 18 I. & N. Dec. 122 (BIA Sept. 22, 1981).

31. *In re Rivers*, 17 I. & N. Dec. 419 (BIA June 30, 1980).

32. *See* section 3:2.1[B][4], *supra*.

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 noncitizen child is considered to be a “child” under the INA.³³

[D] Adoptees

Adopted children may qualify for immigration status under several circumstances. An adopted child may qualify for immigration benefits based on his or her relationship to a U.S. citizen or LPR parent if the adoption was finalized prior to the child’s sixteenth birthday and certain procedural requirements with regard to the adoption have occurred.³⁴ Foreign “orphans” and “Convention adoptees” adopted by U.S. citizens qualify as immediate relatives under certain circumstances.³⁵

[D][1] Validation of Adoptions for Immigration Purposes

USCIS released final policy guidance addressing the validity of adoptions for immigration purposes in November 2012.³⁶ This guidance applies to all petitions involving adopted children under section 101(b)(1)(E) through (G). The guidance states that, for immigration purposes under the INA, an adoption is valid only if:

- (1) it is valid under the law of the country or place granting the adoption;
- (2) it creates a legal permanent parent-child relationship between a child and someone who is not already the child’s legal parent; and
- (3) it terminates the legal parent-child relationship with the prior legal parent.

The guidance reaffirms the principles in prior BIA case law.³⁷

If a foreign adoption does not satisfy the three essential elements noted above, the child may still qualify as an orphan or as a Hague Convention adoptee if it is established that the prospective adoptive parents have legal custody to bring the child to the United States for

33. See *Vizcaino*, 19 I. & N. Dec. at 648; *In re McMillan*, 17 I. & N. Dec. 605 (BIA Jan. 13, 1981) (adopting holding of *Palmer v. Reddy*, 622 F.2d 463 (9th Cir. 1980)).

34. INA § 101(b)(1)(E).

35. *Id.* § 101(b)(1)(F), (G).

36. See USCIS Policy Memo. PM-602-0070.1, Guidance for Determining If an Adoption Is Valid for Immigration and Nationality Act (INA) Purposes (Nov. 6, 2012).

37. *In re Mozeb*, 15 I. & N. Dec. 430 (BIA Aug. 20, 1975).

adoption in the United States. The subsequent domestic adoptions of non-U.S. citizen children must be valid for immigration purposes under the November 2012 guidelines.

With regard to the first element (valid under the law of the country granting adoption), the guidance states that adjudicators will generally accept the adoption decree at face value. Adjudicators may properly question the validity of the adoption, however, if there is credible and probative evidence that: (1) the adoption was flawed in its execution,³⁸ or (2) the adoption was granted due to official corruption or the use of fraud or material misrepresentation. In some countries, “customary” adoption may exist instead of, or in addition to, adoption through a judicial or administrative procedure. In these cases, the petitioner would need to establish that the customary adoption:

- (1) creates a legal permanent parent-child relationship between a child and someone who is not already the child’s legal parent;
- (2) terminates the legal parent-child relationship with the prior legal parent; and
- (3) complies with the requirements of the relevant customary law and is legally recognized in the country or place the adoption occurs.

With regard to the second element (creates a legal permanent parent-child relationship), the guidance indicates that in some countries, a legal parent-child relationship cannot be created by adoption. For example, in countries that follow traditional Islamic law, “adoption” in the sense required for immigration purposes does not exist. Therefore, a Kafala order issued by a country that follows traditional Islamic law will not qualify as an adoption. Because an orphan or Hague Convention adoptee can be brought to the United States for adoption (see below), a Kafala order might establish that the prospective adoptive parents have secured custody of the child for immigration purposes. Similarly, some countries have a type of adoption commonly called a “simple adoption” in addition to another type called “full,” “plenary,” or “perfect” adoption. Some simple adoptions are not valid for immigration purposes because they do not create a legal parent-child relationship.³⁹ If a simple adoption does create a permanent legal

38. Such as when the court (or other official body) granting the adoption appears to have lacked jurisdiction over the adoption, or when the prior parents did not consent to the adoption or were not given proper notice of the termination of parental rights.

39. For example, Appatitha, a form of simple adoption in Burma, does not create a legal parent-child relationship.

parent/child relationship, it might be valid for immigration purposes.⁴⁰ The guidance also indicates that even if a “simple adoption” might be more easily terminated than a “full” adoption, that fact alone does not mean the simple adoption does not create a “permanent” relationship. If the parent-child relationship can be terminated only for “serious” or “grave” reasons, the adoption might still be valid for immigration purposes provided all other elements are met. Also, as with a Kafala order, even if a simple adoption does not create a legal parent-child relationship, the adoption might establish that the prospective adoptive parents have secured custody of the child for immigration purposes in orphan and Hague Convention adoptee cases.

Addressing the third element (termination of legal parent-child relationship with prior parents), the guidance notes that the law in some jurisdictions allows a stepparent to adopt the children of his or her spouse, if the legal parent-child relationship with the other biological parent (that is, the parent who is not the spouse of the adopting stepparent) has been terminated by death or legal action. In this situation, it is enough to meet the third essential element of “adoption” for the parent-child relationship to be terminated as to the other parent. The continuing legal parent-child relationship between the child and the adopting stepparent’s spouse does not preclude recognition of the adoption. Of course, a stepparent does not actually need to adopt his or her stepchild in order for a Form I-130 to be approved. The new guidance also states that the mere fact of ongoing contact with the birth parents (as in “open adoptions”) does not mean that the legal parent-child relationship with the prior legal parent(s) was not terminated. The adoptive parents, rather than the prior parents, must be exercising full parental authority over the child as a result of the adoption.

**[D][2] Adoptive Relationship Under INA
Section 101(b)(1)(E)**

Adopted children of U.S. citizens or LPRs may be considered “children” under INA section 101(b)(1)(E) if the adoption occurred prior to the child’s sixteenth birthday, the adoptive parents had legal custody of the child for two years (before or after the adoption), and the child resided with the adoptive parents for two years (before or after the adoption). The adoption must also be valid for immigration purposes as set forth in USCIS guidance issued in November 2012.⁴¹

40. For example, the French Civil Code states that simple adoption gives the adoptive parent “all the rights of parental authority.” Thus, although the child may still have some inheritance rights through the family of origin, the child is, legally, the child of the adoptive parents not the birth parents.

41. See section 3:2.1[D][1], *supra*.

A sibling of an adopted child who was adopted by the same adoptive parents while under the age of eighteen is also considered a child for immigration purposes. In essence, the statute allows siblings to remain together when adopted by the same adoptive parents even if one of the siblings was over fifteen years of age when the adoption took place. To be considered a child, the sibling must have been adopted while under the age of eighteen. In addition, the sibling must have been in the custody of, and resided with, the adoptive parent for at least two years. The law applies only when the sibling has been or will be adopted by the same adoptive parent(s) or prospective parent(s). In addition, only “natural” siblings are covered. The government interprets this term to mean that the children must share at least one biological parent. In addition, the adoption of the sibling must take place before the child’s eighteenth birthday.

An adopted child under section 101(b)(1)(E) may not confer immigration benefits on his/her natural parent even if the adoptive relationship has been legally terminated, because the natural parent no longer has the status of parent of the adopted child for immigration purposes. Similarly, the adopted child may not confer immigration benefits on his/her natural sibling because their common natural parent is not considered a parent for immigration purposes.

Only children who were adopted prior to their parent’s admission as an LPR qualify for derivative classification. There is no provision for the immigration of newly adopted children of LPRs to join their parent in the United States. Only U.S. citizens may petition for children to immigrate following an adoption overseas or in anticipation of an adoption in the United States (as Convention adoptees or orphans). As a result, the only avenue open to such children is to meet the definition of “adopted” children as discussed above (adoption before the age of sixteen, two years of custody, and two years of residence with the parent). Once this definition is met, the LPR may petition for the child.

Addressing the requirement that the adoption must have occurred prior to the child’s sixteenth birthday, the government takes the position that the adoption order must be granted before the beneficiary reaches sixteen years of age.⁴² At least one court has held, however, that an I-130 petition under section 101(b)(1)(E) should be approved when a state family court issues a nunc pro tunc order of adoption with an effective date before the child’s sixteenth birthday even when the order was issued after the child’s sixteenth birthday.⁴³ In this case, the plaintiff filed an adoption petition while the child was still under

42. *In re Cariaga*, 15 I. & N. Dec. 716 (BIA July 22, 1976).

43. *Cantwell v. Holder*, 995 F. Supp. 2d 316 (S.D.N.Y. 2014).

sixteen years of age. A state court later granted the petition and issued a nunc pro tunc adoption order, effective July 11, 2007, the day before the child turned sixteen years of age. The requisite two-year period of legal custody and residence may take place either prior to or after the formal adoption.⁴⁴

NOTE: The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (“Hague Convention”)⁴⁵ 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. Finally, an LPR 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.

[D][3] Adoption of Foreign Orphans

Another subcategory of “children” consists of foreign orphans under the age of sixteen who will be adopted by U.S. citizens. The statute specifically provides that a child is an eligible orphan if both parents have died or disappeared, or if the child has been abandoned by, deserted by, or separated from the parents.⁴⁶ If one parent is

44. *In re Ho*, 19 I. & N. Dec. 582, 583 n.1 (BIA Mar. 17, 1988); *In re Repuyan*, 19 I. & N. Dec. 119, 120 (BIA July 10, 1984).

45. Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, 1870 U.N.T.S. 167 (signed Mar. 31, 1994, entered into force Apr. 1, 2008) [hereinafter Hague Convention].

46. INA § 101(b)(1)(F), 8 U.S.C. § 1101(b)(1)(F).

surviving, it must be demonstrated that that parent is incapable of supporting the child and has irrevocably released the child 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).⁴⁷ 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 foreign 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. The guidelines released in November 2012 addressing the validity of adoptions for immigration purposes, as discussed above, also apply in orphan cases if the child has already been adopted abroad. If a foreign adoption does not satisfy the essential elements noted above, the child may still qualify as an orphan if it is established that the prospective adoptive parents have legal custody to bring the child to the United States for adoption. The subsequent domestic adoptions of non-U.S.-citizen children must be valid for immigration purposes under the November 2012 guidelines.

If the child was adopted abroad, the parent or parents must have personally observed the child prior to or during the adoption proceedings. An amendment enacted in January 2014 provides that in the case of an orphan adoption by a married couple, the pre-adoption visitation requirement can be satisfied by either spouse (rather than requiring that both spouses see the child prior to or during the adoption).⁴⁸ If the foreign adoption is invalid for immigration purposes, the child

47. 8 C.F.R. § 204.3(b).

48. See Consolidated Appropriations Act of 2014, Pub. L. No. 113-76, § 7083, 128 Stat. 5, 567.

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 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.⁴⁹

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.

[D][4] Hague Convention Adoptions

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

49. 8 C.F.R. § 204.3(e).

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 2000,⁵⁰ 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 2007.⁵¹ A Hague 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.

50. Intercountry Adoption Act, Pub. L. No. 106-279, § 302, 114 Stat. 825.

51. See 72 Fed. Reg. 56,831 (Oct. 4, 2007).

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.⁵²

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.⁵³ 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.

52. 71 Fed. Reg. 8064 (Feb. 15, 2006).

53. 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.⁵⁴ 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.⁵⁵

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 immigration purposes, or the prospective adoptive parents must have

54. *Id.* § 204.303(a).

55. *Id.* § 204.307(c).

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. The guidelines released in November 2012 addressing the validity of adoptions for immigration purposes, as discussed above, also apply in Hague Convention cases if the child has already been adopted abroad. If a foreign adoption does not satisfy the essential elements discussed in the guidelines, the child may still qualify as an Hague Convention adoptee if it is established that the prospective adoptive parents have legal custody to bring the child to the United States for adoption. The subsequent domestic adoptions of non-U.S.-citizen children must be valid for immigration purposes under the November 2012 guidelines.

If the child has not been adopted abroad or the foreign adoption is not effective for immigration purposes, 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));⁵⁶ 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.⁵⁷

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.⁵⁸ 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.

56. *Id.* § 204.301.

57. *Id.* § 204.305.

58. *Id.* § 204.309(b)(2).

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:

- (1) the placement of the child for adoption;
- (2) the consent of a parent, legal custodian, individual, or agency to the adoption of a child;
- (3) the relinquishment of a child to a competent authority or to an agency or person for the purposes of adoption;
- (4) the performance by the child's parent(s) of any act that makes the child a Convention adoptee.⁵⁹

The rule does not prohibit a petitioner, or an individual or entity acting on behalf of the petitioner, from paying the reasonable costs incurred for adoption services.

An individual qualifies as a "parent" under the INA if the person through whom an immigration benefit is being conferred is, or was at one time, his or her "child," as defined above.⁶⁰ Thus, while a child generally stops being a "child" once he or she turns twenty-one or marries,⁶¹ a parent remains a "parent" for immigration purposes even after his or her offspring is no longer a "child."

§ 3:2.2 Spouse

[A] Generally

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 LPRs can qualify as immigrants in the 2A preference subcategory. Although foreign spouses of persons qualifying as immediate relatives on the basis of a parent-child relationship are ineligible for derivative status, spouses of other noncitizens qualified for immigration in one of the family-sponsored preference categories can immigrate as derivative immigrants.⁶²

59. *Id.* § 204.304(a).

60. INA § 101(b)(2), 8 U.S.C. § 1101(b)(2) (1991).

61. Except where he or she is protected by the provisions of the Child Status Protection Act. *See* section 3:1.1[A], *supra*.

62. As discussed *supra*.

Whether an individual 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 noncitizen (a sham marriage); and
- (3) The current status of the marriage.

[B] Validity of Marriage at Inception

The only legally sanctioned marriage defined by the INA to be invalid for immigration purposes is one in which the two parties were not physically in the presence of each other at the time of the marriage ceremony, unless the marriage was subsequently consummated.⁶³ 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.⁶⁴

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.⁶⁵ While all U.S. divorces are considered valid,⁶⁶ determining the validity of divorces in foreign jurisdictions is often a complicated task.⁶⁷ 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.⁶⁸

63. INA § 101(a)(35), 8 U.S.C. § 1101(a)(35).

64. *In re* Agouemos, 10 I. & N. Dec. 444 (BIA Feb. 3, 1964) (not of legal age); *In re* T., 8 I. & N. Dec. 529 (BIA Jan. 20, 1960) (incest).

65. *In re* Hosseinian, 19 I. & N. Dec. 453 (BIA Aug. 25, 1987); *In re* Hann, 18 I. & N. Dec. 59 (BIA May 19, 1981); *In re* Weaver, 16 I. & N. Dec. 730 (BIA May 16, 1979).

66. *In re* Pajarillo, 12 I. & N. Dec. 743 (BIA May 31, 1968).

67. *See, e.g., In re* Luna, 18 I. & N. Dec. 385 (BIA Apr. 26, 1983); *In re* Zorrilla, 18 I. & N. Dec. 378 (BIA Mar. 11, 1983) (Dominican divorce law).

68. *In re* Dabaase, 16 I. & N. Dec. 39 (BIA Oct. 1, 1976), *aff'd*, 627 F.2d 117 (8th Cir. 1980) (per curiam) (customary divorce in Ghana), *modified by In re* Kumah, 19 I. & N. Dec. 290 (BIA Oct. 15, 1985) (requiring evidence of official Ghanaian divorce decree before undertaking fact analysis).

[C] Marriage Not Entered for Immigration Purposes

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 noncitizen. 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. (See also the discussion below, at section 3:3.3[B].) 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. Interpreting section 204(c), the Board has held that although a visa petition filed by a petitioner for a spouse may be subject to denial under INA section 204(c) based on the spouse's prior (fraudulent) marriage, that section does not prevent the approval of a petition filed on behalf of the spouse's child, which must be considered on its merits to determine whether the child qualifies as the petitioner's "stepchild" under the INA.⁶⁹

Several other provisions added by the Immigration Marriage Fraud Amendments of 1986 (IMFA) are also designed to combat sham marriages. First, USCIS cannot approve the spousal second preference petition of LPR petitioners who have been accorded their status based on a prior marriage unless:

- (1) a period of five years has elapsed after the individual acquired the LPR status;
- (2) the individual 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.⁷⁰

Second, an immigrant visa petition cannot be approved for an individual who has married after commencement of removal proceedings until he or she has resided outside of the United States for two years

69. *In re Otiende*, 26 I. & N. Dec. 127 (BIA June 4, 2013).

70. INA § 204(a)(2)(A).

after the marriage.⁷¹ The individual can obtain a “bona fide marriage” waiver of the foreign residence requirement if he or she 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 individual’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 individual.⁷²

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.⁷³

Because it may take some time for adjudication of the waiver, the noncitizen will likely need to seek a continuance of the removal hearing.

Finally, persons 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 residence; failure to do so results in automatic termination of the individual’s resident status.⁷⁴ 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.⁷⁵

71. *Id.* § 204(h).

72. *Id.* §§ 245(e)(3), 204(h).

73. 8 C.F.R. § 204.2(a)(1)(iii)(E).

74. INA § 216(c), 8 U.S.C. § 1186; *see also* section 3:5, *infra* (discussing conditional residence for certain spouses under IMFA in more detail).

75. *Id.* The requirements for filing the joint petition, or, in appropriate cases, the waiver application, are discussed in detail in section 3:5, *infra*.

[D] Marriage Still in Existence

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.⁷⁶

[E] Same-Sex Marriages

In June 2013, the U.S. Supreme Court invalidated a key section of the federal Defense of Marriage Act (DOMA), paving the way for same-sex married couples to qualify for visas, green cards, and other immigration benefits on the same basis as their opposite-sex counterparts.⁷⁷ In its decision, the Court invalidated section 3 of DOMA, which defined “marriage” as a union between a man and woman, finding that this provision is unconstitutional as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment. This means that marriage-related rights under more than a thousand federal statutes that had previously been reserved for opposite-sex married couples will now be available to same-sex couples who were married in a jurisdiction which permits such marriages.

There are numerous scenarios in which immigration benefits are now available to same-sex spouses including family-based immigrant visa petitions. In guidance originally issued in July 2013, USCIS discussed the impact of the decision on immigration benefits, including immigrant visa petitions on behalf of family members.⁷⁸ The guidance states that U.S. citizens and LPRs in a same-sex marriage to a foreign national can now sponsor their spouses and stepchildren for a family-based immigrant visa by filing Form I-130 on behalf of their spouses and stepchildren. In addition, same-sex marital partners are eligible for derivative status in family third- and fourth-preference cases relating to married sons and daughters of U.S. citizens and siblings of U.S. citizens (that is, same-sex spouses of principal third- or fourth-preference immigrants are eligible to accompany or join the

76. *In re Pierce*, 17 I. & N. Dec. 456 (BIA Aug. 1, 1980); *In re McKee*, 17 I. & N. Dec. 332 (BIA Mar. 11, 1980); cf. *In re Lenning*, 17 I. & N. Dec. 476 (BIA Aug. 12, 1980) (formal separation agreement resulting in “conversion divorce” after passage of specified period of time; marriage no longer valid for immigration purposes).

77. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

78. *See Same-Sex Marriages*, USCIS (Apr. 3, 2014), www.uscis.gov/family/same-sex-marriages.

principal immigrant). The agency will treat a same-sex marriage “exactly the same as an opposite-sex marriage” for these and other immigration benefits.

New applications and petitions based on same-sex marriages, including I-130 petitions and related applications (such as applications for adjustment of status on Form I-485, and employment and travel authorization on Form I-765 and I-131) may be filed immediately. Same-sex filings should be submitted with the same initial evidence and documentation one would provide in an opposite-sex case. No other evidence should be required as an initial matter, but requests for evidence (RFEs) are possible given that same-sex filings will be new to adjudicators.

As noted, the eligibility for spousal benefits based on the I-130 filing will be determined according to existing immigration law without regarding to the same-sex nature of the marriage. The USCIS guidance also clarifies that the I-130 petition may be filed even if the couple currently resides in a foreign country that does not recognize same-sex marriages, provided the couple was married in the United States or in a foreign country that recognizes such marriages. In evaluating I-130 spousal petitions, USCIS will look to the law of the place where the marriage took place to determine whether it is valid for immigration law purposes.

NOTE: The question of whether a same-sex civil union in the United States may be recognized for immigration purposes has been raised by some practitioners. A civil union is not a marriage and cannot be used in place of a marriage for immigration benefits.

Same-sex couples will be subject to the same scrutiny as to the bona fide nature of their marriage as opposite-sex couples have been. In cases in which USCIS suspects a sham marriage, for example, the agency may interview the parties, together and separately, to determine the bona fides of the marriage. In many instances, it may be more of a challenge for same-sex couples to produce the same type of paper trail documenting their relationship.

In addition, same-sex spouses who obtain LPR status on the basis of a marriage entered into within two years of the time LPR status is conferred will be granted conditional resident status for a period of two years. This condition applicable to recently married couples must be removed by filing a joint petition with the spouse that filed the original

I-130 petition, and failure to file the joint petition by the end of two-year period may result in automatic termination of the spouse's conditional resident status.⁷⁹

The Board of Immigration Appeals issued its first decision discussing the impact of the Supreme Court ruling in July 2013.⁸⁰ The Board remanded a previously denied same-sex marriage case to USCIS for approval, confirming that DOMA is no longer an impediment to the recognition of lawful same-sex marriages and the recognition of spouses under the INA. The decision also confirmed that, once it is determined that the marriage is valid under the laws of the state where the marriage took place, the “sole remaining inquiry” is whether the marriage is bona fide. In August 2013, the Department of State released guidance indicating that U.S. embassies and consulates will immediately begin to adjudicate immigrant visa applications based on same-sex marriages.⁸¹ Visa applications based on same-sex marriages will be adjudicated in the same way that opposite-sex spousal applications are treated. The DOS makes clear that only same-sex marriages valid in the jurisdiction where they took place will be considered. A same-sex marriage is valid for immigration purposes even if the couple currently resides in a country that does not recognize same-sex marriages, or if the couple intends ultimately to reside in one of the U.S. states that do not recognize same-sex marriages. The same-sex marriage is also valid even if the applicant is applying in a country in which same-sex marriage is illegal. Same-sex domestic partnerships and civil unions will not qualify. In addition, stepchildren acquired through a same-sex marriage qualify for dependent benefits as long as the marriage took place before the child turned eighteen.

§ 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 individual qualifies for immigration must submit a petition to USCIS to establish the eligibility of the individual 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 LPRs who may file petitions on their own behalf.

79. The requirements and procedures applicable to individuals granted conditional resident status are discussed in section 3:5, *infra*.

80. *In re Zeleniak*, 26 I. & N. Dec. 158 (BIA July 17, 2013).

81. *See* U.S. Dep't of State Cable No. 00112850 (Aug. 13, 2013).

The petition may, under certain circumstances, be filed in conjunction with an application for adjustment to LPR status.⁸² Filing the petition is a necessary preliminary step to obtaining permanent residence; USCIS must first adjudicate the individual's eligibility for immigration under the family-sponsored visa allocation system before he or she may actually apply for an immigrant visa or for adjustment of status to permanent residence.

Petitions for family-sponsored preference classification and, in most cases, for immediate relatives, are made on Form I-130. The procedures differ for 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 LPR spouse and who are eligible for self-petition benefits.⁸³

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

- (1) The citizenship or LPR status of the petitioner or person through whom immigrant status will be acquired; and
- (2) The qualifying relationship between the petitioner and the beneficiary.

As a general rule, supporting documents must be in the form of primary evidence, if available.⁸⁴ 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

82. See discussion *infra*.

83. The special procedures for obtaining immediate-relative classification for a noncitizen 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 LPRs or U.S. citizens are discussed in section 3:3.8, *infra*.

84. 8 C.F.R. § 204.1(f)(1).

required to establish either of these facts, although it reserves the right to request submission of originals.⁸⁵ Certification of the copies of documents by an attorney or by USCIS is no longer required.

[B] Evidence of Petitioner’s U.S. Citizen or LPR Status

With regard to proof of U.S. citizenship or LPR status, various alternative forms of evidence may be presented. Primary evidence of U.S. citizenship or LPR 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 an LPR, the petitioner’s permanent resident card, Form I-551.⁸⁶

Secondary evidence of the petitioner’s U.S. citizenship or LPR 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;

85. *Id.* § 204.1(f)(2).

86. *Id.* § 204.1(g)(1).

- (4) census records showing the name, place of birth, and date of birth or age of the petitioner;
- (5) 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 LPR status in the form of an “ADIT” stamp in a valid passport or on an I-94.⁸⁷

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.⁸⁸ Specifically, the law amends the INA to prevent both U.S. citizens and LPRs 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 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.⁸⁹

87. 8 C.F.R. § 204.1(g)(2).

88. See Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587.

89. See USCIS Interoffice Memo., from Michael Aytes, Assoc. Dir. Domestic Operations, Guidance for Adjudication of Family-Based Petitions and I-129F

[C] Evidence Regarding Relationship

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.

[C][1] Evidence of Spousal Relationship

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.⁹⁰ Divorce decrees or death certificates are the typical kinds of evidence presented for the latter. Same-sex filings should be submitted with the same initial evidence and documentation that one would provide in an opposite-sex case.

[C][2] Evidence of Parent/Child Relationship

When a petition is filed by the mother of a son or daughter of that mother (or by a son or daughter on behalf of his or her mother), the petitioner should submit a copy of the child's birth certificate showing the name of the mother; if no birth certificate is available, the petitioner must submit suitable alternative documentation, together with a certificate of unavailability from the registrar of births.⁹¹ If the name of the mother or daughter on the birth certificate differs from that on the petition, perhaps through a subsequent marriage, evidence of the name change should be submitted (for example, a marriage certificate showing the maiden name).⁹²

If the father is submitting the petition on behalf of his son or daughter born in wedlock (or by a son or daughter born in wedlock on behalf of a father), the petitioner 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. The marriage certificate of a married daughter may also be required if her present name differs from that on her birth certificate. If the natural father is submitting the petition on behalf of a son or daughter born out of wedlock (or a son or daughter born out of wedlock on behalf of a father), the petitioner must submit evidence of paternity, such as the

Petition for Alien Fiancé(e) under the Adam Walsh Child Protection and Safety Act of 2006 (Feb. 8, 2007).

90. 8 C.F.R. § 204.2(a)(2).

91. *Id.* § 204.2(d).

92. *Id.*

child's birth certificate or church records relating to the child's birth, a marriage certificate of a married daughter if her present name differs from that on her birth certificate, local civil records, or witness affidavits.⁹³ 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
- (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. USCIS 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.⁹⁴

When the petition is filed on behalf of a son or daughter by a stepfather or stepmother (or by a son or daughter on behalf of a stepparent), the petitioner should submit:

- (1) the child's birth certificate, showing the name of the natural parent,
- (2) the marriage certificate of a married daughter if her present name differs from that on the birth certificate,
- (3) the marriage certificate of the stepparent and the natural parent showing marriage before the child's eighteenth birthday, and
- (4) divorce decrees, death certificates or other documentation, showing termination of all prior marriages of both the stepparent and natural parent.

93. *Id.*

94. *Id.*

When the petition is filed on behalf of a son or daughter by an adoptive parent under INA section 101(b)(1)(E) (or by a son or daughter on behalf of an adoptive parent), the petitioner must submit:

- (1) evidence that the Hague Convention requirements are not applicable;⁹⁵
- (2) the adoption decree, showing that adoption was completed before the child's sixteenth birthday;
- (3) the birth certificate of the child;
- (4) the marriage certificate of a married daughter when her name is different from that of the birth certificate or adoption decree; and
- (5) evidence that the child has been in the legal custody of the parent for two years, and is physically residing with the parent for a two-year period (evidence that the two-year legal custody requirement has been fulfilled includes a final adoption decree or an official document in the form of a written award of custody by the court or by a recognized governmental entity authorized to issue such a document).

With regard to petitions filed by a U.S. citizen parent on behalf of a Hague Convention adoptee (under INA section 101(b)(1)(G)) or an orphan (under INA section 101(b)(1)(F)), the documentation that must be submitted is complex and is discussed separately below in sections 3:3.6 and 3:3.7.

[C][3] Evidence of Sibling Relationship

In sibling petition cases in which the relationship is claimed through a common mother, the petitioner should submit his or her birth certificate as well as that of the beneficiary showing the common mother. If necessary, the petitioner should also submit evidence of name changes⁹⁶ (for example, marriage certificates showing maiden names). If the relationship is claimed through a common father, the petitioner should submit both siblings' birth certificates showing a common father (if this information appears on the birth certificate), the parents' marriage certificate with each mother, and, if applicable, proof of legal termination of the parents' prior marriages. Evidence of name changes should also be submitted (for example, marriage certificate of sibling showing maiden name). If either (or both) 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

95. See section 3:2.1[D][2], *supra*.

96. 8 C.F.R. § 204.2(g).

time of legitimation, or evidence of a bona fide parent-child relationship, must be demonstrated.⁹⁷

§ 3:3.2 Filing the Petition

[A] Generally

Petitioners residing in the United States must mail their stand-alone I-130 applications (that is, I-130 petitions filed without concurrently filed I-485 adjustment applications) to either the Chicago Lockbox or the Phoenix Lockbox, depending on where they reside in the United States. Petitions filed with a lockbox facility will be routed to, and adjudicated at, the appropriate USCIS service center based on the petitioner's place of residence in the United States.

With regard to I-130 petitioners residing abroad, a petitioner residing in a country without a USCIS overseas office must file his or her Form I-130 with the USCIS Lockbox Facility in Chicago. A petitioner residing in a country with a USCIS overseas office has the option of either mailing the petition to the USCIS Chicago Lockbox Facility, or filing at the USCIS international office in the country of residence. These petitioners will also be granted more time to respond to requests for evidence.⁹⁸ Specifically, petitioners residing outside the United States are given up to twelve weeks to respond to RFEs, plus an additional fourteen days to account for overseas mail. Under the revised process, USCIS may authorize the Department of State to adjudicate their case only in certain emergency situations (see below).

[B] Special Filing Situations

There are two special filing situations:

- (1) If the U.S. citizen petitioner is currently outside of the United States and an emergency situation exists, the petition may be filed with a consular post abroad provided USCIS authorizes the adjudication of the petition abroad; and
- (2) If the beneficiary is present in the United States and a visa is immediately available to him or her (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.

97. *Id.*

98. *See* USCIS Policy Memo. PM-602-0040, Change in Standard Timeframes for Applicants or Petitioners to Respond to Requests for Evidence (July 7, 2011), www.uscis.gov/portal/site/uscis (follow "Laws"; then follow "Policy Memoranda").

[B][1] Emergency Situations

As noted, USCIS may authorize the Department of State to adjudicate an I-130 filed by a petitioner who is abroad in certain emergency situations. USCIS guidance issued in May 2012 clarifies that a petitioner's residency within the consular district is no longer a consideration when determining whether a Form I-130 can be processed at the post.⁹⁹ Instead, if a consular officer in an embassy or consulate where a USCIS office is not present encounters an individual case that the officer believes requires immediate processing due to exceptional circumstances, the consular officer should contact the Field Office Director of the international USCIS office with jurisdiction over that location to determine whether the post may accept and adjudicate the case. If USCIS authorizes the consular post to adjudicate a case, the consular officer may adjudicate the case provided it is clearly approvable. If the case is not clearly approvable, the post must forward the case to USCIS.

The memo lists the following examples of exceptional circumstances that may be approved for consular processing:

- (1) A U.S. service member stationed overseas becomes aware of a new deployment or transfer with very little notice. This should be an exception to the regular relocation process for most service members.
- (2) A petitioner or beneficiary is facing an urgent medical emergency that requires immediate travel. This includes the situation where a petitioner or beneficiary is pregnant and delaying travel may create a medical risk or extreme hardship for the mother or child.
- (3) A petitioner or beneficiary is facing an imminent threat to personal safety.
- (4) A beneficiary is within a few months of aging out of eligibility.
- (5) The petitioner and family have traveled for the immigrant visa interview, but the petitioner has recently naturalized and the family member(s) require a new, stand-alone petition.
- (6) The petitioner adopted a child and there is an imminent need to leave the country. This exception should only be considered if the child has been in the petitioner's legal and physical custody for at least two years and the petitioner has a full and final adoption decree on behalf of the child.

99. See USCIS Policy Memo. PM-602-0043, Process for Responding to Requests by the Department of State (DOS) to Accept a Locally Filed Form I-130, Petition for Alien Relative (Aug. 8, 2011).

- (7) A U.S. citizen petitioner living and working abroad who receives a job relocation to the United States or an offer of a new job in the United States with very little notice.

This list is not an exhaustive list of examples. FODs have discretion to authorize consular post adjudication of an I-130 when there are compelling humanitarian reasons. There is no right to appeal a USCIS decision to deny consular processing. In addition, USCIS may also authorize blanket processing of I-130s by consular posts in response to a large scale crisis such as a natural disaster or widespread civil unrest that creates a humanitarian emergency for U.S. citizens or residents living abroad.¹⁰⁰ In these cases, USCIS may give blanket authorization to consular posts to accept and adjudicate I-130s for a specified period of time. If USCIS declines to grant authorization for consular processing, the consular officer will instruct the petitioner to file the I-130 with the appropriate USCIS lockbox in the United States.

NOTE: The I-130 petitioner must have a domicile in the United States before an immigrant visa can actually be issued to a qualifying family member. 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.

100. USCIS has utilized this authority to authorize blanket processing of immediate relative Forms I-130 filed on behalf of Syrian or Libyan nationals residing abroad. *See* Executive Summary of USCIS Stakeholder Meeting dated Oct. 28, 2011.

[B][2] Beneficiary Eligible for Adjustment

When an immigrant visa is immediately available to an individual 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 individual is eligible for “adjustment of status.” Individuals submitting concurrently filed forms must file them with the Chicago Lockbox Facility. All adjustment applications for family-based immigrants will be routed to the National Benefits Center for initial processing, including processing of employment authorization documents (EADs) and advance paroles. After initial processing, the adjustment applications will be forwarded to local USCIS 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.

§ 3:3.3 USCIS Processing

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.

[A] Blood Tests

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.¹⁰¹ 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.

101. 8 C.F.R. § 204.2(d)(2)(vi).

[B] Determining Bona Fides of Marriage

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.¹⁰² In addition, a field examination can be conducted, with a USCIS agent visiting the couple's residence to question neighbors and see the domicile.

In challenges to the bona fides of a marriage, the petitioner bears the burden to show by a preponderance of evidence that the marriage was bona fide from inception and not entered into for the primary purpose of evading the immigration laws.¹⁰³ Relevant evidence on this issue includes:

- (1) documentation showing joint ownership of property (beneficiary and petitioner listed on mortgages, joint bank accounts, etc.);
- (2) lease showing joint tenancy of a common residence (property leases listing both names);
- (3) documentation showing commingling of financial resources (beneficiary listed as the petitioner's spouse on insurance policies, joint income tax returns);
- (4) birth certificates of children born to the petitioner and beneficiary;
- (5) affidavits of third parties having knowledge of the bona fides of the marital relationship (attesting to courtship, wedding ceremony, and shared residence and experiences);
- (6) other documentation establishing that the marriage was not entered into in order to evade the immigration laws of the United States.

USCIS should not discount evidence merely because it was acquired after the I-130 petition was filed. Evidence of a couple's recent behavior is relevant to the question of their intent at the time when they entered the marriage.

[C] Requests for Evidence

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. A USCIS rule finalized in April 2007 removed the fixed time

102. See also section 3:2.2[A][3], *supra*.

103. *In re Laureano*, 19 I. & N. Dec. 1 (BIA Dec. 12, 1983).

period provided for applicants and petitioners to respond to an RFE.¹⁰⁴ 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. The April 2007 rule also allows USCIS to deny incomplete applications without issuance of an RFE.

NOTE: Under the latest guidance implementing the April 2007 rule, the standard response time for RFEs is eighty-four days.¹⁰⁵ In addition, if the petitioner resides abroad, the petitioner is given an extra fourteen days to respond. Adjudication officers have some discretion to reduce response times in specific cases where warranted by the circumstances, but must get supervisor approval in order to do so. As a result, when responding to an RFE, attorneys should follow the actual response time frame set forth in the RFE.

[D] Rules Governing Petitioners Convicted of Certain Offenses Against Minors

Legislation enacted in July 2006 amends the INA to prevent both U.S. citizens and LPRs who have been convicted of a “specified offense against a minor” from filing family-based petitions.¹⁰⁶ “Specified offense against a minor” is defined as an offense against a minor

104. See 72 Fed. Reg. 19,100 (Apr. 17, 2007).

105. See USCIS Policy Memo. PM-602-0040, Change in Standard Timeframes for Applicants or Petitioners to Respond to Requests for Evidence (July 7, 2011), www.uscis.gov/portal/site/uscis (follow “Laws”; then follow “Policy Memoranda”).

106. See Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587.

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 immigrant 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 2006 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.¹⁰⁷

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 an LPR may lead to an investigation by the DHS and the initiation of removal proceedings.

[E] Approval of Petition

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 immigrant of his or her

107. See Memorandum from USCIS Assoc. Dir. of Domestic Operations Michael Aytes (July 28, 2006); Memorandum from USCIS Assoc. Dir. of Domestic Operations Michael Aytes (Feb. 8, 2007); USCIS Policy Memo. PM-602-0033.1, Supplemental Guidance to USCIS Service Centers on Adam Walsh Act Adjudication (Apr. 22, 2011, posted Apr. 27, 2011).

admission to permanent residence, is also sent to the individual. 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 individual's case is complete. The individual 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 individual 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.¹⁰⁸

If the petition was filed alone, and the petitioner indicated that the noncitizen 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 noncitizen 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 noncitizen 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.

[F] Denial of Petition

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.¹⁰⁹

§ 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.¹¹⁰ 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

108. See chapter 2, *supra*, for a full description of the process when an adjustment application is approved.

109. 8 C.F.R. § 204.1(a)(3)(H).

110. See Child Status Protection Act (CSPA), Pub. L. No. 107-208, 116 Stat. 927 (2002).

reached a cut-off 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.

With regard to children of U.S. citizens, the CSPA provides that the determination of whether a noncitizen 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 an LPR 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 LPRs who subsequently become U.S. citizens through naturalization. In such cases, the CSPA provides that if the second-preference petition on behalf of the foreign 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 immigration 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.

NOTE: Interpreting the CSPA provision addressing 2A beneficiaries whose parents naturalize while the 2A petition is pending, the Board has held that the beneficiary's actual age on the date of his or her parent's naturalization determines whether he or she is an immediate relative, not the adjusted age based on the formula applicable to children of LPRs (the latter formula is discussed below).¹¹¹ In this case, because the 2A beneficiary was twenty-two years old when his mother naturalized, he was not a "child" of a U.S. citizen and, therefore, could not adjust his status as an immediate relative. Instead, the F2A petition automatically converted to a family first-preference (F1) petition under the automatic conversion provisions.¹¹² As a result, the beneficiary could not seek adjustment when his priority date in the F2A category became current, because he was no longer an F2A beneficiary and a visa number was not yet available in the F1 category. The Board also held that the CSPA does not allow an individual to retain his or her family 2A preference status by opting out of automatic conversion to the F1 category. This aspect of the ruling is significant because the F1 category is currently years behind the F2A category (especially for Mexico).

The CSPA also extends age-out protection to: (1) the children of LPRs (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 individual's age as of the date a visa becomes available for the individual (or for the individual's parent in derivative cases), minus the number of days that the petition was pending. Specifically, the child's CSPA age is determined by first determining his or her age on the date when a visa number becomes available and then subtracting the number of days that the petition was pending. If the child is under twenty-one years of age using this formula, he or she may benefit from the CSPA's age-out protection. The number of days a petition has been pending is calculated

111. See *In re Zamora-Molina*, 25 I. & N. Dec. 606 (BIA Oct. 6, 2011).

112. See section 3:3.4[B], *infra*.

from the date the petition was filed (receipt date) to the date an approval is issued on the petition.

If the child is entitled to age-out protection using this formula, he or she must seek to acquire LPR status within one year of visa availability. The individual must “seek to acquire” permanent residence within one year of the visa availability by (1) filing either an adjustment application on Form I-485 or an immigrant visa application on Form DS-260, or (2) having the principal file Form I-824 on the derivative’s behalf (covering cases in which the principal immigrant has adjusted status, but the immigrant’s children will obtain immigrant visas at a U.S. consulate). The date when the visa became available is defined as the first day of the first month when the priority date is current in the Department of State’s Visa Bulletin or the date when the petition was approved, whichever is later.

NOTE: The Board held that an individual may satisfy the “sought to acquire” provision of the CSPA by properly filing an application for adjustment of status or by establishing that an application that he or she submitted to the appropriate agency was rejected for a procedural or technical reason or that there were other extraordinary circumstances, particularly those where the failure to timely file was due to circumstances beyond the individual’s control.¹¹³ In this case, the Board ruled that merely consulting a notario or an attorney, without more, is insufficient to satisfy the “sought to acquire” provision.

[B] Petition Conversion

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,

113. *In re O. Vazquez*, 25 I. & N. Dec. 817 (BIA June 8, 2012).

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 an LPR or a first-preference petition for an unmarried adult son or daughter of a U.S. citizen). In addition, the individual 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 LPRs. 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 (commonly referred to as the opt-out provision).

NOTE: This opt-out provision addresses the problem encountered by Filipino family 2B beneficiaries (adult sons or daughters of LPRs) 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 cut-off date for Filipino first preference is earlier than the cut-off date for Filipino family 2Bs. Initially, USCIS also took the position that the opt-out provision applied only to immigrant petitions initially filed for 2B immigrants. USCIS now takes the position that the provision may also be used in cases in which an F2A petition was originally filed but the petition later converted to a F2B petition (when the beneficiary turned twenty-one years of age).¹¹⁴ If the petitioning parent later naturalizes after the conversion to F2B, the beneficiary can opt to retain his or her F2B preference rather than convert to the first preference. The CSPA does not, however, allow an individual to retain his or her family 2A preference status by similarly opting out of automatic conversion to the first-preference category.¹¹⁵

114. See Memorandum from USCIS Assoc. Dir. for Domestic Operations Michael Aytes (June 14, 2006).

115. See *In re Zamora-Molina*, 25 I. & N. Dec. 606 (BIA Oct. 6, 2011), discussed in section 3:3.4[A], *supra*.

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).¹¹⁶ 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.

In a June 2014 decision, the Supreme Court resolved a split among the circuits concerning this issue.¹¹⁷ The Board's position in *In re Wang* was upheld by the Second Circuit,¹¹⁸ but the Fifth and Ninth Circuits rejected the Board's interpretation and, instead, adopted a position that favored family unification.¹¹⁹ Specifically, the Fifth and Ninth Circuits held that petitioners were entitled to utilize the priority dates of F4 petitions in connection with a subsequent second-preference petition filed on their behalf by permanent resident parents. In rejecting this position, however, the Supreme Court held that priority date retention is available only to derivative beneficiaries who downgrade from the F2A classification (for spouses and unmarried minor children of permanent residents) to the F2B classification (for unmarried adult sons and daughters of permanent residents). Other derivative beneficiaries, including family-based and employment-based derivatives, may not claim priority date retention. The Court reasoned that the statutory language in INA section 203(h)(3), which addresses how to treat a child who ages out, was ambiguous and that the Board's "textually reasonable construction" of that ambiguous language was entitled to deference.¹²⁰

116. *In re Wang*, 25 I. & N. Dec. 28 (BIA June 16, 2009).

117. *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014).

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

119. *Khalid v. Holder*, 655 F.3d 363 (5th Cir. 2011); *de Osorio v. Mayorkas*, 2012 WL 4373336 (9th Cir. 2012).

120. *Scialabba*, 134 S. Ct. at 2193–94.

NOTE: The Court’s decision has a far-reaching impact. Under the decision, a priority date established by an earlier fourth-preference petition cannot be carried over to the second-preference petition, which will result in significant delays in processing. The decision also impacts derivative beneficiaries of third-preference petitions. Under the Court’s ruling, if the beneficiary ages out, the priority date established by the original third-preference petition cannot be retained for purposes of a subsequent 2B petition filed on the beneficiary’s behalf. In short, when a derivative child beneficiary ages out of his or her parent’s third- or fourth-preference family-based petition, he or she cannot retain the priority date of that initial petition upon the parent’s filing of a new family 2B second-preference petition on behalf of the now “adult” son or daughter.

[C] Nonimmigrant Benefits for Family Members

Legislation enacted in 2000 (the LIFE Act) created a nonimmigrant category for immediate relatives of U.S. citizens with pending permanent residence papers.¹²¹ 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] Survivor Benefits

[D][1] Background

Under long-standing policy, the government’s view was that a person is no longer legally a “spouse” once the petitioning spouse died for purposes of adjudicating a pending I-130 petition. As a result, an 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

121. See LIFE Act, Pub. L. No. 106-553, tit. XI, 114 Stat. 2762 (Dec. 22, 2000).

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 before the citizen's death.

These policies were challenged in court, and the issues 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.¹²² Within these circuits, USCIS had stated that pending immediate-relative petitions for spouses should be approved and those already approved should not be revoked.¹²³ For cases outside these circuits or in which a substitute sponsor could not be found, DHS announced in June 2009 that it 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.

[D][2] Survivor Benefits for Spouses of U.S. Citizens

Legislation enacted in October 2009¹²⁴ removed a requirement that the immigrant spouse and the deceased spouse 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). The law now states that the widow(er) must have been the spouse of a U.S. citizen at the time of the citizen's death.¹²⁵

Section 568(c) of the law also provides that, if an immediate-relative I-130 petition for the spouse was pending or already approved 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

122. 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).

123. See Memo. from Donald Neufeld, Assoc. Dir., Office of Domestic Operations, Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children (rev. Sept. 4, 2009).

124. See Fiscal Year 2010 Homeland Security Appropriations Act, Pub. L. No. 111-83, § 568(c) (Oct. 28, 2009); see also section 3:3.5, *infra*.

125. The revised standards for widow(er) benefits and the transition cases are discussed in detail in section 3:3.5, *infra*.

death, the couple was married and the widow(er) would be otherwise eligible to file a widow(er)'s Form I-360 (for example, they were not separated at the time of the citizen's death). This provision addresses the problem of the "widow-penalty" cases.¹²⁶

The conversion provision 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 immigrant to the United States. As a result, section 568(c) will also benefit children of newly eligible widows(ers).

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 individual'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.¹²⁷

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:

126. The effect of the new law on pending I-130 cases is discussed *infra*.

127. See USCIS Interoffice Memo. from Donald Neufeld, Acting Assoc. Dir., Domestic Operations Directorate, Lori Scialabba, Assoc. Dir., Refugee, Asylum & Int'l Operations Directorate, and Pearl Chang, Acting Chief, Office of Pol'y & Strategy, Additional Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children (Dec. 2, 2009) [hereinafter Surviving Spouses Memorandum].

- (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.

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 surviving spouse 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 individual 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).

[D][3] Survivor Benefits for Other Family Members

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 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.

[D][3][a] Coverage

These benefits 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;
- (3) spouses and minor children of LPRs, 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;
- (4) unmarried adult sons and daughters of LPRs, 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;
- (5) 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;
- (6) 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
- (7) 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.

[D][3][b] Limitations

The law states that section 204(*I*) 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 clarifies the affidavit of support requirement under INA section 213A for family members who are eligible for survivor benefits under section 204(*I*). The law allows other persons, other than the I-130 petitioner, to file a Form I-864 on behalf of the beneficiary or derivative family member.

[D][3][c] Implementing Guidance

In December 2010, USCIS issued guidance implementing INA section 204(*I*).¹²⁸ The policy memorandum states that INA section 204(*I*) permits the approval of a visa petition, as well as any adjustment application and related application, if the noncitizen seeking the benefit:

- (1) resided in the United States when the qualifying relative died;
- (2) continues to reside in the United States on the date of the decision on the pending petition or application; and
- (3) is at least one of the following:
 - (a) the beneficiary of a pending or approved immediate-relative visa petition,

128. See USCIS Policy Memo. PM-602-0017, Approval of Petitions and Applications after the Death of the Qualifying Relative Under New Section 204(*I*) of the Immigration and Nationality Act (Dec. 16, 2010), www.uscis.gov/USCIS/Laws/Memoranda/2011/January/Death-of-Qualifying-Relative.pdf.

- (b) the beneficiary of a pending or approved family-based visa petition, including both the principal beneficiary and any derivative beneficiaries, or
- (c) any derivative beneficiary of a pending or approved employment-based visa petition.

The memorandum also states that INA section 204(l) does not expressly define the term “qualifying relative,” but that USCIS infers from the list of persons to whom new section 204(l) applies that “qualifying relative” means an individual who immediately before death was:

- (1) the petitioner in a family-based immigrant visa petition,
- (2) the principal beneficiary in a family-based visa petition case, or
- (3) the principal beneficiary in an employment-based visa petition case.

The law specifies that section 204(l) does not “limit or waive” any eligibility requirements or bars to approval of a petition or adjustment application other than the lack of a qualifying relative due to the qualifying relative’s death. Thus, the guidance states that no other eligibility requirements are changed by section 204(l). Addressing the conforming amendment, the memo states that, if after the death of a qualifying relative a visa petition is approved or not revoked under INA section 204(l), another individual who qualifies as a “substitute sponsor” must submit an affidavit of support if a legally binding affidavit of support is otherwise required for this type of case. Such a binding affidavit of support is required for most immediate relatives and family-based immigrants, and some employment-based immigrants.

NOTE: The December 2010 policy memorandum clarifies that the new guidance applies to any case adjudicated on or after October 28, 2009, even if the case was filed before October 28, 2009, and even if the qualifying relative died before that date. The guidance states that, if a case was denied before October 28, 2009, an individual may file an untimely motion to reopen a petition, adjustment application, or waiver application, if INA 204(l) would now allow approval of a still-pending petition or application. If a petition or application was denied on or after October 28, 2009, without considering the effect of section 204(l), and section 204(l) could have permitted approval, USCIS must, on its own motion, reopen the case for a new decision in light of section 204(l).

The memo states that the law does not bar an individual who was actually abroad when the qualifying relative died from proving that he or she still resides in the United States. In addition, the law does not require the individual to show that he or she was, or is, residing here lawfully. Execution of a removal order, however, terminates an individual's residence in the United States. The guidance also notes that, if any one beneficiary of a covered petition meets the residence requirements of the law, then the petition may be approved, despite the death of the qualifying relative, and all the beneficiaries may immigrate to the same extent that would have been permitted if the qualifying relative had not died. In other words, it is not necessary for each beneficiary to meet the residence requirements in order to have the benefit of section 204(I).

Assuming the individual was residing in the United States when the qualifying relative died, and still resides in the United States, the guidance states that an officer now has authority to approve any immigrant visa petition that was pending when the qualifying relative died if the petition is covered by section 204(I). However, the petition must have been approvable when filed and still be approvable, apart from the death of the qualifying relative. Therefore, all other requirements for approval of a petition must be met. As a result, a petition to which section 204(I) applies may still be subject to denial under INA section 204(c) (relating to prior marriage fraud) or any other statutory bar to approval. USCIS also retains the authority to deny a case under section 204(I) as a matter of discretion.

The guidance states that USCIS also has authority to approve an adjustment-of-status application that was pending when the qualifying relative died, if the related visa petition is approved under section 204(I), or if a pre-death approval is reinstated. In the adjustment-of-status context, the individual must have been eligible to apply for adjustment of status at the time that application was filed. All other requirements for adjustment apply. For example, an individual seeking adjustment under INA section 245(a) must still establish a lawful inspection and admission or parole and that an immigrant visa is "immediately available." If there was a properly filed adjustment application pending and the beneficiary or the derivative beneficiary was eligible to adjust, however, approval or reinstatement of approval of a visa petition under section 204(I) will preserve any eligibility for adjustment that existed immediately before the qualifying relative died. For example, if an immediate-relative petition is approved or a pre-death approval is reinstated under section 204(I), the beneficiary remains eligible for the immediate-relative exemptions in section 245(c). Similarly, the adjustment applicant must be admissible, or must obtain any available waiver of inadmissibility. An

individual whose petition has been approved or reinstated under section 204(l) of the act, but who is not eligible to adjust status, may apply for an immigrant visa at a consular post abroad.

With regard to the affidavit of support requirement, the USCIS guidance clarifies that the death of the qualifying relative does not relieve the individual of the need to have a valid and enforceable Form I-864, Affidavit of Support, when required. If the individual is required to have a Form I-864, and the visa petition is approved under section 204(l), a substitute sponsor will need to submit a Form I-864. A substitute sponsor is needed even if the deceased petitioner had filed a Form I-864 in connection with a pending adjustment application.

The guidance states that, if a Form I-130 and Form I-485 are approved under section 204(l) of the act, the individual's LPR status will not be subject to the conditions under section 216 even if the marriage through which he or she acquired residence was entered into less than two years earlier. On the other hand, the USCIS has taken the position that, if the derivative beneficiary of a Form I-526 obtains approval of the Form I-526 and Form I-485 under section 204(l), the individual remains subject to the conditions imposed by section 216A of the act.

USCIS has determined that section 204(l) gives the agency discretion to grant a waiver or other form of relief from inadmissibility to an individual described in section 204(l), even if the qualifying relationship that would have supported the waiver has ended through death. With regard to waivers requiring a showing of extreme hardship to a qualifying relative, the fact that the qualifying relative has died will be deemed to be the functional equivalent of a finding of extreme hardship assuming that the qualifying relative was already a citizen or an LPR at the time of death. If the qualifying relative was not already a citizen or permanent resident, then the qualifying relative's death does not make the individual eligible for a waiver.

Section 204(l) gives USCIS discretion to deny a petition or application that may now be approved despite the qualifying relative's death, if USCIS finds, as a matter of discretion, "that approval would not be in the public interest." The December 2010 memo states that USCIS officers will not, routinely, use this discretionary authority to deny a visa petition that may now be approved, despite the death of the qualifying relative.

In light of section 204(l), the guidance states that it would generally be appropriate to reinstate the approval of an immediate-relative or family-based petition if the individual was residing in the United States when the petitioner dies and if the individual continues to reside in the United States. The guidance also states that USCIS officers may act favorably on requests to reinstate approvals for

humanitarian reasons in employment-based cases and in family-based cases where the principal beneficiary, rather than the petitioner, dies.

§ 3:3.5 Special Procedures for Widows/Widowers

A widow(er) of a deceased U.S. citizen can qualify for classification as an “immediate relative” in certain cases. Legislation enacted in October 2009 removed a requirement that the surviving 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).¹²⁹ 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.

[A] Widow(er) Petition

A widow or widower must file Form I-360 to petition for classification as an immediate relative.¹³⁰ 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.¹³¹ 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:

129. See Fiscal Year 2010 Homeland Security Appropriations Act, Pub. L. No. 111-83, § 568(c) (2009); see also section 3:3.4[D][2], *supra*.
 130. 8 C.F.R. § 204.1(a).
 131. *Id.* § 204.2(b)(2).

- (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.

NOTE: In June 2013, the Supreme Court invalidated a key section of the federal Defense of Marriage Act (DOMA), paving the way for same-sex married couples to qualify for visas, green cards, and other immigration benefits on the same basis as their opposite-sex counterparts.¹³² In guidance issued in July 2013, USCIS discussed the impact of the decision on immigration benefits, including immigrant visa petitions on behalf of family members.¹³³ The agency indicated that it will treat a same-sex marriage “exactly the same as an opposite-sex marriage” for these and other immigration benefits. As a result, a widow(er) of a deceased same-sex spouse may now file I-360 to petition for classification as an immediate relative provided the widow(er) was married to a U.S. citizen at the time of the citizen's death, the petition is filed within two years of the citizen spouse's death, there was no legal separation at the time of the citizen's death, and the widow(er) spouse has not remarried. Same-sex I-360 filings should be submitted with the same initial evidence and documentation one would provide in an opposite-sex case.

[B] Children of Widow(er)

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 immigrant to the United States.¹³⁴ A separate visa petition on behalf of the immigrant is not required. Instead, the child should be included

132. The decision and its impact on family-based petitions is discussed in detail in section 3:2.2[A], *supra*.

133. See *Same-Sex Marriages*, USCIS (Apr. 3, 2014), www.uscis.gov/family/same-sex-marriages.

134. 8 C.F.R. § 204.2(b)(4).

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.¹³⁵ 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.¹³⁶ Derivative benefits do not extend to an unmarried or married adult son or daughter of a widow or widower.

[C] Filing and USCIS Processing

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 individual's place of residence. If no USCIS overseas office exists with jurisdiction over the individual's place of residence, the petition may be filed with the U.S. consulate with jurisdiction over the widow(er)'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 that is also approved, Form I-181B, which is used to notify the individual of his or her admission to permanent residence, is also sent to the individual. If the petition was filed alone, and the petition indicated that the foreign national 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.

[D] Section 586(c) Guidance

USCIS issued guidance addressing section 568(c) in December 2009.¹³⁷ The memorandum explains that this amendment applies equally to persons seeking immigrant visas abroad and persons in the United States seeking to adjust status. The memorandum further

135. *In re Minkova*, 22 I. & N. Dec. 1161 (BIA Dec. 1, 1999).

136. Evidence required to establish the existence of a parent-child relationship is discussed in section 3:3, *supra*.

137. *See* Surviving Spouses Memorandum, *supra* note 127.

explains that section 568(c) relates only to the impact of the citizen's death on the individual'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.

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.¹³⁸ 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.

138. 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.¹³⁹ 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.¹⁴⁰ 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.¹⁴¹

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;

139. 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*.

140. 8 C.F.R. § 204.3(c).

141. *Id.* § 204.3(d)(1).

- (6) 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.¹⁴²

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.¹⁴³ 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.¹⁴⁴

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. If the prospective petitioner is currently residing abroad, the application for advance processing may be filed with the USCIS overseas office having jurisdiction over the location abroad or the Dallas Lockbox Facility. 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.¹⁴⁵ 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 when an application for advance processing has already been approved:

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- 142. *Id.* § 204.3(c)(1).
 - 143. *Id.* § 204.3(c)(2).
 - 144. *Id.* § 204.3(e)(9)(ii).
 - 145. *Id.* § 204.2(h)(3).

- (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.¹⁴⁶

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.¹⁴⁷ If an application for advance processing has already been approved, the orphan petition may be filed with the USCIS overseas office located in the country of the child's residence abroad (provided the petitioner is physically present abroad in the adoptive child's home country 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 pending or the petitioner is in the United States, the petition

146. *Id.* § 204.3(d)(1).

147. *Id.* § 204.3(g).

must be filed with the Dallas Lockbox address that will route the petition to the National Benefits Center for final processing. Prospective parents residing abroad can also file their I-600 petitions with the Dallas Lockbox Facility. If a child is already in the United States and he or she is eligible for adjustment of status, the petition and the application for adjustment of status may be filed with the National Benefits Center. Note that only children who are presently in the United States in parole status are eligible to be accorded orphan status and to apply for adjustment of status.

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.¹⁴⁸ 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.¹⁴⁹ When the orphan petition is approved at an immigrant visa-issuing post, the post can initiate immigrant visa processing.¹⁵⁰

NOTE: Legislation enacted in 2000 permits foreign-born children, including adopted children, to acquire citizenship automatically if they meet certain requirements.¹⁵¹ 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.

148. *Id.* § 204.3(h)(8).

149. *Id.* § 204.3(h)(9).

150. *Id.* § 204.3(h)(10).

151. *See* INA § 320, as amended by Title I of the Child Citizenship Act of 2000 (CCA), Pub. L. No. 106-395, 114 Stat.1631.

§ 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.¹⁵² 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 a noncitizen 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.

152. 8 C.F.R. § 204.310.

Applicants are required to submit Form I-800A and all supplements to Form I-800A to the USCIS Dallas Lockbox Facility for initial 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.¹⁵³ 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.¹⁵⁴ 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

153. *Id.* § 204.312(e).

154. *Id.*

adopt or obtain custody of the child.¹⁵⁵ The petitioner must specify 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).¹⁵⁶

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.

155. *Id.* § 204.309(b)(1).

156. *Id.* § 204.313(b).

- (8) 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.
- (9) 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.
- (10) 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.
- (11) Either a Form I-864W, Intending Immigrant's I-864 Exemption, or a Form I-864, Affidavit of Support.¹⁵⁷

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.¹⁵⁸ 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):

- (1) 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

157. *Id.* § 204.313(d).

158. *Id.* § 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.¹⁵⁹

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 a foreign child who is in the United States and who is eligible both for approval of a Form I-800 and for adjustment of

159. *Id.* § 204.313(h).

status, the USCIS office with jurisdiction to adjudicate the child's 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.¹⁶⁰

§ 3:3.8 Self-Petitioning by Battered Spouses, Children, and Parents

[A] Generally

Battered spouses of U.S. citizens and LPRs may also file their own immediate relative or preference petitions in certain situations.¹⁶¹ To qualify, the self-petitioning 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/LPR spouse, and must have been battered or subjected to "extreme cruelty" by the citizen/LPR spouse. The law provides similar 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;¹⁶² the 1994 law was reauthorized in 2000, 2006, and 2013.¹⁶³

A child of a self-petitioner may be derivatively included in the self-petition. No separate petition is necessary for derivative classification, and the child is not required to have been the victim of abuse. A derivative child need not be the child of the abuser, but must qualify as the self-petitioning spouse's "child" for immigration purposes.¹⁶⁴ Under the CSPA, derivative children of battered immigrants are now

160. *Id.* § 204.314.

161. INA § 204(a)(1).

162. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

163. *See* Victims of Trafficking and Violence Prevention Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464; Department of Justice Appropriations Authorization Act for FY 2006–2009, Pub. L. No. 109-162, 119 Stat. 2960 (2006); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54.

164. *See* section 3:2.1, *supra*.

protected from being denied self-petition benefits because they turn twenty-one while the permanent resident papers are pending.¹⁶⁵ Under legislation enacted in 2013, the surviving minor children of a VAWA self-petitioner remain eligible for derivative benefits notwithstanding the death of the self-petitioner while the I-360 petition is pending.¹⁶⁶

The 2013 law also clarifies the public charge requirement in self-petition cases. Specifically, the law states that self-petitioners are exempt from the public charge inadmissibility ground, including the affidavit of support requirements under INA section 213A applicable in most family-based cases.¹⁶⁷

NOTE: In June 2013, the Supreme Court invalidated a key section of the federal Defense of Marriage Act (DOMA), paving the way for same-sex married couples to qualify for visas, green cards, and other immigration benefits on the same basis as their opposite-sex counterparts.¹⁶⁸ In guidance issued in July 2013, USCIS discussed the impact of the decision on immigration benefits, including immigrant visa petitions on behalf of family members.¹⁶⁹ The agency indicated that it will treat a same-sex marriage “exactly the same as an opposite-sex marriage” for these and other immigration benefits. As a result, a battered or abused spouse in a same-sex marriage to a U.S. citizen or an LPR may file a self-petition on Form I-360 under the same conditions that apply to opposite-sex spouses, i.e., the marriage was entered in good faith, and the self-petitioner is a person of good moral character, resided with the spouse in the United States, and was abused by the U.S. citizen or LPR spouse. Same-sex I-360 filings should be submitted with the same initial evidence and documentation one would provide in an opposite-sex case.

165. See section 3:3.4[A], *supra*.

166. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54.

167. See section 3:4.2[A], *infra*.

168. The decision and its impact on family-based petitions is discussed in detail in section 3:2.2[A], *supra*.

169. See *Same-Sex Marriages*, USCIS (Apr. 3, 2014), www.uscis.gov/family/same-sex-marriages.

[B] Eligibility for Self-Petition Benefits

To qualify for self-petitioning benefits under the 1994 legislation, as amended, several requirements must be met.

[B][1] Establishing Relationship to U.S. Citizen/LPR

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 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 an LPR 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 an LPR 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 LPR 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 an LPR, it must be established that the parent lost his or her citizenship or LPR 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 an LPR (in cases in which the abuser lost his citizenship or LPR status or renounced his or her citizenship).

USCIS issued guidance in September 2011 that addresses the 2006 amendment providing for the continued eligibility for certain individuals to file a self-petition as a child after attaining age twenty-one but before attaining age twenty-five.¹⁷⁰ The memo states that such an adult is eligible to file a self-petition under the 2006 amendment if:

- (1) the self-petitioning son or daughter qualified to file the self-petition on the day before he or she attained age twenty-one—that is, all qualifying factors must have been in place on that date;
- (2) the qualifying abuse was one central reason for the delay in filing—that is, the delay was caused by or incident to the battery or extreme cruelty to which the self-petitioner was subjected (for example, the abuse took place so near in time to the self-petitioner attaining age twenty-one that there was insufficient time to timely file, or the abuse was so traumatic that the self-petitioner was mentally or physically incapable of filing in a timely manner);
- (3) the self-petition is filed prior to the self-petitioner attaining the age of twenty-five;
- (4) the self-petitioner is unmarried at the time of filing and remains unmarried until acquiring permanent residence.

In September 2013, USCIS released interim guidance on the exception to the two-year custody and two-year residence requirement for abused adopted children.¹⁷¹ The guidance notes that the VAWA 2005 changes allow an abused adopted child to leave an abusive household without adversely affecting his or her eligibility to file a VAWA self-petition. An abused adopted child submitting a self-petition must still show that there was a valid adoption and that he or she shared a residence for some period of time with the abusive

170. See USCIS Policy Memo. PM-602-0048, Continuing Eligibility to File for Child VAWA Self-Petitioners After Attaining Age 21 (Sept. 6, 2011).

171. See USCIS Policy Memo. PM-602-0089, Exception to the Two Year Custody and Two Year Residency Requirement for Abused Adopted Children (Sept. 12, 2013).

adoptive parent, according to the guidance. However, an adopted child who has been abused by the adoptive parent or household family member is no longer required to present evidence that he or she has been in the custody of, and resided with, the adoptive parent for at least two years.

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. USCIS guidance issued in August 2011 states that the self-petitioning parent must demonstrate that he or she:

- (1) possesses the requisite qualifying relationship to the U.S. citizen son or daughter (that is, the self-petitioner is the parent of a U.S. citizen who is at least twenty-one years of age when the self-petition is filed, or the parent of a former U.S. citizen who lost or renounced citizenship within the two years prior to filing the self-petition as a result of an incident of domestic violence and was at least twenty-one years of age when citizenship was lost, or the parent of a U.S. citizen who was at least twenty-one years of age and who died within two years prior to the filing of the self-petition);
- (2) is a person of good moral character;
- (3) is otherwise eligible as an immediate relative parent;
- (4) resides with or has previously resided with the abusive U.S. citizen son or daughter; and
- (5) has been subjected to battery or extreme cruelty by the U.S. citizen son or daughter.¹⁷²

While the statutory language is not as clear on whether an abused stepparent or an abused adoptive parent of a U.S. citizen may also benefit from the 2006 law, the August 2011 guidance states that an abused parent, stepparent, or adoptive parent of a U.S. citizen is eligible for self-petition benefits provided that the self-petitioner is a “parent”¹⁷³ and has or had a qualifying relationship to a U.S. citizen son or daughter. In addition, the qualifying relationship must have been in existence at the time of the abuse and at the time of filing.

In the case of step-relationships, the guidance notes that such relationships may be terminated by death, legal separation, or divorce.

172. See USCIS Policy Memo. PM-602-0046, Eligibility to Self-Petition as a Battered or Abused Parent of a U.S. Citizen (Aug. 30, 2011).

173. As defined in INA § 101(b)(2).

To remain eligible for self-petition benefits after the termination of a step-relationship, the stepparent must demonstrate that:

- (1) the abusive U.S. citizen stepson or stepdaughter had not reached the age of eighteen years at the time when the marriage creating the step-relationship occurred;
- (2) the step-relationship was in legal existence (and not terminated by death, legal separation, or divorce) at the time of the abuse; and
- (3) the step-relationship legally existed at the time of filing or if the relationship was terminated at the time of filing (due to death, legal separation, or divorce), the relationship continued to exist between the stepparent and the U.S. citizen stepson or stepdaughter at the time of filing.

A self-petition parent filing based on abuse by an adopted U.S. citizen son or daughter must establish that the relationship was created when the U.S. citizen son or daughter was under the age of sixteen and that the adoptive relationship was recognized under U.S. immigration laws (the child qualified as an adoptive child, an orphan, or a Hague Convention adoptee).

[B][2] Eligibility for Immigrant Classification

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 (unless a statutory exception applies). 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 LPR who the noncitizen intended to marry.

[B][3] Residency Requirements

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.

[B][4] Establishing Qualifying Abuse

Fourth, the self-petitioner (or the self-petitioner's child) must have been abused by the citizen or LPR 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 noncitizen 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 LPR 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 LPR spouse or parent is not qualifying, unless it was shown that the citizen or LPR 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.

[B][5] Proving Good Moral Character

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.

[B][6] Marriage Was Made in Good Faith

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 self-petitioner 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 self-petitioner 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 LPR 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 LPR, 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 an LPR, evidence must be submitted showing that the abuser lost his or her citizenship or LPR 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 LPR/abuser spouse acquired permanent residence within the past five years based on a marriage to a citizen or an LPR, 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 LPR 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/LPR 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 knowledgeable attest to the self-petitioner's good moral character may also be considered.

- (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,¹⁷⁴ 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 individual of his or her admission to permanent residence, is also. If the petition was filed alone, and the petition indicated that the individual 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.

174. INA § 245(a).

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 an LPR) may be eligible for deferred action. If the individual is placed in deferred action, the VSC will notify the individual that he or she should apply for an employment authorization document (EAD) on Form I-765. USCIS guidance issued in August 2011 clarifies that all persons with approved self-petitions who are in the United States are eligible for work authorization.¹⁷⁵ Self-petitioners should apply for work authorization on Form I-765, which must be filed with the Vermont Service Center. Consideration of placing a self-petitioner in deferred action will continue to be a part of the I-360 adjudication process.

§ 3:4 Application for Permanent Residence

Once eligibility for immigration has been established through approval of a family-sponsored immigrant visa petition, an individual can make an application for permanent residence.

§ 3:4.1 Visa Processing or Adjustment of Status

[A] Generally

If the person 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 abroad. Other individuals, 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 individual will be permitted to apply for an immigrant visa at the U.S. consulate. Note that an immigrant does not become an LPR until an immigration inspector actually admits him or her into the United States with his or her immigrant visa.

175. See USCIS Policy Memo. PM-602-0046, Eligibility to Self-Petition as a Battered or Abused Parent of a U.S. Citizen (Aug. 30, 2011), www.uscis.gov/portal/site/uscis (follow “Laws”; then follow “Policy Memoranda”).

Some persons 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 persons ineligible for adjustment under section 245(a) may be eligible for adjustment of status under a special adjustment status enacted in 1994.¹⁷⁶ 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).¹⁷⁷

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 immigrant becomes an LPR when the adjustment-of-status application is approved, and he or she will be given temporary evidence of such status and processed for a permanent resident 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.¹⁷⁸ Most family-based intending immigrants must seek immigrant visas

176. INA § 245(i).

177. See section 2:10, *supra*.

178. *Id.*

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.

[B] Provisional Waivers

A rule issued in January 2013 established a special provisional waiver process allowing immediate relatives of U.S. citizens who are ineligible for adjustment of status and are subject to the three-/ten-year inadmissibility bars to apply for waivers of inadmissibility before leaving the United States for an immigrant visa interview.¹⁷⁹ USCIS began accepting applications for provisional waivers of unlawful presence on March 4, 2013. Immediate relatives who entered the United States without being inspected by an immigration officer are ineligible to adjust status to permanent residence, but can apply for an immigrant visa abroad. However, if they have been unlawfully present for more than 180 days, leaving the United States to apply for the visa triggers a three-/ten-year bar against reentry.

Though a waiver of unlawful presence has long been available to these foreign nationals, prior rules permitted them to seek the waiver from abroad only. Waiver applicants were thus subject to long waiting periods and separation from family members. The new process is intended to reduce family separation by allowing immediate relatives to seek a waiver of unlawful presence before they travel abroad for an immigrant visa interview. Note, however, that the provisional waiver is limited to unlawful-presence bars to reentry. Foreign nationals seeking a waiver of any other ground of inadmissibility must follow standard waiver procedures.

Under the rule, individuals are eligible to request a provisional waiver if:

- (1) their sole ground of inadmissibility at the time of the immigrant visa interview with the DOS is unlawful presence under the three-/ten-year bar;
- (2) they qualify as an immediate relative of a U.S. citizen;

179. See 78 Fed. Reg. 536 (Jan. 3, 2013).

- (3) they are the beneficiary of an approved Form I-130 or Form I-360 classifying them as an immediate relative;
- (4) they are physically present in the United States when they file the application for the provisional unlawful presence waiver;
- (5) they appear for biometrics capture in the United States;
- (6) they have an immigration visa case pending with the State Department based on the approved petition and have paid the immigrant visa processing fee;
- (7) they will depart the United States to obtain the visa;
- (8) they establish that their U.S.-citizen spouse or parent would experience extreme hardship if the individual is denied admission to the United States as an LPR;
- (9) they warrant a favorable exercise of discretion; and
- (10) they are seventeen years of age or older at the time of filing an application for a provisional unlawful presence waiver.

An application for a provision waiver is submitted on Form I-601A, along with the filing fee and biometrics fee. Among the documents that must be submitted with the application is a copy of the approval notice for the I-130 or I-360 petition, a copy of the fee receipt establishing payment of the immigrant visa processing fee, and evidence that the U.S.-citizen spouse or parent would suffer extreme hardship. Form I-601A must be filed with the Chicago Lockbox Facility.

A pending or an approved provisional unlawful-presence waiver does not authorize any interim immigration benefits such as employment authorization or advance parole. All applicants must appear at an application support center for biometrics collection. In addition, an interview may be required in appropriate cases. If an RFE is issued, USCIS has indicated that the applicant must respond within thirty days.¹⁸⁰ There is no administrative appeal from a denial of a provisional waiver application, and a motion to reconsider or reopen cannot be filed. However, a person may file another provisional waiver application after the denial provided an immigrant visa case is still pending with the DOS. Alternatively, the individual can file a Form I-601 waiver application with the USCIS lockbox, after he or she attend the immigrant visa interview and after a consular officer determines that he or she is inadmissible.

180. See USCIS Policy Memo. PM 602-0081 (Mar. 1, 2013).

If a USCIS officer determines, based on the record, that there is reason to believe that the applicant may be subject to a ground of inadmissibility other than unlawful presence at the time of his or her immigrant visa interview with a consular officer, USCIS will deny the request for a provisional unlawful presence waiver.¹⁸¹ In some cases, USCIS has denied a provisional waiver application if the applicant has any criminal history. USCIS guidance issued in January 2014 instructs, however, that if, based on all evidence in the record, it appears that the applicant's criminal offense falls within the "petty offense" or "youthful offender" at the time of the I-601A adjudication or is not a crime involving moral turpitude that would render the applicant inadmissible,¹⁸² adjudicators should not deny the application solely on account of that criminal offense.¹⁸³ Instead, adjudicators are instructed to continue with the adjudication to determine whether the applicant meets the other requirements for the provisional unlawful presence waiver.

Once the application is approved, therefore, USCIS will notify the NVC of the approval and the applicant will receive a notice from the NVC regarding the interview. The individual must depart the United States and appear for an immigrant visa interview at a U.S. consular post abroad. If the individual fails to depart and attend his or her immigrant visa interview, the waiver will not take effect and the approval may no longer be valid. The approval is automatically revoked if the individual reenters or attempts to reenter the United States without being inspected and admitted or paroled.

[C] Special Considerations in Family-Based Cases

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 immigrant becomes a U.S. citizen or

181. 8 C.F.R. § 212.7(e)(4)(i) (2013).

182. Under INA § 212(a)(2)(A)(i)(I).

183. See USCIS Field Guidance, Guidance Pertaining to Applicants for Provisional Unlawful Presence Waivers (Jan. 24, 2014).

until he or she has worked in the United States for a period of ten years. The affidavit of support requirements applicable in most family-based cases are discussed below.

§ 3:4.2 Affidavit of Support Requirement

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 certain immigrants described below may not be relied on by the DOS or USCIS unless the affidavit is executed as a contract:

- (1) in which the sponsor agrees to provide support to maintain the sponsored immigrant at an annual income that is not less than 125% of the federal poverty guidelines, until he or she becomes a U.S. citizen or until the immigrant (or the immigrant's parent or spouse) has worked in the United States for ten years (that is, forty qualifying quarters);
- (2) that is legally enforceable against the sponsor by the sponsored immigrant, the federal government, any state, or by any other entity that provides any means-test public benefit to the immigrant; and
- (3) 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 meet income requirements discussed below.¹⁸⁴

[A] Coverage and Exempted Applicants

IIRIRA provides that a family-sponsored immigrant is inadmissible under the public charge inadmissibility ground unless the person petitioning for the immigrant's admission (and any additional sponsors) has executed an affidavit of support that meets the requirements of section 213A of the INA.¹⁸⁵ 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 immigrant (or by an entity in which such relative has a significant ownership interest) is also

184. See section 3:4.1[C], *supra*.

185. See INA § 212(a)(4)(C), *amended by IIRIRA § 531(a)*.

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 immigrant spouses or children of U.S. citizens or LPRs who have been abused by the citizen or resident and are self-petitioning, nor do they apply to an widow(er) of a U.S. citizen and his or her 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 individual seeks permanent residence through admission or adjustment of status, he or she 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 2006,¹⁸⁶ 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:

- (1) an immigrant who can be credited with forty qualifying quarters of employment in the United States;
- (2) 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;
- (3) an immigrant seeking an immigrant visa or adjustment as a self-petitioning widow(er); and
- (4) an immigrant seeking an immigrant visa or adjustment as a self-petitioning battered spouse or child of a U.S. citizen or permanent resident.

186. See 71 Fed. Reg. 35,372 (June 21, 2006).

[B] Eligible Sponsors**[B][1] Generally**

Only certain classes of individuals may serve as sponsors and may complete the affidavit under the agency guidelines.

A sponsor or joint sponsor must be:

- (1) a U.S. citizen or an LPR,
- (2) at least eighteen years of age, and
- (3) domiciled in the United States (see discussion below).

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.

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 (discussed below), 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 immigrant 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 immigrant had immigrated did not excuse the filing of an affidavit of support. In these cases, the principal immigrant and derivative family members were not eligible for immigration based on the deceased petitioner's filing. However, the Family Sponsor Immigration Act of 2002¹⁸⁷ remedies the situation of a principal immigrant 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

187. Pub. L. No. 107-150, 116 Stat. 74.

affidavit of support rule is not recognized when the sponsor relinquishes his or her LPR status or if the sponsor and the principal immigrant divorce after the principal immigrant has immigrated but before all following to join dependents have immigrated.

Legislation enacted in October 2009 also allows persons other than the I-130 petitioner to file a Form I-864 on behalf of the beneficiary or derivative family member when the beneficiary or derivative family member is eligible for survivor benefits under section 204(l).¹⁸⁸ Addressing this provision, USCIS guidance issued in December 2010 clarifies that the death of the qualifying relative does not relieve the immigrant of the need to have a valid and enforceable Form I-864, when required. Instead, if the person is required to have Form I-864, and the visa petition is approved under section 204(l), a substitute sponsor will need to submit a Form I-864.

[B][2] Domicile Requirements

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 LPR status.

An LPR 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 organizations. 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 LPR or citizen who is abroad must establish that he or she did not, in fact, give up his or her U.S. domicile.

188. Survivor benefits are discussed in section 3:3.4[D][2]–[D][3], *supra*.

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 additional substantive requirements for who may petition for a relative. Petitioners under the age of eighteen or those who are not domiciled in the United States will not be able to successfully sponsor a 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.

[C][1] Determining Household Size

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 immigrant 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 a person 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.

[C][2] Calculating Household Income

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 an LPR. 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 immigrant) living in the sponsor's residence for the prior six months could be counted. Imposing a requirement that the sponsored immigrant had to be part of the sponsor's household for six months, however, created problems of timing in filing the individual'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 immigrant 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.

[C][3] Analyzing Compliance with Income Requirement

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 noncitizens 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 he or she 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 individual'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 individual 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.

[C][4] Reliance on Significant 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.

[C][5] 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.

[D] 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 immigrant. 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 LPR 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 immigrant 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 immigrant 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.

[E] Procedural Considerations

[E][1] Required Forms

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 immigrant 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 immigrant 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: 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.

[E][2] Required Evidence

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 LPR 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 LPR 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 immigrant(s).

[E][3] Submission and Processing

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 Form I-864. If the Form I-864 is not technically correct or complete, the NVC will ask the sponsor to correct and complete the Form I-864 a second time. It will explain what is lacking in the previously submitted Form 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.

§ 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 foreign nationals 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 LPRs who immigrate to this country on the basis of their marital relationship. Under IMFA, any foreign national 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 individual'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 foreign national 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 person's conditional resident status.¹⁸⁹

§ 3:5.1 Coverage of Section 216

Preliminarily, it should be noted that the "conditional residence" rules apply only to 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 an LPR 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 LPR status, regardless of the date of his or her marriage to the U.S. citizen or resident. Further, spouses who immigrate "derivatively"—as part of the family unit when the other spouse is the principal immigrant—are not covered by IMFA.¹⁹⁰

Although spouses who are the direct beneficiaries of 2A preference petitions filed by their LPR 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 eligible for admission to this country unconditionally as LPRs.

In determining whether an individual is subject to conditional residence, the date when the person is actually admitted to this country as an immigrant controls.¹⁹¹ Thus, if a noncitizen has been married

189. INA § 216(b)(1), 8 U.S.C. § 1186(b)(1).

190. FRAGOMEN, DEL REY & BERNSEN, IMMIGRATION LAW AND BUSINESS § 3.4(b)(4), at 3-64 (Fragomen 2008).

191. INA § 216(g)(1), 8 U.S.C. § 1186(g)(1).

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 an LPR, provided the marriage is bona fide; what counts is that the marriage was over two years old at the time of the individual'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 individual'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 individual may work and travel freely, and he or she may file preference petitions on behalf of close relatives.¹⁹² Further, if the individual 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.¹⁹³ Similarly, like other permanent residents, the individual must file taxes as a resident noncitizen and, if male and of draft age, register with the Selective Service System.¹⁹⁴

§ 3:5.2 Joint Petition Requirement

[A] Preparing and Filing Form I-751

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 LPR spouse are required to file Form I-751. All petitioners filing a Form I-751 must file with the CSC or VSC, depending on the state in which they reside.

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;
- (2) 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 individual was admitted as a conditional resident.¹⁹⁵

192. 8 C.F.R. § 216.1.

193. INA § 216(e), 8 U.S.C. § 1186(e). See discussion of naturalization, *infra*.

194. 8 C.F.R. § 216.1.

195. INA § 216(d)(1)(A), (B), 8 U.S.C. § 1186(d)(1)(A), (B).

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.¹⁹⁶

The couple must file the joint petition within three months prior to the second anniversary of the person's admission to this country as a conditional resident.¹⁹⁷ 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.¹⁹⁸ 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 individual's control, and further provided that the individual has not yet been formally placed in removal proceedings.¹⁹⁹

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 expires. If a late filing is accepted by USCIS or the immigration judge and the individual's status is restored to lawful status, he or she 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 person's status as a conditional resident expired.²⁰⁰

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

196. 8 C.F.R. § 216.4(a)(2).

197. Under legislation enacted in 2011, the ninety-day period for filing the I-751 petition is tolled while the conditional resident or the spouse is serving abroad in active-duty status in the U.S. Armed Forces. *See* Pub. L. No. 112-58, 125 Stat. 747 (2011). In these cases, the I-751 petition may be filed at any time during active-duty service after the commencement of the ninety-day petition period.

198. 8 C.F.R. § 216.4(a)(6).

199. *Id.*

200. The three-/ten-year bar is discussed in detail in chapter 7, *infra*.

property, such as a deed or mortgage; a lease showing that the conditional resident 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.²⁰¹

[B] Processing of Joint Petition

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.²⁰² Upon approval of the petition, the individual will be notified in writing and will be required to surrender his or her old permanent resident card and obtain a new one indicating that he or she is now an LPR. 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.²⁰³ If it deems necessary, the local office will schedule the couple for an interview to determine the bona fides of the marriage. USCIS is required to schedule an interview with both spouses at the USCIS office nearest to the parties within ninety days of receipt of Form I-751 (unless USCIS waives the interview).²⁰⁴ Failure to appear at the interview will result in automatic termination of the person's permanent residence and subject the individual to removal.²⁰⁵ 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 USCIS 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 individual will be ordered to surrender his or her permanent resident card and his or her status as an LPR will be terminated, and he or she placed into removal proceedings. The individual may not directly appeal an adverse USCIS

201. 8 C.F.R. § 216.4(a)(5).

202. *Id.* § 216.4(b)(1).

203. *Id.*

204. Legislation enacted in 2011 allows the ninety-day interview period to toll while the conditional resident or the spouse is serving abroad in active-duty status in the U.S. Armed Forces. *See* Pub. L. No. 112-58, 125 Stat. 747.

205. 8 C.F.R. § 216.4(b)(3).

decision; he or she may only seek review of the decision in removal proceedings.²⁰⁶

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 individual will be unable to comply with the joint petition filing requirements. For example, the resident 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.²⁰⁷ In such cases, a conditional resident wishing to remain permanently in the United States must file an application

206. *Id.* § 216.4(c).

207. *Id.* § 216.4(a).

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.²⁰⁸

USCIS may, in its discretion, waive the joint petition requirement if the resident can establish one of the following:

- (1) removal would result in extreme hardship;
- (2) he or she 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) he or she entered into the marriage in good faith but, during the marriage the conditional resident, or his or her child, was battered by or subjected to extreme cruelty committed by the citizen or LPR spouse or parent.

[A] Extreme Hardship

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.²⁰⁹ In addition, only factors that arise subsequent to the conditional resident's entry are relevant in a waiver claim based on extreme hardship.

[B] Good-Faith Marriage Terminated

With regard to the second basis for a waiver, the conditional resident 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.²¹⁰

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.

208. Travel and work authorization during the pendency of the waiver request is discussed in section 3:5.2, *supra*.

209. 8 C.F.R. § 216.5(e).

210. *Id.* § 216.5(e)(2).

The conditional resident 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 conditional resident show that he or she was not at fault for termination of the marriage. A conditional resident 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 conditional resident for good cause. That showing usually meant that the conditional resident 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.

In the case of the death of the petitioning spouse, the conditional resident only needs to submit a copy of the death certification with the waiver application. The resident 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.

[C] Battered Spouses, Children

Under the third ground for a waiver, the conditional resident 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 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.²¹¹ To evidence physical abuse, the conditional resident must submit affidavits or reports issued by police, judges, medical personnel, school officials, and representatives of social service agencies.²¹² To evidence extreme mental cruelty, the conditional resident must submit an evaluation by a professional recognized by USCIS as an expert in the field.²¹³ Legislation enacted in March 2013 expanded this waiver.²¹⁴ Specifically, the law extends the waiver where the abuse occurred at the hands of a U.S. citizen or LPR spouse, but the underlying marriage was invalid because the U.S. citizen or LPR committed bigamy without the noncitizen victim spouse’s knowledge.

211. *Id.* § 216.5(e)(3)(i).

212. *Id.* § 216.5(e)(3)(iii).

213. *Id.* § 216.5(e)(3)(iv).

214. *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54.

§ 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, multiple petitions, or have filed untimely petitions; and
- (3) where the death of the spouse occurs while the I-751 petition is pending.

[A] Legal Separation; Pending Divorce; Annulment

Guidance on the procedures for adjudicating I-751 petitions before termination of the marriage was issued in July 2009.²¹⁵ USCIS 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

215. See USCIS Memo. from Donald Neufeld, Acting Assoc. Dir., I-751 Filed Prior to Termination of Marriage (Apr. 3, 2009), www.uscis.gov/files/native/documents/i-751_Filed_%20Prior_Termination_3apr09.pdf.

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.

[B] Removal Proceedings

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, or have filed multiple petitions.²¹⁶ 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 in which the conditional resident has a final order of removal, is in proceedings, or has filed multiple petitions. The October 2009 guidance also discussed adjudication of late-filed joint petitions, but that guidance was superseded by guidance issued in January 2013, discussed below.

Under the guidance, a conditional resident with a final removal order has been stripped of his or her conditional 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.

[C] Multiple Filings

With regard to multiple filings, the memorandum explains that there are no regulatory limitations on how many times a conditional

216. See USCIS Memo. 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).

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.

[D] Untimely Filings

In January 2013, USCIS released guidance related to the late filing of a joint Form I-751.²¹⁷ The memorandum provides that if a late-filed Form I-751 does not contain an explanation of good cause for the untimely filing, USCIS officers must issue an RFE requesting an explanation and corroborating evidence. The new memo replaces October 2009 guidance, which authorized USCIS officers to deny without an RFE any late-filed joint I-751 that did not include an explanation for the untimely filing. The current guidance instructs immigration services officers adjudicating a late jointly filed I-751 to check for a written explanation of the late filing and, if one was submitted, to review it in relation to how late it was filed and in conjunction with any corroborating evidence to determine if the conditional permanent resident established good cause for the late filing. If the conditional resident did not include a written explanation for the late filing, the ISO is instructed to issue an RFE. If a response is received to the RFE, the ISO will evaluate the explanation and corroborating evidence to determine if good cause is established for the late filing. Corroborating evidence is not required if the explanation is acceptable on its face. If the response is not conclusive, the adjudicator has the option to forward the petition to a field office for an interview. If no response is received to the RFE, the ISO will deny the I-751.

[E] Death of Spouse

In a 2010 decision, the BIA clarified the need for a waiver request when the petitioner spouse dies during the conditional residence period.²¹⁸ 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 a 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 conditional residents 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.

217. See USCIS Interim Policy Memo. PM-602-0078, Revised Guidance Concerning Adjudication of Certain I-751 Petitions (Dec. 23, 2012).

218. See *In re Rose*, 25 I. & N. Dec. 181 (BIA Jan. 25, 2010).