

Practical Strategies for Immigration Relief: Family-Based Immigration and Executive Actions



CATHOLIC LEGAL
IMMIGRATION
NETWORK, INC.

NCLR
NATIONAL COUNCIL OF LA RAZA

1st Edition

By Immigrant Legal Resource Center, Catholic Legal Immigration Network, Inc.,
and National Council of La Raza

Practical Strategies for Immigration Relief: Family-Based Immigration and Executive Actions

1st Edition

By Immigrant Legal Resource Center, Catholic Legal Immigration Network, Inc.,
and National Council of La Raza

The Immigrant Legal Resource Center



Copyright 2017
Immigrant Legal Resource Center
1663 Mission Street, Suite 602
San Francisco, CA 94103
(415) 255-9499
www.ilrc.org

The Immigrant Legal Resource Center (ILRC) is a national, nonprofit resource center that provides legal trainings, educational materials, and advocacy to advance immigrant rights.

Since 1979, the mission of the ILRC is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people.



WHAT WE DO

Legal Professionals & Advocates

- **Trainings:** Throughout the year, the ILRC staff attorneys provide classroom seminars and webinars on a wide range of topics that affect the immigrant community.
- **Publications:** ILRC publishes some of the top reference manuals on immigration law.
- **Technical Assistance:** Our unique, nation-wide consultation service called the Attorney of the Day (AOD) provides legal assistance to attorneys, staff of nonprofit organizations, public defenders, and others assisting immigrants.

Immigrants

- **Community Advocacy:** ILRC assists immigrant groups in understanding immigration law and the democratic process in the United States, so as to enable them to advocate for better policies in immigration law, as well as in health care, community safety, and other issues that affect the immigrant community.
- **Leadership Training:** ILRC trains immigrant leaders how to be more effective advocates for their communities.
- **Know Your Rights Presentations:** ILRC attorneys regularly conduct “know your rights” trainings with immigrant-based organizations to inform immigrants about their rights under the immigration laws and the United States Constitution, how to protect themselves from becoming victims of immigration fraud, changes in immigration law and policy, and a host of other issues that affect the lives of immigrants.

Laws, Policies & Practice

- **Monitoring Changes in Immigration Law:** ILRC attorneys are experts in the field of immigration law, and keep abreast of the frequent changes in immigration case law and policy so that we can inform our constituents of those changes as soon as they occur.
- **Policies:** ILRC conducts ongoing dialogues between Immigration Service officials and the community agency representatives to help ensure that government policies and procedures are more reasonable and fair, and to make sure that information about these policies is provided to the immigrant advocacy community in a timely manner.
- **Advocacy:** ILRC advocates for reasonable changes in immigration law to get closer to our ideal of a system that will recognize the contributions immigrants make to our society, respect their dignity, and insure a workable, secure, and humane immigration system.

How to Contact Us

- General inquiries: ilrc@ilrc.org
- Publications: publications@ilrc.org
- Seminars: seminars@ilrc.org
- Attorney of the Day (AOD): contracts@ilrc.org
- Website: www.ilrc.org

How to Support Our Work

Please visit our website www.ilrc.org to make a tax-deductible contribution.

PREFACE AND ACKNOWLEDGMENTS

Given the continued dysfunction of our immigration system, the immigrants' rights community has become increasingly creative and strategic in finding ways to allow family members to reunite or remain together in the United States. Former President Obama's executive actions emerged as a powerful tool in this fight to keep families together. These executive actions provided new ways for immigrants to become eligible for temporary protection as well as expanded eligibility for family-based immigration. This manual discusses the law, policy, and practice regarding the parts of former President Obama's executive action that have been implemented as of the time of this writing.

Many programs mentioned in this manual, such as parole, DACA, and the enforcement priorities, are in flux, particularly after the 2016 election. At the time this manual went to press, President Trump had begun issuing executive orders of his own on immigration, with potentially more to follow. We therefore invite you to visit the Immigrant Legal Resource Center's website at www.ilrc.org for updates and to join our education listserv by subscribing at www.ilrc.org/subscribe to receive email messages about updates to this manual as well as in-person and webinar trainings opportunities related to immigration executive actions.

We wish to thank the National Council of La Raza (NCLR), and specifically Charles Kamasaki and Laura Vazquez, for their leadership on these issues, their guidance during the writing of this manual, and their input on the content. We are also grateful for the partnership and contributions of Catholic Legal Immigration Network, Inc. (CLINIC). In particular, we would like to thank Charles Wheeler, Michelle Mendez, and Susan Schreiber. This manual would not have been possible without the support and contributions of NCLR and CLINIC.

Thank you also to our wonderful colleagues at the ILRC who helped to create this new manual. We are grateful to Eric Cohen, Allison Davenport, Lena Graber, Nikki Marquez, Erin Quinn, Sally Kinoshita, and former ILRC attorney Aidin Castillo, who wrote, edited, and updated chapters of this manual, often more than once to keep up with the evolving law in this area. Thank you to our Publication and Program Coordinator Timothy Sheehan who so patiently made sure all of the details were in place to create this manual.

Alison Kamhi
Staff Attorney
Immigrant Legal Resource Center
January 19, 2017

**PRACTICAL STRATEGIES FOR IMMIGRATION RELIEF: FAMILY-BASED
IMMIGRATION AND EXECUTIVE ACTIONS
1ST EDITION**

TABLE OF CONTENTS

Chapter 1	Introduction	
§ 1.1	Introduction	1-1
§ 1.2	Overview	1-1
§ 1.3	About This Manual.....	1-4
Chapter 2	Family Visas: Qualifying Family Relationships, Eligibility for Visas, and Application Process	
§ 2.1	Overview of the Family Immigration Process: A Two-Step Process.....	2-1
§ 2.2	The Immediate Relative Category and the Definition of “Child” and “Spouse”	2-5
§ 2.3	K Visa.....	2-10
§ 2.4	Petitions under the Preference System: Definition of Siblings and Sons and Daughters.....	2-13
§ 2.5	The Preference Categories.....	2-14
§ 2.6	Derivative Beneficiaries	2-18
§ 2.7	The Preference System.....	2-20
§ 2.8	Using the State Department Visa Bulletin to Make an Estimate of When Your Client Can Immigrate	2-21
§ 2.9	Advising Your Client about When a Visa May Become Available	2-27
§ 2.10	Child Status Protection Act (CSPA)	2-28
§ 2.11	Completing Government Forms	2-35
§ 2.12	Completing the Visa Petition, Form I-130	2-36
§ 2.13	The G-325A and Photograph: Required in a Petition for a Husband or Wife.....	2-42
§ 2.14	Documenting the Visa Petition.....	2-43
§ 2.15	Documents to Prove Family Relationship?	2-43
§ 2.16	Making Proper Copies of Documents	2-46
§ 2.17	Making Certified Translations of Documents	2-47
§ 2.18	Documenting the Immigration Status of the Petitioner.....	2-48
§ 2.19	Filing the I-130 Packet	2-49
§ 2.20	When Is a Visa Petition Terminated or No Longer Valid?	2-49
Appendix 2-A	Answers to Exercises	
Appendix 2-B	Sample Forms I-130 and G-325A	
Appendix 2-C	Sample I-94s	
Appendix 2-D	Step-by-Step Guide to Completing FOIA Requests	

Chapter 3 Family Visas: Adjustment of Status and Conditional Residence

§ 3.1	What Is Adjustment of Status?.....	3-2
§ 3.2	Understanding 245(a) and 245(i) Adjustment.....	3-2
§ 3.3	INA § 245(a): Adjustment of Status for Persons Who Entered the United States after Being Inspected and Admitted, or Paroled.....	3-3
§ 3.4	INA § 245(i): Adjustment of Status for Persons Who Did <i>Not</i> Enter the United States with Inspection or Face INA § 245(c) Bars.....	3-4
§ 3.5	Adjustment and Admissibility.....	3-9
§ 3.6	Should Your Client Adjust or Consular Process?.....	3-17
§ 3.7	What Forms and Documents Are Needed to Apply for Adjustment of Status?.....	3-18
§ 3.8	The Application for Adjustment, Form I-485.....	3-20
§ 3.9	Form G-325A, Fingerprints, Photos, and Medical Exam.....	3-21
§ 3.10	Submitting the Adjustment Application.....	3-22
§ 3.11	The Effect of Leaving the Country.....	3-23
§ 3.12	The Adjustment Interview.....	3-23
§ 3.13	The Decision: Approvals and Denials.....	3-26
§ 3.14	Conditional Residence.....	3-28
§ 3.15	Removal of the Condition on Residency if the Marriage Still Exists after Two Years: The I-751 “Joint Petition”.....	3-30
§ 3.16	When to File the I-751 Joint Petition.....	3-30
§ 3.17	Completing the I-751 Joint Petition.....	3-32
§ 3.18	Application Procedure: Filing, Interview, Standard for Approval, Denials.....	3-32
§ 3.19	Termination of Conditional Residency by USCIS during the “Testing Period”.....	3-35
§ 3.20	Waivers of the I-751 Joint Filing Requirement.....	3-36
§ 3.21	When to File.....	3-37
§ 3.22	How to File a Waiver.....	3-37
§ 3.23	The “Good Faith” Waiver.....	3-38
§ 3.24	The Extreme Hardship Waiver.....	3-39
§ 3.25	The Battery or Extreme Cruelty Waiver.....	3-39
§ 3.26	Filing a Waiver if the U.S. Citizen or Permanent Resident Spouse Has Died.....	3-40
§ 3.27	Dependent Sons and Daughters.....	3-40
§ 3.28	Special Situations Involving Conditional Residency and Waivers.....	3-41

Chapter 4 Consular Processing

§ 4.1	The NVC, the U.S. Consulates and the Department of State.....	4-2
§ 4.2	How DHS and the State Department Divide Responsibility in Visa Cases.....	4-2
§ 4.3	Initial Consular Processing at the NVC.....	4-3
§ 4.4	Obtaining Documents According to NVC Instructions and the FAM.....	4-8

§ 4.5	Getting Ready for the Interview	4-10
§ 4.6	What Will Happen at the Interview?	4-12
§ 4.7	What Happens after the Immigrant Visa Is Granted	4-15
§ 4.8	What to Do if Your Alien Registration Card Fails to Arrive	4-16
§ 4.9	Waivers of Grounds of Inadmissibility	4-16

Appendix 4-A	NVC Cover Letter and Invoices
Appendix 4-B	NVC Document Cover Sheet and Payment Receipt Notices
Appendix 4-C	Answers to Exercises

Chapter 5 Unlawful Presence Waivers

§ 5.1	Overview of Unlawful Presence.....	5-1
§ 5.2	Unlawful Presence and Exceptions	5-2
§ 5.3	Triggering the Unlawful Presence Ground of Inadmissibility	5-4
§ 5.4	When an I-601 Waiver Is Required.....	5-7
§ 5.5	Eligibility Requirements for an I-601A Provisional Waiver.....	5-8
§ 5.6	Approved Visa Petition Requirement.....	5-9
§ 5.7	Qualifying Relatives.....	5-12
§ 5.8	Extreme Hardship.....	5-12
§ 5.9	Provisional Waiver and Other Grounds of Inadmissibility	5-13
§ 5.10	Prior Removals and Proceedings.....	5-13
§ 5.11	Approvals and Denials	5-15
§ 5.12	How to Apply for an I-601A Waiver	5-15
§ 5.13	What Is Extreme Hardship	5-15

Chapter 6 Parole-in-Place

§ 6.1	What Is Parole?	6-1
§ 6.2	Overview of Parole-in-Place	6-2
§ 6.3	Eligibility Requirements for Parole-in-Place	6-4
§ 6.4	The Benefits of Parole-in-Place	6-5
§ 6.5	Impact on DACA-Eligible Persons	6-7
§ 6.6	How to Apply for Parole-in-Place.....	6-8

Appendix 6-A	USCIS, ICE, CBP, <i>Memorandum of Agreement Between USCIS, ICE, and CBP</i> (Sep. 29, 2008)
Appendix 6-B	USCIS, <i>Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces, the Selected Reserve of the Ready Reserve, and Former Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve</i> , (Nov. 15, 2013)
Appendix 6-C	DHS, <i>Families of U.S. Armed Forces Members and Enlistees</i> , (Nov. 20, 2014)

Appendix 6-D USCIS, *Discretionary Options for Designated Spouses, Parents, and Sons and Daughters of Certain Military Personnel, Veterans, and Enlistees* (Nov. 23, 2016)

Chapter 7 Summary of DACA Eligibility Requirements

§ 7.1 Introduction 7-1
§ 7.2 What Is Deferred Action for Childhood Arrivals (DACA)? 7-1
§ 7.3 Who Qualifies for DACA? 7-5
§ 7.4 Ineligibility Due to Criminal Conduct or Being a Threat to National Security or Public Safety 7-6

Chapter 8 Advance Parole and Travel

§ 8.1 What Is Advance Parole? 8-1
§ 8.2 Requesting Advance Parole as a DACA Recipient 8-2
§ 8.3 Risks of Traveling Abroad for DACA Recipients 8-4
§ 8.4 Advance Parole and Adjustment of Status 8-8

Chapter 9 Screening for Other Immigration Relief

§ 9.1 Introduction 9-1
§ 9.2 Self-Petitioning Visas for Battered or Abused Family Members of U.S. Citizens or Lawful Permanent Residents 9-2
§ 9.3 The U Visa 9-6
§ 9.4 The T Visa 9-9
§ 9.5 Asylum and Restriction on Removal 9-12
§ 9.6 Special Immigrant Juvenile Status 9-13
§ 9.7 Cancellation of Removal for Non-Permanent Residents 9-13
§ 9.8 NACARA 9-15
§ 9.9 Cancellation of Removal for Certain Permanent Residents 9-16
§ 9.10 Temporary Protected Status (TPS) 9-17
§ 9.11 Diversity Visas 9-18
§ 9.12 Prosecutorial Discretion and Deferred Action 9-18
§ 9.13 Motions to Suppress and Challenging Removability 9-21
§ 9.14 Voluntary Departure 9-22
§ 9.15 Private Bills Passed by Congress 9-25
§ 9.16 Other Immigration Remedies 9-26

Appendix 9-A Client Intake Form and Notes

Chapter 10 Immigration Enforcement Priorities

§ 10.1 Executive Action on Enforcement 10-1
§ 10.2 DHS Enforcement Priorities 10-1

CHAPTER 1

INTRODUCTION

This chapter includes:

§ 1.1	Introduction	1-1
§ 1.2	Overview	1-1
§ 1.3	About This Manual.....	1-4

§ 1.1 Introduction

In light of the continued failure of the U.S. Congress to pass meaningful immigration reform and the continued dysfunction of our immigration system, former President Obama announced a series of immigration policy changes through executive action during his presidency. The use of executive action to implement immigration policy is by no means new. Every President since Eisenhower issued an executive action on immigration in some capacity.¹ Nevertheless, the breadth and impact of the changes President Obama sought to implement were unprecedented. As of January 2017, some of the changes outlined by the 2014 executive action have been implemented; others have been blocked indefinitely. Even the policies that have been enacted may be vulnerable to change. Those that were enacted by executive action only can be changed or canceled by the new administration; those implemented by regulation could be changed, but only under the processes outlined by the Administrative Procedures Act. All immigration law evolves; the law covered in this manual only more so.

This manual seeks to explain the parts of former President Obama’s executive action that have been implemented as of the time of this writing. These new changes, even if short-lived, can help many. They can provide individuals with much-needed immigration relief, and also provide a blueprint for future immigration policy and legislation.

§ 1.2 Overview

On November 20, 2014, former President Obama announced a series of changes that his administration would undertake to modify immigration policy. The Department of Homeland Security (DHS) issued twelve memoranda to make changes to immigration enforcement priorities, Secure Communities, Deferred Action for Childhood Arrivals, deferred action, provisional waivers, advance parole, parole-in-place, and more. In general, the reforms fall into three categories: (i) changes to immigration enforcement policy; (ii) deferred action expansion; and (iii) changes to our legal immigration system.

¹ Charles Kamasaki, “Critics Say Executive Action on Immigration Would Be Unprecedented. They Forget their History,” *The Atlantic* (Oct. 1, 2014), available at www.theatlantic.com/politics/archive/2014/10/critics-say-executive-action-on-immigration-would-be-unprecedented-they-forget-their-history/431352/.

Changes to Immigration Enforcement Policy. DHS restructured its immigration enforcement priorities, directing all of its agencies (including Immigration and Customs Enforcement, Citizenship and Immigration Services, and Customs and Border Protection) to focus attention on national security threats, immigrants with certain criminal convictions, and recent unlawful entrants.² DHS replaced the controversial Secure Communities program with the new Prioritized Enforcement Program.³ This new program facilitates cooperation among federal, state, and local law enforcement with the stated goal to focus on convicted criminals. Additionally, DHS further strengthened its approach to border security, adding personnel at the southern border and developing three new inter-agency task forces to coordinate their efforts.⁴

Deferred Action Expansion. Recognizing the need to address the millions of unauthorized immigrants who currently live in the United States without access to lawful status, the President authorized DHS to expand its use of deferred action. This expansion sought to take two forms, the expansion of the current Deferred Action for Childhood Arrivals (DACA) program, and the creation of a new deferred action program, Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). In broad strokes, the expanded DACA program was for people who came to the United States before age 16, lived here since January 1, 2010, and met certain educational and criminal background requirements.⁵ DAPA was for people who as of November 20, 2014 had U.S. citizen or lawful permanent resident (green-card holders) children, lived in the United States since January 1, 2010, and were not enforcement priorities.⁶

Unfortunately, both of these programs were blocked by federal litigation,⁷ and at the time of this manual's writing, remain indefinitely suspended. Although these were the two biggest, and boldest, parts of the 2014 Executive Action, they were by no means the only parts. This manual focuses on the other parts of the executive action that did take effect, and the ways in which they impact immigrants in the United States. In addition, the original DACA program as enacted in 2012 remains, at least for now; this manual also covers existing DACA and advance parole options for DACA recipients.

Deferred action under any program does not confer legal status, nor a path to permanent residency. As such, it was never intended to be a permanent solution for the millions of unauthorized immigrants living in limbo in the United States. It may also cease to exist under a new presidential administration; the executive branch may modify or terminate the DACA

² DHS, *Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants*, (Nov. 20, 2014), available at

www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

³ DHS, *Secure Communities*, (Nov. 20, 2014), available at www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf.

⁴ DHS, *Southern Border and Approaches Campaign*, (Nov. 20, 2014), available at www.dhs.gov/sites/default/files/publications/14_1120_memo_southern_border_campaign_plan.pdf.

⁵ DHS, *Exercising Prosecutorial Discretion with Respect to Certain Individuals who Came to the United States as Children and with Respect to Certain Individuals who are Parents of U.S. Citizens or Permanent Residents*, (Nov. 20, 2014), available at www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.

⁶ *Id.*

⁷ *United States v. Texas*, 579 U.S. ____; 136 S.Ct. 2271 (2016).

program at any time. Because of this, advocates should keep up-to-date on the current deferred action policies and practices, and always ensure that they are screening their clients for more permanent forms of relief as well.

Changes to Our Legal Immigration System. The President’s executive action on immigration reform also made numerous changes to existing processes within the legal immigration system. These changes include a directive to expand the eligibility for provisional waivers, parole-in-place, and advance parole; calls to modernize and streamline the visa processing system, such as proposed changes to employment-based visas; and efforts to encourage and increase access to naturalization. The expansions of provisional waivers and parole opportunities warrant particular attention given the ways they could reduce some of the obstacles unauthorized immigrants face in obtaining lawful status.

Under current law, certain unauthorized family members living in the United States who are eligible for a family-based immigrant visa must leave to be interviewed and processed at U.S. consulates in their home countries. A provisional waiver provides certain family members in the United States the ability to apply to waive their unlawful presence in the United States before they leave to consular process. The opportunity to apply for the waiver from within the United States reduces the amount of time that the family members have to spend outside of the country and decreases the risk they will be unable to return. U.S. Citizenship and Immigration Services (USCIS) expanded the family members eligible for the provisional waiver process, previously limited to spouses and children of U.S. citizens, to include spouses and minor children of LPRs and adult children of U.S. citizens and LPRs. USCIS also issued guidance on how it interprets the hardship waiver criteria.⁸

A grant of parole-in-place can allow an unauthorized immigrant to adjust status to permanent residency, and thus avoid the need to depart the country to consular process, if the person is otherwise eligible. Parole-in-place is a highly discretionary opportunity used to benefit family members of current and previous U.S. military members. The executive action directs DHS to consider expanding eligibility for parole-in-place to family members of people *seeking to enlist* in the U.S. military as well, and to explore granting deferred action to family members of U.S. military members who have overstayed their visas.⁹

Advance parole is a discretionary grant of permission for someone living in the United States in temporary status to travel abroad without losing her temporary status. The Board of Immigration Appeals (BIA) has held that an adjustment applicant who leaves the United States pursuant to advance parole has not made a “departure” for purposes of triggering certain unlawful presence inadmissibility grounds that ordinarily apply when someone departs after living here unlawfully.¹⁰ DHS asked its general counsel to provide legal guidance clarifying that anyone leaving the country on advance parole will not trigger these unlawful presence bars. DHS directed

⁸ DHS, *Expansion of the Provisional Waiver Program*, (Nov. 20, 2014), available at www.dhs.gov/sites/default/files/publications/14_1120_memo_i601a_waiver.pdf.

⁹ DHS, *Families of U.S. Armed Forces Members and Enlistees*, (Nov. 20, 2014), available at www.dhs.gov/sites/default/files/publications/14_1120_memo_parole_in_place.pdf.

¹⁰ *Matter of Arrabally, Yerabelly*, 25 I&N Dec. 771 (BIA 2012).

*Immigrant Legal Resource Center
December 2016*

its agencies to apply this policy (once issued) to all noncitizens, not just adjustment applicants, who leave pursuant to advance parole.¹¹

§ 1.3 About This Manual

This manual is intended as a practical guide to understand the implemented parts of the 2014 executive action. This manual is designed for attorneys, advocates, paralegals and other staff at nonprofit organizations, government agencies, and other organizations who serve immigrant communities. The manual is divided into ten chapters and three parts, as follows:

Part 1: Strategies for Family-Based Immigration Using the 2014 Immigration Executive Action

Chapters 2 through 6 discuss the effects of the 2014 executive action to expand eligibility for family-based immigration. Family-based immigration is the most common way for people to gain immigration status in the United States, and the changes implemented by executive action expand this eligibility further. **Chapter 2** provides an overview of family-based immigration, including explanations of the preference system, the Child Status Protection Act, the visa petitioning process, how to fill out the necessary forms and obtain the required documentation, and the reasons for visa revocation. **Chapter 3** discusses the adjustment of status process, including who is eligible, how to submit the application, what will happen at the adjustment interview, and a thorough discussion of conditional residence. **Chapter 4** covers consular processing, including an overview of the process, how to obtain documents, and what to expect at the interview. These three chapters lay the groundwork to understand how the expansions to the waiver and parole process afforded by the 2014 executive action impact the immigrant community.

In **Chapter 5**, this manual explains the provisional waiver and the expansion of the waiver, as directed by the 2014 executive action, and later as implemented by regulation. This chapter discusses the new regulations, the requirements for the waiver, and how to apply.

Chapter 6 provides an analysis of parole-in-place, the benefits of obtaining parole for adjustment-eligible immigrants, eligibility requirements, and how to apply.

Part Two: Existing DACA

The second part of the manual focuses on the 2012 executive action creating DACA. **Chapter 7** covers DACA and the DACA eligibility requirements. **Chapter 8** discusses advance parole, focusing on its use for DACA applicants and recipients and explaining both the benefits and risks.

Part Three: Screening for Other Immigration Relief

This part of the manual provides information on screening immigrant clients for more permanent forms of relief, as well as screening them for the risk of enforcement. **Chapter 9** provides an overview of other potential ways in which immigrant clients may be able to obtain lawful status

¹¹ DHS, *Directive to Provide Consistency Regarding Advance Parole*, (Nov. 20, 2014), www.dhs.gov/sites/default/files/publications/14_1120_memo_arrabally.pdf.

including through U nonimmigrant status, the Violence Against Women Act, asylum, T nonimmigrant status, Temporary Protected Status, cancellation of removal, Special Immigrant Juvenile Status, the Nicaraguan Adjustment and Central American Relief Act, and others. Finally, **Chapter 10** discusses the 2017 enforcement priorities that were issued as this manual went to press. These priorities provide advocates with information about which clients may currently be at the greatest risk of enforcement.

Many programs mentioned in this manual, such as parole, DACA, and the enforcement priorities, are in flux, particularly after the 2016 election. At the time this manual is being published, President Trump has begun issuing executive orders on immigration policy, with potentially more to follow. We therefore invite you to visit the Immigrant Legal Resource Center's website at www.ilrc.org for updates and to join our education listserv by subscribing at www.ilrc.org/subscribe to receive email messages about updates to this manual as well as in-person and webinar trainings opportunities related to immigration executive actions.

CHAPTER 2

FAMILY VISAS: QUALIFYING FAMILY RELATIONSHIPS, ELIGIBILITY FOR VISAS, AND APPLICATION PROCESS

This chapter includes:

§ 2.1	Overview of the Family Immigration Process: A Two-Step Process.....	2-1
§ 2.2	The Immediate Relative Category and the Definition of “Child” and “Spouse”	2-5
§ 2.3	K Visa.....	2-10
§ 2.4	Petitions under the Preference System: Definition of Siblings and Sons and Daughters.....	2-13
§ 2.5	The Preference Categories.....	2-14
§ 2.6	Derivative Beneficiaries	2-18
§ 2.7	The Preference System.....	2-20
§ 2.8	Using the State Department Visa Bulletin to Make an Estimate of When Your Client Can Immigrate	2-21
§ 2.9	Advising Your Client about When a Visa May Become Available	2-27
§ 2.10	Child Status Protection Act (CSPA)	2-28
§ 2.11	Completing Government Forms	2-35
§ 2.12	Completing the Visa Petition, Form I-130	2-36
§ 2.13	The G-325A and Photograph: Required in a Petition for a Husband or Wife.....	2-42
§ 2.14	Documenting the Visa Petition.....	2-43
§ 2.15	Documents to Prove Family Relationship?	2-43
§ 2.16	Making Proper Copies of Documents	2-46
§ 2.17	Making Certified Translations of Documents	2-47
§ 2.18	Documenting the Immigration Status of the Petitioner	2-48
§ 2.19	Filing the I-130 Packet	2-49
§ 2.20	When Is a Visa Petition Terminated or No Longer Valid?	2-49

Gina is a lawful permanent resident of the United States. She recently married Juan, a citizen of Mexico. Juan has a 10-year-old daughter named Soledad. Can Gina help Juan and Soledad obtain legal status in the United States?

§ 2.1 Overview of the Family Immigration Process: A Two-Step Process

This chapter will discuss how people can immigrate through family members who are U.S. citizens or lawful permanent residents. U.S. citizens and lawful permanent residents can help certain family members immigrate to the United States. This is a two-step process. The first step

is the family visa petition. The second step is the application to become a permanent resident. Each step involves different legal and factual issues.

A. Step One: The Petition

In order for a person to immigrate to the United States through a U.S. citizen (USC) or lawful permanent resident (LPR) relative, the USC or LPR relative has to prove that their foreign national relative has the required relationship to immigrate to the United States through a family member. In other words, the USC or LPR must *petition* the U.S. government to allow the foreign national to apply for an immigration *benefit*. The USC or LPR relative is called the “**petitioner**” and the foreign national relative is called the “**beneficiary**.”

The form that begins the process of immigration of a family member is filed by the USC or LPR relative and is called the “Petition for Alien Relative,” **Form I-130**, commonly referred to as the “**visa petition**.” Only a U.S citizen or permanent resident can file a family-based immigrant visa petition on behalf of a family member.

Two facts must be established in support of a visa petition:

1. The petitioner and the beneficiary have the **family relationship** required for the petition (for example, parent and child), and
2. The petitioner has the **immigration status** required for the petition—either U.S. citizenship or lawful permanent (or conditional lawful permanent resident status).

If these elements are proven, USCIS must approve the visa petition and step one will be completed.¹

Generally, petitioning relatives prove their relationship with their beneficiary relatives by submitting official documents such as birth and marriage certificates. But some cases may be more complex. A married couple, for example, must show not only that they are legally married but also that the marriage is **bona fide** and not a fraud or sham entered into solely for immigration purposes. Some children may have to submit extra documents to show that they qualify as the **child** of the parent under immigration law. These include stepchildren, adopted children, orphans, and children born out of wedlock. Also, an adopted child cannot petition for his biological birth parents or birth siblings.

PRACTICE TIP: Where the I-130 petition is filed depends on where the petitioner resides and whether the Form I-130 is being filed alone or concurrently with the beneficiary’s Application for Permanent Residence on Form I-485, or “adjustment of status.” (If the beneficiary is an immediate relative; see § 2.2 below). See **Chapter 3** for more information on adjustment of status.

¹ There are two exceptions barring approval of otherwise qualified petitions: (1) past marriage fraud (or attempted marriage fraud) engaged in by the beneficiary, see INA § 204(c), and (2) a conviction of the petitioner for a certain “specified offense against a minor,” see INA § 204 (a)(1)(A)(viii), known as the “Adam Walsh Act” provision.

You must check the most recent version of the Form I-130 instructions on the USCIS website (www.uscis.gov/i-130) to determine the exact address for filing, and any other filing instructions.

NOTE: The Adam Walsh Child Protection and Safety Act may prohibit certain petitioners from successfully filing visa petitions for any family member if the petitioner was convicted of a “specified offense against a minor,” unless USCIS determines that the petitioner poses no risk to the beneficiary. The “minor” must have been under 18, and the convictions specified, broadly defined, involve primarily sexual or related offenses.²

When the visa petition on Form I-130 is filed, the beneficiary is categorized according to the relationship that qualifies him or her for an immigrant visa. For example, relatives who fit the definition of a “child” or “spouse” of a lawful permanent resident fall under the category referred to as “second preference” or “2A,” and sons and daughters of U.S. citizens (children over 21) are classified as “first preference” or category “1.” These categories are discussed in more detail in the sections that follow, but generally speaking, they each represent a queue or waiting list of foreign nationals on behalf of whom their U.S. citizen or lawful permanent resident relatives have filed visa petitions. The reason for these waiting lists is that the number of people who can immigrate each year is limited by the law. Therefore, after the visa petition is approved, some foreign national relatives are placed on the waiting list until an immigrant visa becomes available.

B. Step Two: Application to Immigrate

Once the relative’s petition moves to the front of the waiting list, he or she can proceed to step two and apply to immigrate. The end goal is referred to as becoming a **lawful permanent resident, immigrating**, obtaining an **immigrant visa**, or obtaining a **green card**. These terms are often used interchangeably, and basically mean the same thing: the person becomes a lawful permanent resident of the United States with the right to live and work in the United States.

How soon the beneficiary gets to the front of the waiting list and can apply to immigrate depends on which waiting list he or she is in. In other words, it depends on which category of relatives eligible for family visas he or she belongs to. For example, spouses, parents and unmarried children of U.S. citizens are considered “**immediate relatives**” and they do not have to wait in line at all. They can immigrate relatively quickly.³ If such a beneficiary is physically present in the United States and eligible for adjustment of status, he or she can apply for permanent resident status at the same time as the visa petition is filed or as soon as the visa petition is approved. This is because immediate relatives always have immigrant visas available to them—the law does not set a quota on how many immediate relatives may come each year.

However, because other relatives of U.S. citizens and lawful permanent residents have a limited number of visas available to them through a yearly “**quota**,” they must wait for visa number

² See Aytes, *Guidance for Adjudication of Family-Based Petitions and I-129F Petition for Alien Fiancé(e) Under the Adam Walsh Child Protection and Safety Act of 2006*, (Feb. 8, 2007), available at www.uscis.gov/files/pressrelease/AdamWalshAct020807.pdf.

³ See § 2.2 of this chapter.

availability, which can often take several years. These relatives are organized into groups referred to as “**preference categories**” and they are categorized according to the relationship that qualifies them for an immigrant visa. Under this “**preference system**,” these beneficiaries may have to wait many years after the visa petition is approved before they can actually immigrate.⁴ See § 2.4.

When applying to immigrate, the applicant must prove that she is **admissible** as an immigrant. An applicant is admissible if she does not fall within a **ground of inadmissibility**. But an applicant who is inadmissible can still sometimes immigrate if USCIS agrees to **waive** (forgive) the ground of inadmissibility. Otherwise, the inadmissible applicant cannot immigrate.

Thus, three facts must be established at step two:

1. The visa petition is still valid (petitioner-beneficiary relationship still exists, the petitioner still has the required immigration status and the petition has not been terminated by the U.S. Department of State);⁵
2. An immigrant visa is now available for the beneficiary/applicant and she does not have to wait any longer; and
3. The beneficiary/applicant is not inadmissible, or if she falls into a category of inadmissibility, that she or he can obtain a waiver of the inadmissibility ground.

Special rules apply to married couples. Some people who immigrate through their marriage must go through a third step to immigrate. Applicants who have been married for less than two years at the time the immigrant spouse actually becomes a lawful permanent resident, obtain something called **conditional permanent residency**, which is valid for two years. The married couple must file a joint petition to remove that conditional status before the end of the two years to obtain full lawful permanent residence.

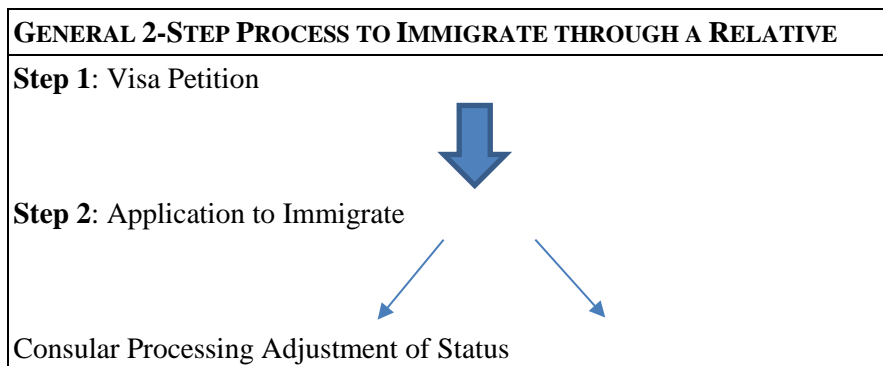
IMMEDIATE RELATIVES	PREFERENCE CATEGORIES
✓ Children	✓ Married & unmarried sons & daughters of USC's
✓ Spouses	✓ Siblings of USC's
✓ Parents of USC's	✓ Spouses, children and unmarried sons & daughters of LPR's

C. Adjustment of Status versus Consular Processing

People can immigrate in one of two ways: by applying for immigrant **visa processing** in another country at a U.S. consulate (also called “consular processing”) or by applying for **adjustment of status** to permanent residency at a USCIS office in the United States. These two different tracks are discussed in detail in the chapters that follow.

⁴ See §§ 2.4–2.10.

⁵ See § 2.20 regarding termination and revocation of visa petitions.



§ 2.2 The Immediate Relative Category and the Definition of “Child” and “Spouse”

A. Who Is an Immediate Relative?

Certain people can immigrate as the **immediate relative** of a U.S. citizen. Immediate relatives can immigrate very quickly. As soon as the visa petition is approved, the person may begin the application to immigrate, because visas are always available for immediate relatives of U.S. citizens. Visa availability never delays immigration for immediate relatives, but the application process itself may take several months, depending on how busy the USCIS or consulate office is. Under § 201(b) of the Act, the following people qualify as immediate relatives:

CATEGORY	BENEFICIARIES COVERED BY THIS CATEGORY
Immediate Relative	Spouse of a USC. “Children” of a USC (“child” as defined in the INA, see below). Parents of USC’s, when USC’s are over 21.

Example: Alfredo is married to a U.S. citizen. Laura has a U.S. citizen son who is 30 years old. Kwan is 12, and his father is a U.S. citizen. Alfredo, Laura and Kwan all qualify as immediate relatives of U.S. citizens.

A separate visa petition must be filed for each immediate relative; and immediate relatives cannot include “derivative beneficiaries” in their visa petitions. For example, if the beneficiary spouse of a U.S. citizen petitioner has a child, the U.S. citizen petitioner must file a separate immediate relative visa petition on behalf of that child, whether the child is the biological, step, or adopted child of the U.S. citizen. This is one reason why it is important to understand the rules about which relative qualifies under which category, such as who is considered a child and who is considered a spouse.

“One-Step” Adjustment Applications: Immediate relatives who qualify for adjustment under INA § 245(a) or INA § 245(i) can often submit the I-130 at the same time as the adjustment

application, instead of waiting for visa petition approval first. See **Chapter 3** for a discussion of adjustment.

B. Who Is a “Child”?

The term “**child**” has a special legal meaning in immigration law and includes different types of child-parent relationships.⁶ It also differs in some respects than the definition of “child” in other parts of the immigration law.⁷ For purposes of immigrating as a family member of U.S. citizen or permanent resident, to be a child the person must meet two important criteria.

1. The person must be unmarried and under 21 years of age

Example: A daughter who is 21 years old when the petition is filed is not a child under the INA and cannot be petitioned for as an immediate relative. (She may, however, be able to immigrate as a “daughter” through a preference petition. See § 2.4.)

A person who is divorced or widowed at the time the petition is filed is considered unmarried.

Example: A married 19-year-old daughter is not a child. But a 19-year-old divorced daughter is a child under the INA.

However, note that if the USCIS or the immigration court find that the divorce was sought purely for purposes of obtaining an immigration benefit, they may deem the petition and corresponding application fraudulent and may thus deny them.⁸

NOTE: The Child Status Protection Act (CSPA) allows some children of U.S. citizens and permanent residents who turn 21 while a parent’s visa petition is pending to immigrate as if they were still children, even though they are 21 years old or older at the time of adjustment or consular processing. See § 2.10. The National Defense Authorization Act also allows some children to be classified as immediate relatives after turning 21 if they are children of deceased USC or LPR members of the armed forces who died “as a result of an injury or disease incurred in or aggravated by combat.” The child must have been under 21 and unmarried at the time the parent died and self-petition within two years of the parent’s death. See INA § 329A.

2. The person must have a child-parent relationship that USCIS recognizes

Biological children who were born in wedlock are considered “children” of their biological parents most clearly under the immigration laws. But other children, such as stepchildren, adopted children, adopted orphans, and children born out of wedlock, may also qualify if they meet specific additional requirements. The requirements are discussed in detail in the reference books listed at the end of this chapter. Here is an overview of these other categories of “children”:

⁶ See INA §§ 101(a)(39), 101(b)(1).

⁷ An example is that a “step-child” is not a “child” for purposes of acquisition or derivation of citizenship. INA §§ 101(b), § 101(c).

⁸ See *Matter of Aldecoatalora*, 18 I&N Dec. 430 (BIA 1983).

Stepchildren. A stepchild is a child for immigration purposes if the marriage that created the stepparent-stepchild relationship took place before the child became 18 years old. See INA § 101(b)(1)(B).

Example: Gina, a lawful permanent resident, marries Juan. Juan has a 10-year-old daughter, Soledad. Can Gina petition Soledad as her child?

Yes. Since Juan and Gina married before Soledad reached the age of 18, Soledad is Gina's child for immigration purposes. Soledad became Gina's stepchild as of the date of Gina and Juan's marriage.

In cases where the parents are still married, there is no need for the stepparent to establish that he or she has an ongoing relationship with the child. However, where the marriage creating the stepchild relationship has been terminated by death, divorce or legal separation, the Board of Immigration Appeals (BIA) has ruled that the petitioning stepparent must prove that a stepparent-child relationship continues to exist as a matter of fact.⁹

Adopted Children Generally. Certain children adopted while under the age of 16 who have resided with the adoptive parents for two years and who have also been in the legal custody of the adoptive parents for two years may qualify as children under the Act.¹⁰ The two years residing together and two years legal custody requirements do *not* need to be fulfilled at the same time. In addition, the burden is placed on the parent to establish primary parental control during the two-year period of joint residence.¹¹

There are two exceptions to these requirements:

First, if the same adoptive parents adopt a brother or sister of an adopted child, the parents must meet the same requirements for the second child, but adoption may take place while the child was under the age of 18, rather than under 16 years.

Second, the Violence Against Women Act of 2005, removed the two-year custody and residency requirements for abused adopted children. Adopted children, rather, can obtain permanent residency through a self-petition even if they have not been in the legal custody of or 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. See VAWA § 805(d).

Children Adopted Subject to Hague Adoption Convention. On April 1, 2008, The Hague Adoption Convention went into effect. This is an agreement between the United States and many

⁹ See *Matter of Breier*, 8 Immig. Rptr. B1-57 (BIA 1997); *Matter of Mowrer*, 17 I&N Dec. 613 (BIA 1981); *Matter of Mourillon*, 18 I&N Dec. 122 (BIA 1981) (step-siblings).

¹⁰ INA § 101(b)(1)(E), 8 CFR § 204.2(d)(2)(vii).

¹¹ See *Matter of Marquez*, 20 I&N Dec. 160 (BIA 1990). This is particularly important if the adopted child is a relative of the adoptive parents. USCIS will closely examine whether the biological parent has truly given up "parental control" to the adoptive parents, or whether the adoption is a "sham" for immigration purposes.

other countries governing international adoptions. The Hague Convention changed the rules under which U.S. citizens can adopt children from the other countries that are signatories to the Convention.¹² U.S. citizens who wish to adopt a child from one of these countries must be careful to comply with the rules of the Convention or their adoption will not be recognized by USCIS.¹³ A child adopted from a Hague Convention country by a U.S. citizen that is a habitual U.S. resident qualifies for visa status as an immediate relative.¹⁴

If a child is adopted from a non-Hague Convention country, but is adopted abroad, this adoption is classified as an “Orphan Adoption” and different rules apply (see “Adopted Orphans,” below).

NOTE: If your client is adopting a child from a Hague Convention country then the client must make sure that he or she is in compliance with the Hague Convention as well as the adoption laws of the country in which the adopted child resides.

Adopted Orphans. Orphans adopted abroad in a non-Hague Convention country while under the age of 16 by a U.S. citizen may qualify as children under the INA.¹⁵ “Orphan” under the INA has a different meaning from common usage and does not necessarily require that the child’s birth parents be deceased. In order for a child to meet the definition of “orphan,” the adopting parent must obtain a valid home study before adopting and meet many other requirements.¹⁶ If the same adoptive parents adopt a brother or sister of an orphan, the second child must meet the same requirements but can be considered an orphan if the orphan petition is filed while he or she is under the age of 18.

Children Born Out of Wedlock. If a child’s parents are not married at the time of birth, he or she is considered a “child born out of wedlock.”¹⁷ Such a child trying to immigrate through his or her mother should not have a problem. But if the child tries to immigrate through the father, the family must meet certain conditions.¹⁸ They must either prove that the father has “legitimated” the child or established a bona fide relationship with the child before the child reaches the age of 21 by showing “an actual concern for the child’s support, instruction and general welfare.”¹⁹ The family also must prove that the father is the biological father.

Example: Geraldo has a daughter Eliza. He and Eliza’s mother never married. Geraldo lived and worked in the United States for years, but he always sent money to Eliza’s mother for her upbringing in Mexico. He visited her every year when he returned to Mexico, and they sometimes wrote letters to each other. Everyone in the village knows

¹² 22 CFR § 42.24.

¹³ The current list of Hague Convention member countries can be found on the U.S. Department of State’s website at: http://adoption.state.gov/hague_convention/countries.php.

¹⁴ INA § 101(b)(1)(G).

¹⁵ INA § 101(b)(1)(F).

¹⁶ See 8 CFR § 204.3.

¹⁷ See INA §§ 101(b)(1)(A), 101(b)(1)(D), 101(b)(2).

¹⁸ INA § 101(b)(1)(C), (D).

¹⁹ 8 CFR § 204.2(d)(2)(iii); see also *Matter of Pineda*, Int. Dec. 3112 (BIA 1989).

that Geraldo is Eliza’s father. Geraldo’s mother in Mexico is a devoted grandmother to Eliza and often cares for her.

Geraldo has become a permanent resident and wants to petition for Eliza, who is 16. To prove that they have had a bona fide relationship, he will submit copies of money-order receipts, copies of letters, and affidavits of friends, neighbors and others to show the emotional and financial support he provided to Eliza as her father. To prove that he is Eliza’s natural father, Geraldo will submit her birth certificate listing him as father. If no father is listed on the birth certificate, the regulations specify what other “secondary evidence” proof of relationship is acceptable to USCIS, such as baptism certificates, medical and school records or affidavits.²⁰ DNA evidence may also be required.²¹

In other cases, the family may prove that the child has been “legitimated” under the law or that the child should not have been considered illegitimate in the first place, because the laws of the particular country where he or she was born do not distinguish between children born in or out of wedlock.²² Note that while some countries have passed laws to eliminate discrimination against children born out of wedlock, some still require a marriage of the parents for the child to be considered legally “legitimated.”²³ The “legitimation” may occur under the laws of the child’s residence or domicile or that of the father, and the petitioner may choose that which is most favorable.²⁴ If relying on a foreign country’s “legitimation” laws, it is critically important to research the current law of that country or consult with an expert.

PRACTICE TIP: Always ask clients specifically to disclose to you all children they may have inside or outside of marriage. Some people are not aware that children born out of wedlock are also “children” for immigration purposes, or sometimes the existence of these children may be a sensitive issue, and so the parents fail to list them on their immigration petitions and applications. They should be told that if they fail to include any such children on petitions filed with USCIS, it will be more difficult later to claim these children for immigration purposes.

C. Who Is a “Spouse”?

All couples, including same sex and opposite sex, who are legally married and have a bona fide marriage relationship are spouses under the INA. USCIS looks to the law of the place where the marriage took place when determining whether it is valid for immigration law purposes.

Same-Sex Spouses. Same-sex marriage is recognized in the United States, but couples who did not live in a jurisdiction that recognized same-sex marriage (e.g., they lived abroad) need to obtain a lawful marriage in a location that does so.

²⁰ 8 CFR 204.2(d)(2)(v). Note that the regulations have very specific requirements for affidavits used as secondary evidence.

²¹ 8 CFR 204.2(d)(2)(vi).

²² See, e.g., *Matter of Patrick*, Int. Dec. 3076 (BIA 1988).

²³ See *Matter of Hines*, 24 I&N Dec. 544 (BIA 2008).

²⁴ 8 CFR 204.2(d)(2)(ii).

Transgender Spouses. Marriages where one or both partners are transgender are treated the same as other marriage cases, whether same sex or opposite sex. Familiarity with the April 2012 USCIS Policy Memorandum regarding the adjudication of benefits for transgender individuals may be helpful in assisting transgender clients to ensure the appropriate gender identification is reflected on immigration documents. This memorandum clarifies that sex reassignment surgery is not necessary to change the gender marker and acknowledges a broader range of clinical treatments and other steps that can result in a legal change of gender.²⁵

Widows and Widowers. A widow or widower of a U.S. citizen, who was not legally separated from the U.S. citizen at the time of his or her death, will continue to be considered an immediate relative for two years after the U.S. citizen's death, or until the time he or she remarries, whichever comes first.²⁶ Note that the widow or widower will need to file a Form I-360 as a self-petitioner rather than filing Form I-130.²⁷ Persons widowed before October 28, 2009 and who did not have a pending I-130 petition but otherwise met the above stated criteria could file a self-petition via Form I-360; however, such a petition *must have* been filed by October 28, 2011.²⁸

Example: Jacqueline married a U.S. citizen in June of 2014. Her husband died on February 1, 2016. Jacqueline may file a self-petition to immigrate as an immediate relative widow until January 31, 2018, or until she remarries, whichever comes first.

Additionally, under INA § 204(1), as of October 28, 2009, applicants who become widowed after the I-130 had already been filed by the now-deceased U.S. citizen spouse are able to continue with the immigration process as self-petitioners. In these cases where an I-130 has already been filed, it will automatically be converted to an I-360 self-petition without a new filing. See INA § 204(a)(1)(A)(ii).

§ 2.3 K Visa

A. The Fiancé(e) Petition (the K-1 Visa)

The “K-1” petition allows a U.S. citizen (but not a lawful permanent resident) to petition for a fiancé(e) to enter the United States in order to marry the U.S. citizen petitioner. This is not an immediate relative visa petition, it is a “nonimmigrant” visa petition that allows the fiancé(e) to enter the United States for a limited time and purpose: to marry the U.S. citizen within 90 days of arrival. To qualify for this visa, the couple must show that they have met at least once in person within the past two years, that they intend to marry, and that they are legally able to marry. Under certain circumstances, such as an arranged marriage, the government will waive the requirement

²⁵ USCIS Policy Memorandum, *Adjudication of Immigration Benefits for Transgender Individuals* (AFM Update AD2-02),” (Apr. 13, 2012), available at www.uscis.gov/sites/default/files/USCIS/Outreach/Feedback%20Opportunities/Interim%20Guidance%20for%20Comment/Transgender_FINAL.pdf.

²⁶ INA § 201(b)(2)(A)(i).

²⁷ See P.L. 111-83 § 568(c)(2)(B); INA § 204(a)(1)(A)(iii); see also USCIS Policy Memorandum, *Approval of Petitions and Applications after the Death of the Qualifying Relative under New Section 204(1) of the Immigration and Nationality Act*, (Dec. 16, 2010). See § 2.20 below for information regarding beneficiaries who become widows or widowers after the I-130 petition had already been filed.

²⁸ See INA § 201(b)(2)(A)(i).

that the couple actually have met in person within the past two years. If the couple does not get married within 90 days, the fiancé(e) will be required to leave the United States, or she will be removed. The only exception is if the couple gets married after the 90 days and the same petitioner submits a new I-130 petition, the fiancé(e) may then adjust using the I-130 instead of the fiancé petition.

For a U.S. citizen to file a K-1 visa petition for a fiancé(e), Form I-129F must be filed at the Service Center with jurisdiction over the petitioner's residence. If the petitioner and fiancé(e) live outside of the United States, the Form I-129F must be submitted to the Service Center with jurisdiction over the petitioner's last place of residence in the United States.

The K-1 fiancé(e)'s unmarried children under the age of 21 can be included in the petition and enter the United States with the fiancé(e) parent. Children of K-1 fiancé(e)s are designated as "K-2" visa holders. K-2 visa holders can become permanent residents as long as they still qualify for the K-2 visa, meaning that they must be unmarried and under 21 at the time the application is approved.

After the marriage, the alien spouse must apply for adjustment of status to permanent residence, filing the application with USCIS in the United States. The couple does not need to file an I-130, however, as long as the marriage occurred within 90 days of the beneficiary's admission to the United States.²⁹ The government will grant the alien spouse conditional residence status for two years. Before the end of the two years, the couple will have to apply to remove the conditional status so that the alien spouse can remain in the United States.³⁰

PRACTICE TIP: If the K-2 is about to turn 21, you must immediately notify USCIS and ask that the adjustment applications for the K-1 and K-2 be expedited before the K-2 "ages out" or the K-2 will lose the opportunity to adjust status. It is USCIS' position that the Child Status Protection Act (CSPA) does *not* apply to K-2 applicants for adjustment of status who age out before USCIS grants LPR status. Follow up and request assistance from a supervisor at USCIS, if necessary. This is a deadline that must not be missed.

Two other laws affect U.S. citizen petitioners directly. **The International Marriage Broker Regulation (IMBRA)** provides that alien fiancé(e)s and spouses coming to the United States with K visas must be provided information regarding the petitioner's past criminal activity and other K petitions previously filed by the petitioner. When filing the I-129F, petitioners now must provide information regarding certain criminal convictions, which will be shared with the beneficiary prior to the issuance of a K visa. The petitioner for a K-1 fiancé(e) visa must also request a waiver if the petitioner has filed two or more K-1 visa petitions at any time in the past or had a prior K-1 petition approved within the last two years.³¹

The second law is the **Adam Walsh Child Protection and Safety Act**, which prohibits a U.S. citizen petitioner from filing K nonimmigrant visa petitions for fiancé(e)s, spouses or minor

²⁹ See INA §§ 101(a)(15)(K), 214(d); 8 CFR § 214.2(k).

³⁰ See INA § 245(d), INA § 216. See Chapter 3.

³¹ See INA § 212(d)(2)(C).

children if the petitioner was convicted of a “specified offense” against a minor, which is listed in the statute, unless USCIS determines that the petitioner poses no risk to the beneficiary.

B. Petitions for Spouses and Children of U.S. Citizens (the K-3 and K-4 Visas)

As of December 21, 2000, the Legal Immigration and Family Equity Act (LIFE Act) created a new nonimmigrant visa category for the spouses and minor children of legal permanent residents (the V visa), and also expanded the availability of K visas to include spouses and minor children of U.S. citizens residing abroad. The intent of this expansion was to expedite the entry into the United States of these spouses and minor, unmarried children on “non-immigrant” visas and allow them to subsequently apply for adjustment to permanent residency in the United States.

Example: Vijay, who is a U.S. citizen, recently traveled to India to get married. He just returned to the United States to file immigration papers for his new wife. While waiting for an I-130 approval notice, he can file a K-3 visa petition for his new wife who will then be allowed to travel to the United States where they will be able to apply for her green card, instead of waiting for her to go through consular processing in India.

In order to obtain a K-3 visa, the U.S. citizen spouse must have submitted an I-130 Relative Petition and received the Notice of Action (I-797) from the USCIS indicating that the Service has received the petition. The U.S. citizen spouse can then file an I-129F and all supporting documents with the Service Center where the underlying I-130 petition is already pending. Use the address on the most recent receipt or transfer notice.

However, for petitions filed from abroad, contact the U.S. embassy or consulate nearest the petitioner’s residence for current filing instructions.

In addition, the K-4 visa allows the under 21 and unmarried children of K-3 eligible applicants to enter the United States as well. However, if the K-4 is the step-child of the U.S. citizen petitioner, the petitioner and the K-3 spouse had to marry before the K-4 child turned 18, in order for the child to qualify to adjust status to permanent resident after entering the U.S. with the K-4 visa.

Example: Vijay’s new wife has a 12-year-old daughter. Vijay can request a K-4 visa to bring his wife’s daughter (i.e., Vijay’s new stepdaughter) into the United States.

PRACTICE TIP: Before filing a K-3 visa petition, compare the processing times for the I-129F for spouses (K-3) and the I-130. If processing times are similar, do *not* file the I-129F to try to obtain the K-3, as it will not benefit the couple. This is because in cases where the I-130 is approved before the K-3 petition, or the I-130 reaches the Department of State from USCIS before the spouse obtains the K-3 visa to travel to the U.S., the spouse will be considered ineligible for the K-3. Instead the consulate will require the spouse to apply for an immigrant visa as a beneficiary of the I-130 petition, and will invalidate the K-3 petition. Though the intent of Congress in adding the K-3 and K-4 categories to the INA was to speed up the reunification of U.S. citizens with their spouses, in practice, processing times for the I-129F for a K-3 and the I-130 have been nearly identical in the past, making the K-3 an unviable choice for most potential beneficiaries. This may change in the future if I-130 processing again becomes backlogged.

§ 2.4 Petitions under the Preference System: Definition of Siblings and Sons and Daughters

Family members who do not qualify as an immediate relative or fiancé(e) beneficiaries may be able to immigrate another way, through the **preference system**. Unlike an immediate relative, the beneficiary of a preference petition may have to wait for some period of time between approval of the visa petition and immigrating. The waiting period is discussed in § 2.8–2.9.

Before discussing preference petitions, we must define two new categories of family members: “sons and daughters” and “siblings” (brothers and sisters).

A. Who Is a Son or Daughter?

A son or daughter is a person who once qualified as a child but now may be over 21 or married.

Example: Gina and Juan marry when Soledad is 10 years old. Soledad qualifies as a child under the stepchild rule discussed above. Years later, when Soledad is 30, she wants to immigrate through Gina. She is not a child because she is over 21. Can she qualify as Gina’s “daughter”?

Did Soledad ever qualify as Gina’s “child”? Yes. Since Soledad once qualified as Gina’s child, she now can qualify as her daughter.

B. Who Is a Sibling (Brother or Sister)?

Siblings are persons who were once “children” with at least one parent in common either by adoption or by blood relation. However, an adopted child cannot file a visa petition for his or her biological siblings or parents if the adoption is one that meets the definition of “adopted child” under the immigration laws and someone received an immigration benefit due to the adoption. After such an adoption, the biological siblings or parents can immigrate through the adopted child only if no immigration benefit was received due to the adoption, the adoption has been legally terminated, and the original parent-child relationship has been lawfully reestablished.

Example: Suppose that when Soledad was age 30, Gina left Juan and had another child, Fidel, with another man. Years pass. Now Fidel is 30 years old and Soledad is 60. Are Fidel and Soledad siblings under the INA?

Yes, they qualify as siblings because both Soledad and Fidel once were children with the same mother, Gina. It does not matter that they were not children at the same time or that Soledad was a stepchild and Fidel a child born out of wedlock. At one time, they both qualified as Gina’s “children” under the Act.

Example: A U.S. citizen married couple adopts Lim, born in China. They petition for her as their child and she immigrates, later becoming a naturalized U.S. citizen. When Lim grows up, she travels to China and meets her birth parents and biological siblings. Lim wants to petition for her natural sister. Can she?

No. Although Lim and her sister have the same biological parents, Lim's adoption canceled her ability to file visa petitions for her birth parents and her biological siblings.³² If Lim had not immigrated through her adopted parents but had immigrated another way, and her adoption was ultimately terminated, she might have been able to petition for her natural parents and siblings.

§ 2.5 The Preference Categories

People who immigrate through a family preference visa petition will fall into one of four categories. These categories are set forth at INA § 201(b). The preference categories are:

PREFERENCE CATEGORY	BENEFICIARIES COVERED BY THIS CATEGORY	
First Preference (F1)	Unmarried sons and daughters, 21 years of age or older, of U.S. citizens.	
Second Preference	(2A)	Spouse and unmarried children (under 21) of LPRs.
	(2B)	Unmarried sons and daughters (over 21) of LPRs. If an unmarried son or daughter of an LPR marries, he or she loses eligibility to immigrate as the son or daughter of an LPR.
Third Preference (F3)	Married sons and daughters (of any age) of USCs.	
Fourth Preference (F4)	Siblings of USCs, when USCs are over 21. The petitioner must be at least 21 years old. Both siblings must at some time have been the children of one common parent.	

A. Conversion of the Petition to a New Category

In many circumstances where a beneficiary would no longer qualify under a particular category, the visa petition will transition to a new category. This might happen in circumstances such as when a child turns 21, where there is a change in the beneficiary's marital status, where there is a change in the petitioner's immigration status or a change in the relationship between the petitioner and beneficiary through marriage or the termination of a marriage. In some instances, described below, the petition may stay alive in a new category, and the beneficiary may retain his or her priority date.

The basic rule is: If the same petitioner and beneficiary have a new relationship which also will support a family petition, the beneficiary retains the previously filed petition and priority date but will now qualify under a new preference category, which means that the beneficiary now must wait in a different line for an immigrant visa. Additionally, the Child Status Protection Act (CSPA) protects children from aging out of eligibility in certain cases, see § 2.10 for more information.

³² See INA § 101(b)(1)(E); *Matter of Xiu Hong Li*, 21 I&N Dec. 13 (1995); *Matter of Li*, Int. Dec. 3207 (BIA 1993); *Matter of Kong*, 17 I&N Dec. 151 (1979).

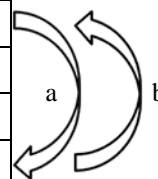
Here are some of the ways in which petitions (and the beneficiaries they pertain to) jump from one preference category to another:

1. From 1st preference to 3rd preference (and vice versa)

The unmarried daughter of a U.S. citizen marries while waiting for her 1st preference priority date to become current. Because a U.S. citizen can petition for a married daughter in the 3rd preference, the 1st preference petition converts to a 3rd preference petition. If the beneficiary then divorces during the long wait for a current date, the beneficiary again converts—this time back to the 1st preference.

UNMARRIED SON OR DAUGHTER OF A USC MARRIES

Immediate Relative	Spouses, Unmarried Children, & Parents of USC
First (F1)	Unmarried Sons/Daughters of USC
Second (2A)	Spouses & Children of LPR
Second (2B)	Unmarried Sons/Daughters of LPR
Third (F3)	Married Sons/Daughters of USC
Fourth (F4)	Brothers & Sisters of USC's



a: Unmarried Son or Daughter of a USC Marries

b: Married Son or Daughter of a USC Divorces

2. From preference 2A to 2B

The child of an LPR (2A preference) reaches the age of 21 while she awaits a current priority date. The petition filed on her behalf converts to 2B preference and she retains the priority date. Note, however, that this child may be protected by the Child Status Protection Act (CSPA), so you should always calculate the “CSPA age” of the child to see if she qualifies to remain under the 2A preference category. See § 2.10.

CHILD OF AN LPR TURNS 21

Immediate Relative	Spouses, Unmarried Children, & Parents of USC
First (F1)	Unmarried Sons/Daughters of USC
Second (2A)	Spouses & Children of LPR
Second (2B)	Unmarried Sons/Daughters of LPR
Third (F3)	Married Sons/Daughters of USC
Fourth (F4)	Brothers & Sisters of USC's



3. From immediate relative to 3rd preference

The child of a U.S. citizen (an immediate relative) marries, thus converting the immediate relative petition to 3rd preference. The petition is still valid, with the priority date established by the date of filing (receipt by USCIS) of that petition.

UNMARRIED CHILD OF A USC MARRIES

Immediate Relative	Spouses, Unmarried Children, & Parents of USC
First (F1)	Unmarried Sons/Daughters of USC
Second (2A)	Spouses & Children of LPR
Second (2B)	Unmarried Sons/Daughters of LPR
Third (F3)	Married Sons/Daughters of USC
Fourth (F4)	Brothers & Sisters of USC's



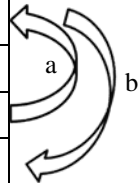
4. From preference 2B to first preference to 3rd preference

The petitioner naturalizes so that the beneficiary is now the son or daughter of a U.S. citizen. A beneficiary could move from 2B to First Preference and then to Third Preference upon getting married after the petitioner has naturalized. See **Practice Tip** below.

WARNING: If the beneficiary marries before the parent naturalizes, the petition is no longer valid! That is because there is no category for married children of LPRs.

LPR PARENT OF UNMARRIED SON OR DAUGHTER NATURALIZES

Immediate Relative	Spouses, Unmarried Children, & Parents of USC
First (F1)	Unmarried Sons/Daughters of USC
Second (2A)	Spouses & Children of LPR
Second (2B)	Unmarried Sons/Daughters of LPR
Third (F3)	Married Sons/Daughters of USC
Fourth (F4)	Brothers & Sisters of USC's



a: LPR Parent of Unmarried Son or Daughter Naturalizes

b: Unmarried Son or Daughter (of now USC) Marries


5. From preference 2A to immediate relative

The petitioner naturalizes so that 2A spouses and unmarried children under 21 become immediate relatives. This allows them to escape the preference quotas and potentially process immediately their applications for green cards. In addition, for certain beneficiaries, it may allow them to adjust status—an option they may not have had as 2A beneficiaries. See discussion at § 2.10, **Subsection B** when, under CSPA, a beneficiary might opt to retain his or her 2A classification so

that they can keep their derivative beneficiaries under their petition (which they cannot do if their petition converts into an immediate relative petition).

LPR PARENT OF UNMARRIED MINOR CHILD (UNDER 21) NATURALIZES

Immediate Relative	Spouses, Unmarried Children, & Parents of USC
First (F1)	Unmarried Sons/Daughters of USC
Second (2A)	Spouses & Children of LPR
Second (2B)	Unmarried Sons/Daughters of LPR
Third (F3)	Married Sons/Daughters of USC
Fourth (F4)	Brothers & Sisters of USCs



NOTE: It used to be that an immediate relative child who turned 21 would automatically convert to 1st preference. However, under the Child Status Protection Act (CSPA), effective August 6, 2002, the beneficiary of a filed visa petition remains an immediate relative even after turning 21, unless he or she prefers to convert to 1st preference. See § 2.10 below.

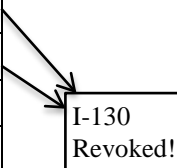
If, however, the changed petitioner-beneficiary relationship will not support a family petition, the petition is invalidated, together with the priority date. See § 2.12 below on automatic revocation of visa petitions.

6. Child or daughter/son of an LPR (preference 2A or 2B) marries

If the child or daughter/son of an LPR marries, he or she has nowhere to go in the preference system. The petition filed on his or her behalf as well as the priority date, are lost. When and if his or her parent naturalizes, the newly naturalized parent can file a new petition and the wait begins again. Note: If the parent *naturalizes first*, before the child or daughter/son marries, then the petitioner's naturalization and subsequently the beneficiary's marriage converts the petition to a new category, and the petition and priority date continue to be valid.

THE CHILD OR SON/DAUGHTER OF AN LPR MARRIES

Immediate Relative	Spouses, Unmarried Children, & Parents of USC
First (F1)	Unmarried Sons/Daughters of USC
Second (2A)	Spouses & Children of LPR
Second (2B)	Unmarried Sons/Daughters of LPR
Third (F3)	Married Sons/Daughters of USC
Fourth (F4)	Brothers & Sisters of USCs



PRACTICE TIP: Timing is important. If an LPR parent petitions his unmarried son/daughter and the son/daughter then marries, that petition is revoked. The son/daughter is no longer eligible to

immigrate through the LPR parent, and the priority date is lost. However, if the LPR parent naturalizes after petitioning for his unmarried son/daughter but *before* the son/daughter marries, the son/daughter becomes a first preference beneficiary initially. Then if the son/daughter marries subsequently, the beneficiary will move into the third preference category for “married sons/daughters of U.S. citizens.” Throughout all the changes, the petition would remain valid and the beneficiary would retain the priority date, which would determine his or her place in each new waitlist. The key is to compare the date the parent naturalizes with the date of the marriage of the son/daughter. If the naturalization date came first, the petition is alive. If the child or daughter/son married first, the petition and priority date are lost.

§ 2.6 Derivative Beneficiaries

People who immigrate under the preference system have an important right: their spouse and children can immigrate along with them, so the family will not be split up. INA § 203(d). The **principal beneficiary** is the person immigrating under the **preference** system. The spouse and children who immigrate with him or her are the **derivative beneficiaries**.

There is a very easy way to see if someone can immigrate as a derivative beneficiary. Simply ask two questions:

1. Will the principal beneficiary immigrate through a preference visa petition?
2. Does that person have a spouse or child?

If the answer to both questions is yes, the spouse and/or children qualify as derivative beneficiaries.

Example: Ramona, a U.S. citizen, files a visa petition on behalf of Rafael, her son. Rafael is married and has two sons, one is 18 years old and the other is 25. When the time comes for Rafael to apply for lawful permanent resident status, who can apply along with him?

First ask: Will Rafael (the principal beneficiary) immigrate on a preference visa petition? Yes, he will immigrate as a third preference immigrant because he is the married son of a U.S. citizen.

Then ask: Does Rafael have a wife or any children? Yes, Rafael has a wife and an 18-year-old child. They can immigrate as derivatives. His 25-year-old son is not a “child” under the Act because he is over 21. Therefore, the elder son cannot immigrate as a derivative beneficiary, unless he is helped by the Child Status Protection Act (CSPA).

Derivative beneficiaries depend on the status of the principal beneficiary. The I-130 petition is not filed on behalf of the derivative, but rather on behalf of the principal beneficiary. This is often the only way for a derivative to immigrate through a family petition, because derivatives do not often qualify on their own as principal beneficiaries. For example, there is no category for “nephews or nieces” of U.S. citizens, so they must immigrate as derivative children of the sibling of a U.S. citizen, who is the principal beneficiary.

A major exception is where a principal beneficiary in the 2A category has a child who could also be the principal beneficiary in a separate 2A petition filed by the petitioner, as the petitioner's own child, independent of the principal beneficiary parent. It is often a good idea for petitioners to file separate 2A petitions for their spouse and their children, especially where the petitioner is likely to naturalize in the near future. See the **Practice Tip**, below. In addition, each family member must file his or her own separate application for an immigrant visa or adjustment of status at the second and final step in the immigration process. They also must prove their family relationship to the principal beneficiary.

Example: Rafael's mother filed just one I-130 visa petition, for Rafael. When Rafael immigrates, he, his wife, and his younger son each must submit an application for lawful permanent residency. Plus, his wife must submit a marriage certificate and his son a birth certificate to prove that they are Rafael's relatives—just as they would do if Rafael had filed a visa petition for them.

If a 2A derivative beneficiary (child) turns 21 before obtaining their lawful permanent resident (LPR) status, the person might "age out" and no longer qualify as a derivative beneficiary at the time his or her parent obtains their LPR status—that is, unless the Child Status Protection Act (CSPA) prevents the "age out" (see § 2.10). If the CSPA does not prevent the person from aging out, the beneficiary will move into the 2B classification and will retain the priority date of the principal beneficiary parent from the 2A petition (referred to as **recapturing a priority date**).³³ This helps the former 2A derivative child avoid being placed at the end of the waiting list.³⁴

There are no derivative beneficiaries of **immediate relative** visa petitions. Each immediate relative must qualify independently and the petitioner must file separate visa petitions for each person.

Example: Steve is a U.S. citizen who files an immediate relative petition for his wife, Marie. Marie's six-year-old daughter Lisa cannot immigrate as a derivative beneficiary of the petition. Steve must file a separate immediate relative visa petition for Lisa as his stepchild.

PRACTICE TIP: Submitting a separate family petition, even if the relative would qualify for derivative status, may be advisable. A derivative can only immigrate if the principal beneficiary immigrates successfully. For example, if the principal is denied admission at the border or has a health problem and cannot come, the derivatives cannot then enter. The same is true if the principal beneficiary divorces the petitioner. An LPR, especially one who is planning to naturalize, should submit separate family petitions for a spouse and children. Once the petitioner has naturalized, a beneficiary spouse becomes an immediate relative, and any children who were derivatives of the spouse's application are no longer eligible as derivatives since immediate relatives cannot have derivatives.

³³ *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 573 US __ (2014).

³⁴ See § 2.7 and § 2.8 below for an explanation of priority dates.

§ 2.7 The Preference System

Probably the first question a family immigrant visa client will ask you is when he or she will be able to immigrate. As discussed above, immigration through a family petition is usually a two-step process. The first step is submitting a visa petition, and the second step is applying for the immigrant visa and permanent resident status. The process is different for immediate relatives than for beneficiaries under the preference category system. This is because preference visa categories are subject to a **quota system**, through which there is a limited number of visas available each year for each of the preference categories. Because of these limitations, there are often more people who file petitions than there are visas available, resulting in long waiting periods for prospective immigrants. No such quota exists for visas for immediate relatives and, therefore, they are not subject to the same wait lists. Once the visa petition is approved, an immediate relative beneficiary may go to step two and apply for an immigrant visa. A preference petition beneficiary, however, must wait until a visa is available under the preference system before going on to step two. The date that the preference visa petition is filed with USCIS is called the **priority date**. The priority date determines when the prospective immigrant can immigrate. Its function is equivalent to a number on a waitlist. Earlier priority dates are further up on the waitlist for an immigrant visa or green card. Understanding how the preference system works will help you analyze visa cases.

The Preference System. The preference system for **family** refers to people who immigrate through the first, second, third, and fourth preference categories.

Only a certain number of people who are born in each country can immigrate to the United States each year under the family preference system. Each time someone immigrates to the United States under the preference system, one visa is **charged to** (subtracted from) the numbers of visas set aside for the country where the person was born. If more people per year want to immigrate than there are visas, that country develops a waiting list or “visa backlog.” USCIS can approve an unlimited number of preference visa *petitions* each year. But not everyone with an approved petition will be able to immigrate. Instead, their petition will be placed in line based on the date the petition was filed.

The more people who want to immigrate from a country each year over its visa allotment, the longer the waiting list for that country will be. For that reason, someone from France or Uruguay may be able to immigrate much faster than someone with a similar visa petition from Mexico or the Philippines.

Example: Only 30,130 people can immigrate to the United States from any one country each year, with some exceptions. Each year many thousands more people from Mexico apply to immigrate to the United States. For this reason, Mexican nationals face a wait of several years to immigrate through the preference system. Each year, a far smaller number of people apply to immigrate to the United States from France. For that reason, many applicants from France have a relatively short wait.

§ 2.8 Using the State Department Visa Bulletin to Make an Estimate of When Your Client Can Immigrate

Each month the U.S. State Department issues a Visa Bulletin.³⁵ With the right information, you can consult the State Department Visa Bulletin to see if your client is eligible to immigrate. For example, below is the visa bulletin for December 2016. As you can see, it lists the preference categories in the left-hand column and then shows the priority dates that are current for each category. Note the four countries that are assigned their own queues of chargeability. Everyone else goes into the queue for all other chargeability areas. See more information below.

VISA BULLETIN FOR DECEMBER 2016

Family-Sponsored	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
F1	01DEC09	01DEC09	01DEC09	15APR95	15SEP05
F2A	22FEB15	22FEB15	22FEB15	15FEB15	22FEB15
F2B	08MAY10	08MAY10	08MAY10	15OCT95	01MAR06
F3	15FEB05	15FEB05	15FEB05	08DEC94	15AUG94
F4	22DEC03	01OCT03	01APR03	15MAY97	22MAY93

When a backlog exists, *predicting exactly when the client will be able to immigrate is impossible*. But the Bulletin may be used to make a *very rough estimate* of when the client might be able to immigrate in the future. To do this you need to know the following information about the intending immigrant:

1. The priority date of the visa petition;
2. The country of chargeability;
3. The preference category; and
4. How fast the preference category has been advancing in the last 2-3 or more years.

A. Priority Date

As explained above, the date that the I-130 visa petition is *filed* with the USCIS becomes, upon approval of the I-130, the beneficiary's "**priority date**" in the preference system.³⁶ That date establishes the person's place in line to wait for a visa and to determine when the person can immigrate. The priority date is the date that the USCIS *received* the petition and accepted the fee, not the date that the petition was mailed nor the date it was approved. This is only fair, because in some cases the petition might not be approved for several months or even years after filing it.

³⁵ The Visa Bulletin, including archived past bulletins can be accessed through the State Department's website at http://travel.state.gov/visa/bulletin/bulletin_1360.html.

³⁶ 22 CFR § 42.53(a).

Example: Ana filed a petition for her sister Elsa on May 2, 2015. The petition was approved on July 9, 2015. Elsa’s priority date is May 2, 2015.

PRACTICE TIP: Within 2-3 weeks of filing the I-130 with USCIS, the petitioner should receive a receipt notice on Form I-797. It is possible, however, that USCIS will reject the filing for an error and return the packet with a notice that describes the error, in which case the priority date is not yet established. After acceptance for processing, the notice of decision to approve or deny takes longer, up to two to three years in some cases, depending on the kind of petition.

B. “Recapturing” Old Priority Dates

In a limited number of situations, immigrants may take advantage of earlier priority dates:

1. *Western Hemisphere nationals who established a priority date prior to January 1, 1977 may use that date in any other visa petition*

Before 1977, people who had a U.S. citizen child or another potential way to immigrate through a family member could register and obtain a priority date. Some of these people who had U.S. citizen children may carry so-called “*Silva* letters” as beneficiaries of the lawsuit *Silva v. Bell*, 605 F.2d 978 (7th Cir. 1979). Other people may have had a parent or spouse immigrate before 1977 and, as a result, may qualify for an earlier priority date. Old Western Hemisphere priority dates show up increasingly rarely. When they do, however, the pre-1977 priority date can be used in any family preference category.

Example: Eduardo had a U.S. citizen child and registered with a U.S. consulate on June 1, 1976. He never immigrated. Now his brother is a U.S. citizen and has filed a 4th preference for him. Eduardo can use his old priority date of June 1, 1976 to immigrate now, rather than waiting in the long 4th preference line.

2. *Children who were 2A derivative beneficiaries but now have turned 21 and are not protected by the CSPA age calculator*

Children who have “aged out” as derivative beneficiaries in the 2A category may nevertheless be able to use the priority date of their principal beneficiary parent’s I-130. This will be the case where one parent was the petitioner and the other parent the principal beneficiary spouse. These “aged out” children, who are now 21, may immigrate under preference category 2B.

Example: Mary is an LPR who filed an I-130 petition for her husband Javier under the 2A preference category. Since their child, Guadalupe, was only 16 years old at the time, Javier and Mary believed that she would be able to immigrate as a derivative with her father before her 21st birthday; hence they did not want to spend the money to submit a separate I-130 for her. Javier’s priority date is May 1, 2011.

However, 2A visas became very backlogged again and in the year 2016 Guadalupe turned 21 before she could complete consular processing and immigrate. Javier immigrates and Guadalupe is now automatically considered to be a 2B principal

beneficiary, with a May 1, 2011 priority date. She can retain the filing date of the petition for the principal beneficiary (her father).

For “recapturing” an earlier priority date, the visa petition must not have been revoked or terminated (See § 2.12, below on revocation and termination).

Presently, the only family category where derivatives are allowed to “recapture” priority dates after aging out is the F2A category beneficiary who ages out to F2B.³⁷

3. If an F2A derivative “child” of an LPR ages out into the F2B category, a new petition is not necessary if the beneficiary is able to immigrate as an F2B

The Board of Immigration Appeals (BIA) in *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009), ruled that § 203(h)(3) of the INA allowed derivative beneficiaries of I-130 petitions filed under preference category F2A to automatically convert into the F2B category without having to file another visa petition.³⁸

Example: Guadalupe turned 21 before she could immigrate through Mary’s petition for her father, Javier, and took no action to immigrate for many years. Guadalupe finally takes action to immigrate, and the F-2B category is now current. Guadalupe may now immigrate without filing a new petition, as an F-2B.

Note that in the past a new I-130 petition on behalf of such children had been required by both USCIS by regulation³⁹ and DOS in the Foreign Affairs Manual (FAM).⁴⁰ However, USCIS issued a Policy Memorandum in 2015, after the Supreme Court’s decision in *Scialabba v. Cuellar de Osorio*, instructing that those 2A aged out children who are otherwise eligible to adjust status in the 2B category would not be required to have a second petition filed on their behalf by the petitioner. The Memorandum stated that this change was made in the instructions within the Adjudicator’s Field Manual (AFM), consistent with the BIA’s decision in *Matter of Wang*.⁴¹ However, since as of the date of this writing, neither the regulation nor the FAM have yet been amended to reflect this new policy and the BIA decision, proceed with caution and communicate with the consulate or USCIS field office to be certain the office is aware of and following the BIA

³⁷ *Scialabba v. Cuellar de Osorio*, 573 U.S.____, 134 S. Ct 2191 (2014); *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009).

³⁸ See USCIS policy memorandum, *Updated Guidance to USCIS Offices on Handling Certain Family-Based Automatic Conversion and Priority Date Retention Requests Following the Supreme Court Ruling in Scialabba v. Cuellar de Osorio* (June 25, 2015), available at www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-0625_Post_Cuellar_de_Osorio_PM_Effective.pdf.

³⁹ 8 CFR 204.2(a)(4) has not yet been amended and still appears to require a new petition to retain or recapture the priority date of the original principal beneficiary parent.

⁴⁰ 9 FAM 502.2-3(C).

⁴¹ USCIS policy memorandum, *Updated Guidance to USCIS Offices on Handling Certain Family-Based Automatic Conversion and Priority Date Retention Requests Following the Supreme Court Ruling in Scialabba v. Cuellar de Osorio* (June 25, 2015), available at www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-0625_Post_Cuellar_de_Osorio_PM_Effective.pdf; see also *Scialabba v. Cuellar de Osorio*, 573 U.S.____, 134 S. Ct 2191 (2014); *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009).

decision. The Memorandum does not speak to consular processing and the Department of State has not to date made a change in the Foreign Affairs Manual (FAM).

PRACTICE TIP: To request the recapture of the old priority date, send a letter requesting the earlier date with an explanation of the reason you believe the beneficiary is entitled to that date. Include a copy of the original 2A visa petition approval notice and documentation that the beneficiary qualified as a derivative of that petition. You can send the request to the National Visa Center if you are requesting consular processing, or with the adjustment application, if the beneficiary is adjustment eligible.

C. Country of Chargeability

Sometimes a question comes up about the country to which the person's visa will be charged. This can make a tremendous difference, since the visa backlog from one country may be a few months, while the wait may be several years from another.

As a general rule, the person's place of birth is the country or territory to which a visa will be charged. This is true even if the person has become a citizen of another country.

Example: Enrique was born in Mexico but has acquired citizenship in Guatemala. His country of chargeability is Mexico.

In some situations, an exception may apply and immigrant applicants can "cross-charge" to a different country. For example, family members who are immigrating together and who were born in different countries may be able to cross-charge all of their visas to the country with the shortest waiting list.⁴²

Example: Enrique marries Sara, who was born in Guatemala, and they are both immigrating through the 4th preference petition filed by Enrique's brother. Enrique can "cross-charge" to Sara's country of birth, Guatemala and the couple can immigrate much faster, using the 4th preference "All Chargeability Areas" date, rather than the date for 4th preference for Mexico. That would reduce their wait time by several years!

D. Preference Category

This is the category of the visa petition, for example second preference 2A for the immigrating spouse of a lawful permanent resident.

⁴² See INA § 202(b); 22 CFR 42.12.

How to Read the Visa Bulletin: Look at the Visa Bulletin for Family Sponsored immigrants below.

VISA BULLETIN FOR DECEMBER 2016

Family-Sponsored	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
F1	01DEC09	01DEC09	01DEC09	15APR95	15SEP05
F2A	22FEB15	22FEB15	22FEB15	15FEB15	22FEB15
F2B	08MAY10	08MAY10	08MAY10	15OCT95	01MAR06
F3	15FEB05	15FEB05	15FEB05	08DEC94	15AUG94
F4	22DEC03	01OCT03	01APR03	15MAY97	22MAY93

First, notice the date at the top. This shows the month to which this visa bulletin is pertinent. The State Department issues a new visa bulletin each month and most of the information in the bulletin changes from month to month. It is important to check the new visa bulletin each month.

Along the left side of the bulletin chart are all the categories of preference visas. Across the top is a list of countries called the “areas of chargeability.” The first category says “All Chargeability Areas Except Those Listed.” Known as the “worldwide” category, it includes all countries not separately listed. For example, Kenya does not have a separate listing in the bulletin. Therefore, a person from Kenya should use the “All Chargeability” column. The countries in this category usually have the smallest backlogs and thus the shortest waiting periods.

If the person is from a country that has its own separate listing, such as India or Mexico, he or she must consult that column of information.

If you draw a line across from the relevant preference category and down from country of chargeability the lines will meet at a date. That is the priority date of persons from that country, and in that preference category, for whom visas are available now. The rule to reading the Bulletin is:

If your client’s priority date falls *before the date listed*, a visa is generally now available and she can immediately apply for lawful permanent residence. If your client’s priority date falls *on or after the date listed*, no visa is available to her that month and she must wait longer.

Example: Look at the Visa Bulletin above. Pretend today is December 7, 2016. Sarwan, who is single, was born in India in 1991. On April 5, 2010, his permanent resident mother filed a second preference visa petition for him. The petition was approved in 2015. The priority date for second preference 2B visa petitions from India on the chart is May 8, 2010. Sarwan’s priority date of April 5, 2010 is before the priority date listed in the Visa

Bulletin. Therefore, Sarwan is eligible to immigrate now.

Example: Louise was born in Haiti. On January 1, 2006, her U.S. citizen sister filed a visa petition for her. The priority date for fourth preference petitions for all chargeability areas is December 22, 2003. Louise is not eligible to immigrate now, because her priority date falls after the date in the Visa Bulletin.

Sometimes, categories show the letters “C” or “U” instead of a date. The letter “C” means that the category is current and there is no waiting for a visa, no matter when the petitioner filed the petition. The letter “U” means that the category is unavailable. All the visas in that category and country have been used up for the current fiscal year. Some visas may become available at the end of the year or the beginning of the next year’s accounting in October (USCIS operates on a fiscal year basis, beginning every October 1st). Until then, the person cannot immigrate no matter when his or her visa petition was filed.

There are two visa bulletin charts for family sponsored immigrants, and two for employment sponsored immigrants. The first chart provides the actual current dates for visa availability. That chart is the “Application Final Action Dates” chart. The second chart, labelled “Dates for Filing Applications” indicates when immigrant visa applicants undergoing consular processing should start assembling and submitting documents to the National Visa Center in anticipation of future priority date availability. Those applicants who will be adjusting status in the United States should start checking the USCIS website regularly to determine if an application for adjustment of status may possibly be submitted in advance of the “Application Final Action Dates” chart dates. For adjustment of status cases, it is very important to only submit the application if the intending immigrant’s priority date is actually already current (first chart), or the USCIS website indicates that additional visa numbers will be available in a category and the adjustment applicant is allowed to submit in advance.⁴³ This latter situation is rare, and only occurs if there are more visa numbers anticipated to be available than known applicants in that preference category under the first chart. Submitting too early could result in acceptance of the application, but subsequent denial and loss of fees paid.

TO ACCESS THE STATE DEPARTMENT VISA BULLETIN: You can access the monthly Visa Bulletin on line, as well as see archived old bulletins on the Department of State website at: www.travel.state.gov/content/visas/en/law-and-policy/bulletin.html. There is no charge. To be placed on the Department of State’s E-mail subscription list for the Visa Bulletin, go to the subscription website: <https://calist.state.gov/scripts/wa.exe?A0=VISA-BULLETIN>. The same address can be used to unsubscribe from the list.⁴⁴

Exercise: The following people have come to your office. It is December 2016. Visa petitions filed on their behalf have been approved. They want to know if they are eligible to immigrate to the United States now. Use the visa bulletin provided above to advise them. (See answers in **Appendix 2-A**.)

⁴³ See www.uscis.gov/visabulletininfo.

⁴⁴ Additionally, a recorded message with visa cut-off dates can be accessed at: (202) 485-7699.

1. Oscar was born in Nicaragua and is the beneficiary of a third preference visa petition filed on February 2, 2005.
2. Joel was born in the Philippines. He is the beneficiary of a fourth preference visa petition filed on April 4, 1994.
3. Marta was born in Mexico and is the beneficiary of a second preference visa petition filed by her wife on September 15, 2015.
4. Fatoumata was born in Mali and is the beneficiary of a second preference visa petition filed by her husband on December 3, 2014.
5. Kim was born in Korea and is the beneficiary of a first preference visa petition filed on August 3, 2009.
6. Julio was born in Mexico and is the beneficiary of an immediate relative visa petition filed on November 13, 2014. (This is a trick question!)
7. Ravi was born in India and is the beneficiary of a third preference visa petition filed on January 12, 2005.

§ 2.9 Advising Your Client about When a Visa May Become Available

Predicting exactly when a visa will become available for a person waiting to immigrate under the preference system is impossible. The priority dates in the Visa Bulletin do not advance consistently because the number of people who apply in a particular preference category can vary from month to month (the number is simply unpredictable), the number of people who are on the waiting list who still want to immigrate is unknown, the number of people who moved from one category to another is variable, and the number of derivative beneficiaries is unpredictable. The dates in one category may jump ahead three months over one month of “real time” or they may stand still or even go backwards.

Review past Visa Bulletins and read the comments in the State Department mailing to get an idea of where a preference category may be moving. However, no one can guarantee exactly what will happen. You must explain this uncertainty to clients. You can only make rough estimates of when a client will be able to immigrate when there is a backlog.

PRACTICE TIP: Your client may have more than one family member who can file a petition for her. In general, when the wait will be long, consider advising your client to ask more than one family member (and perhaps all who can) to file a petition. Long waits coupled with life’s uncertainty can result in loss of the ability to immigrate after many years of waiting.⁴⁵ Filing two or more petitions is a relatively inexpensive insurance policy against future loss of a petition and priority date. In addition, if the petitions are in different categories, the beneficiary can also hedge her bet about which category will advance more quickly.

⁴⁵ Note however, that some beneficiaries of a visa petition may still be able to immigrate after the death of a petitioner, whether through a widow/widower of a U.S. citizen “self-petition” or through INA § 204(l). Despite these potential means to preserve a visa petition after death of the petitioner or principal beneficiary, it is still advisable to file all possible family petitions.

§ 2.10 Child Status Protection Act (CSPA)

The Child Status Protection Act (CSPA) went into effect on August 6, 2002. It was created to help with the problem of children “aging out” of their eligibility to immigrate when they turn 21. This section describes how CSPA works.

A. Children of U.S. Citizens

Children of U.S. citizens benefit the most from CSPA. If their parents file I-130 visa petitions for them before they turn 21, they will never age out. They will remain immediate relatives indefinitely, as long as they do not marry, even though they are no longer children as defined in the INA. *The age that matters is the age of the child at the time the petition was filed.* If that age was under 21, the child will qualify to apply for permanent residence as an immediate relative regardless of his or her age when he or she applies. While these beneficiaries must remain unmarried, there is no time limitation regarding when they must actually apply for adjustment or an immigrant visa.

However, such a beneficiary as is described above might prefer to convert to 1st preference if he or she has a child of her own. This is because an immediate relative petition does not include derivative beneficiaries, meaning that if the parent immigrates as an immediate relative, her child cannot immigrate with her. Instead, the child would have to wait until the parent becomes an LPR and then can petition for her. This could take years. However, all preference petitions allow derivative beneficiaries, so if the parent immigrates as a 1st preference immigrant, her child can immigrate with her.

Fortunately, the CSPA allows the immediate relative beneficiary to opt out of remaining an immediate relative upon turning 21. If she wants, she can convert to 1st preference, which will allow her child to immigrate with her as a derivative beneficiary.⁴⁶

The BIA has held that the CSPA also allows for applications for adjustment or immigrant visas by those former immediate relatives who aged out before the CSPA became effective, *if they have not yet filed an application for adjustment of status application or an immigrant visa*, no matter how long ago the visa petition was filed and approved.⁴⁷

Example: Paula, a U.S. citizen, filed an I-130 for her daughter Isabel on June 7, 1997. The petition was approved on December 2, 1997. Isabel did not file for adjustment of status and then turned 21 on January 5, 2000. The petition was at that time converted to first preference. Since the BIA has recognized that visa petition beneficiaries like Isabel should qualify for CSPA, Isabel files an adjustment application on August 1, 2016, even

⁴⁶ See American Immigration Law Foundation (AILF), Updated Practice Advisory On The Child Status Protection Act, (Mar. 8, 2004) (citing January 17, 2003 DOS cable), available at www.immigration.com/sites/default/files/03-08-2004%20Am%20Imm%20Law%20Foundation%20-%20Practice%20Advisory%20-%20Updated.pdf.

⁴⁷ See *In re Avila-Perez*, 24 I&N Dec. 78 (BIA 2007); see also Neufeld memorandum, *Revised Guidance for the Child Status Protection Act (CSPA)*, (Apr. 30, 2008), available at: www.uscis.gov/files/nativedocuments/CSPA_30Apr08.pdf.

though she was then 37 years old. Isabel should be considered an immediate relative and be allowed to adjust her status, *so long as* her petition has not been revoked or terminated (see below, section on revocation).

B. Children of LPR Parents Who Naturalize While the Petition Is Pending

Under the CSPA, if an LPR parent petitions for a child, and then naturalizes before that child turns 21, the child will remain an immediate relative even if he or she turns 21 before he or she can immigrate. *The age that matters is the age of the child when the LPR parent naturalizes.* If that age was under 21, the child will qualify to apply for permanent residence as an immediate relative regardless of his or her age when he or she so applies.

Sometimes an LPR petitioner will file only one I-130 for his or her spouse and assume that their children will immigrate in derivative status. Keep in mind that when these parents naturalize, they will need to file a separate I-130 petition for each child, since the children will lose their derivative status. What happens to those children when they turn 21?

Under the CSPA, we believe that if the children are under 21 when the LPR parent naturalizes, they should remain immediate relatives, even if the parent doesn't file new petitions for them until after they turn 21. This is because the petition that should count for the CSPA should be the original one filed by the LPR parent for the spouse that included the children. However, the CSPA is not totally clear on what happens to children in this situation. To be on the safe side, you should make sure that separate petitions for the children are filed before they turn 21. That way, they will be sure to retain their status as immediate relatives after they turn 21.

Like other children of U.S. citizens, if the petitioner's child has a child of her own, she might not want to remain an immediate relative after turning 21, because he or she would not be able to bring the child in as a derivative beneficiary. Again, the Department of State has said that the CSPA allows the beneficiary to opt out of classification as an immediate relative if desired.

C. Married Children of U.S. Citizens (Third Preference Category) Whose Marriage Is Terminated

If the marriage of a married child of a U.S. citizen is terminated before the child turns 21, the child becomes an immediate relative. (Otherwise, if the child is over 21 when the marriage ends, then their 3rd preference petition converts into a 1st preference petition). *The age that matters is the age of the child when the marriage is terminated.* If that age was under 21, the child will qualify as an immediate relative regardless of her age when she applies for permanent residence.

It is not clear under the CSPA whether married children of U.S. citizens who are under 21 years are eligible to opt out of converting to immediate relatives if they divorce. Obviously, if they have dependent children, they may prefer to move into the first preference category upon turning 21 so that their children can derive status and immigrate with them.

D. Children of LPRs and Derivative Children Beneficiaries

Before CSPA, the children of LPRs who turned 21 would convert from the 2A to the 2B preference category. Derivative beneficiaries, such as the children of 4th preference (sibling of U.S. citizen) beneficiaries, would age out and lose their ability to immigrate altogether before CSPA. The CSPA changed this, but it is much less generous, and much more complicated, for the children of LPRs and other derivative beneficiaries than it is for the children of U.S. citizens.

You have to look at the biological age of the derivative beneficiary at the time the visa becomes available. If the beneficiary is over 21, she may still qualify, depending on how long the I-130 was pending.⁴⁸

Following the formula outlined below, you must deduct the time the petition was pending from the beneficiary's actual age on the date a visa became available. The number you come up with is the "CSPA age" or "calculated age."

The formula is as follows:

STEP ONE: Calculate the time the petition was *pending*:

Time between

- the petition's *filing date* and
- the petition's *approval date*

The CSPA itself does not define what "pending" means, but the USCIS and the State Department have decided that it means the time between the filing date and the approval date.

STEP TWO: Subtract

- The time the petition was pending (time from Step One),
- From the beneficiary's *actual age* on the *date the visa becomes available* (*not* his current age, but his age at the time the Visa Bulletin indicated that his priority date was current, or the "visa availability date")

The *date the visa becomes available* is either:
(a) the first day of the visa bulletin month on which the priority date becomes current, or
(b) the petition approval date, *whichever occurs later*.

See the note below, "Watch Out for Visa Regression!"

This calculation applies both to the principal beneficiaries of 2A petitions for children of LPR's or for the derivative beneficiaries of any petition under the preference categories.

The age you get from this formula is the CSPA age; and if it is under 21, the beneficiary may continue to qualify as a "child" under the INA.

⁴⁸ INA §§ 203(h)(1)(A)-(B).

1. Caveat: The one-year requirement

The CSPA “calculated” age has an expiration date and is not valid indefinitely. In order to be protected by the CSPA age, *an individual must “seek to acquire” lawful permanent residence within one year of the visa availability date (the date when the priority date became current).*

Example: A 2A beneficiary you represent already turned 21 and her priority date becomes current on October 1, 2017. You then calculate her CSPA age, and you see that it comes out to 18 years of age. However, this beneficiary does not have another three years of protection under the CSPA, as her CSPA age would suggest. Instead, she must comply with the one-year requirement and must seek to acquire status as a lawful permanent resident before October 1, 2018.

For those who are going to adjust their status, the clearest and safest way to comply with the “sought to acquire” provision is to file the I-485 adjustment application within one year of the priority date becoming current. For those who are going to immigrate through consular processing, this means that the beneficiary should either submit a completed form DS-260 to NVC (see **Chapter 4**) or, for derivative beneficiaries of a principal beneficiary, submit a Form I-824 or an adjustment application to the Service Center that processed the I-130 within one year of the priority date becoming current (see **Chapter 3**).

PRACTICE TIP: For a derivative beneficiary, the important date to take action and seek to acquire residence is within one year from when the priority date becomes current for the *principal* beneficiary. This means that the derivative beneficiary should *not* necessarily wait to take action to apply to immigrate until after the principal beneficiary immigrates, which may occur more than one year after their priority date became current. If the beneficiary is then over 21 and has not “sought to acquire” residency within the one-year time period, it will likely be too late to do so.

If the beneficiary did not file the I-485 or consular processing documents within one year, it is possible that other actions may be sufficient to meet the “has sought to acquire” residency requirement, such as seeking legal counsel.⁴⁹

Example: Pedro, who is an LPR, filed an I-130 for his son Samuel on October 8, 2010. It was approved exactly one year later, on October 8, 2011. It is now November 1, 2016, the priority date is now current, and Samuel is now 21. Samuel is in the United States and intends to apply for adjustment of status (see **Chapter 3**). Since the USCIS took one year to approve the petition, you can deduct one year from his current age. For purposes of immigrating, therefore, he is only 20, and he can still immigrate as a 2A beneficiary, even though he is really over 21. However, if he does not file his adjustment application before November 1, 2017, he will lose the right to immigrate in the 2A preference category, and will automatically become a 2B beneficiary. Since the priority date for 2B is not current, he would have to wait longer to immigrate.

⁴⁹ See *In re Kim*, A77 828 503 (BIA Dec. 20, 2004).

The same rule applies to derivative beneficiaries in other preference categories.

Example: Jane, a U.S. citizen, filed a third preference petition for her married son Mark on August 1, 2007. It was approved three years later, in August of 2010. Mark’s wife Wanda and minor daughter Diana were derivatives. It is now November 1, 2016, Diana is 22, and the priority date is current. Under the CSPA, if you deduct Diana’s age of 22 from the 3 years that the petition was pending, the number you get is 19. Therefore, Diana can remain included in Mark’s petition *as long as she files for adjustment or consular processing before November 1, 2017*. If she fails to file before November 1, 2017, Diana will lose her derivative status, and the only way she will be able to immigrate is through a separate petition filed by her father or mother after they have immigrated.

E. Recapturing a Priority Date When the CSPA Fails to Protect a Derivative Beneficiary

Section 203(h)(3) of the Immigration and Nationality Act (INA) provides that if a derivative beneficiary is not protected by the CSPA (for example, because the beneficiary failed to comply with the one-year requirement to “seek to acquire” status), the beneficiary’s I-130 petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.

However, in the case of *Matter of Wang*, 25 I&N Dec 28 (BIA 2009), the Board of Immigration Appeals (BIA) agreed with the USCIS’ interpretation of the law, stating that the retention of a priority date is limited to when the **same petitioner** files a new I-130 for the **same beneficiary** in the **same preference category**. In other words, the retention of the priority date only applies to F-2A derivatives who were first included as derivative beneficiaries in an I-130 petition filed by their lawful permanent resident parent on behalf of their other parent, who was the principal beneficiary. When that derivative beneficiary child ages out, the petitioning LPR parent can file a new I-130 on his or her behalf; and the now adult son or daughter of an LPR may “recapture” or “retain” the priority date of the initial I-130.

The BIA held that this protection does not apply to derivatives in other preference categories, such as children of the sons and daughters of U.S. citizens in the third preference category or children of the siblings of US citizens in the fourth preference category. The U.S. Supreme Court upheld the BIA’s decision in a divided 5-4 decision, in *Scialabba v. Cuellar de Osorio*, 573 U.S. ___, 134 S. Ct 2191 (2014).

Example: In 1994, Abdoulaye, a U.S. Citizen, filed an I-130 for his sister, Fanta, in which she included her child, Bintou, as a derivative beneficiary. However, Bintou aged out and was not otherwise protected by the CSPA. According to the decisions by the BIA and the U.S. Supreme Court, Bintou is out of luck. After his mother becomes a permanent resident and files a new I-130 petition for Bintou, Bintou will not be able to utilize the old 1994 priority date.

F. Watch Out for Visa Regression!

Sometimes the Visa Bulletin moves backward rather than forward. For example, you may have a priority date of August 8, 2012. Suppose hypothetically, that the Visa Bulletin for November 2016 showed a priority date for visa availability for your preference category of March 2012, so your own August 8, 2012 priority date was not current then. The next month, in December 2016, the Visa Bulletin moved forward and showed a current priority date of November 3, 2012. Your priority date then became current! As the blurb next to the calculation chart above shows, this means that your visa availability date would be December 1, 2015 (the first date of the Visa Bulletin month where your priority date became current). However, in January 2017, the Visa Bulletin moved backward, or regressed, and shows a current priority date for your preference category of June 12, 2012. Your priority date is no longer current and it does not become current until July 2017, when the Visa Bulletin shows a current priority date of October 2012. So what happens to your CSPA age? What is the “visa availability” date you must use when calculating your CSPA age?

1. **Your CSPA Is “Locked-In”:** If you had already “sought to acquire” LPR status by filing your I-485, DS-260, or I-824 *before* the Visa Bulletin regressed, your CSPA age is *locked-in* and you need not worry. You cannot adjust status or consular process at this time, because your priority date is not current (that is, there is no immigrant visa available for you at this time). However, when it becomes current again, your CSPA age will be the same as it was when you filed your I-485, DS-260 or I-824. The USCIS or the State Department will hold onto your application until a visa becomes available again.
2. **Caution, You May Age-Out:** *If you had not “sought to acquire” LPR status by the time the Visa Bulletin regressed, you may age out!* The USCIS treats this situation as if the Visa Bulletin had never become current. Therefore, it calculates the age of the beneficiary with the latest visa availability date (in the example above, that would be July 1, 2016, because that was the Visa Bulletin month when the priority date became current again; in other words, when the visa became available again).⁵⁰ Since the second step of the CSPA calculation is to subtract the time the petition was pending from the beneficiary’s *actual age* on the date the visa becomes available, the longer the visa availability date gets pushed back after the I-130 has already been approved, the higher the likelihood the CSPA calculation will fail to bring the CSPA age under 21.

Therefore, it is very important to try to “seek to acquire” LPR status as soon as the priority date becomes available, to minimize the risk that the Visa Bulletin will regress before the beneficiary has a chance to file the I-485, DS-260 or I-824. This is why the beneficiary should not wait until the priority date becomes current in order to prepare the appropriate forms and assemble the supporting documents to move on to the next step.

⁵⁰ Remember that this “regression” and “sought to acquire” example uses hypothetical Visa Bulletins, not the actual Visa Bulletins from the months and years cited, although this situation has in fact occurred in the past.

G. Opt Out Provisions under CSPA § 6

The CSPA addressed a problem which faced many adult sons and daughters of LPRs who found themselves facing an extended wait time due to the naturalization of their petitioning parent. The CSPA provision allows beneficiaries in this situation to elect whether they want to automatically convert to the first preference or opt out and stay in the 2B category.⁵¹

The USCIS advises that persons seeking to opt out file a request in writing with the District Office that has jurisdiction over the beneficiary's residence. This request must be submitted by the beneficiary him or herself not the petitioner. The Officer in Charge of the USCIS Office will provide written notification of a decision to both the beneficiary and the Department of State's visa issuance unit. Once the beneficiary's request is approved, the beneficiary's eligibility for family-based immigration will be determined as if the beneficiary's parent never naturalized. The age of the child on the date of the parent's naturalization remains his or her age for CSPA purposes.⁵² Of course, if the children were under 21 at the time the parent naturalized, then they would become immediate relatives upon their parents' naturalization and would be able to immigrate immediately.

H. Effective Date of CSPA

The CSPA was signed into law on August 6, 2002. Therefore, it applies to all petitions filed on or after that date. According to USCIS and DOS initially, it also applied to petitions that were filed before August 6, 2002 but that were approved on or after that date. This includes petitions that were denied before August 6, 2002 if an appeal or motion to reopen was granted after that date. Those beneficiaries who had approved visa petitions but no adjustment of status application "pending" on August 6, 2002 who later filed applications for adjustment were initially denied or discouraged from applying. The BIA has clarified that such beneficiaries are actually protected by the CSPA, finding that the CSPA does not require that an adjustment application be pending on the date of enactment if a visa petition was already approved.⁵³ Those beneficiaries who otherwise qualified for CSPA may now file motions to reopen or reconsider their denied adjustment applications without fee, or make their initial application now, in certain cases.⁵⁴

According to USCIS and DOS, the CSPA does not apply to petitions approved before August 6, 2002, if there has been a final determination on the immigrant visa application or adjustment of status application before that date. According to the USCIS, a final determination for purposes of an adjustment of status application means approval or denial by the USCIS or EOIR. However,

⁵¹ CSPA § 6, amending and adding INA § 204(k).

⁵² See USCIS, *Section 6 of the Child Status Protection Act*, (Mar. 24, 2004), available at www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2004/cspa_sec6_32304.pdf.

⁵³ See *In re Avila-Perez*, 24 I&N Dec. 78 (BIA 2007).

⁵⁴ See also Neufeld memorandum, *Revised Guidance for the Child Status Protection Act (CSPA)*, (Apr. 30, 2008).

the Ninth Circuit has ruled that there is no final determination if an appeal is pending in federal court.⁵⁵ At this time, USCIS is only applying the *Padash* holding in the Ninth Circuit.

If there has been no final determination of the immigrant visa or adjustment of status application, the CSPA will apply to petitions approved before August 6, 2002 if the dependent aged out on or after August 6, 2002. It will only apply to those who aged out before August 6, 2002 if they applied for adjustment of status or an immigrant visa before aging out. Although there is some dispute about whether the USCIS/DOS interpretation is correct, as of this writing this is how the CSPA is being implemented.

§ 2.11 Completing Government Forms

Completing government forms is something that immigration practitioners spend a lot of time doing. This section will discuss general rules about how to complete forms.

- Never complete an immigration form unless you have done a complete interview of the client.
- Never complete an immigration form unless you know who is eligible under the law and who is not for that benefit and the legal implications for each answer on the form.
- If you have a question about the person's case, *do not* file the application.
- Applications that are filed thoughtlessly can result in the person being deported.
- Never file an application that has any information that you know to be false.
- Always check every detail of the form with your client before filing the application.
- Always give a copy of the application to the client.

Your clients should be active and informed participants in completing immigration application forms. There are several reasons for this. If your clients understand the form they will provide more complete and accurate answers to the questions. It may reduce the chance that you will be surprised later by new information. Also, if your clients understand what is on the form they will be able to answer questions about it with confidence at an interview or hearing, even if you are not there to help.

There are many ways to involve a client in completing forms. You may ask the client to fill out a copy of the form before your appointment. Some agencies help people fill out forms in groups.

Here are a few basic rules to follow when filling out government forms.

- **Don't leave any space blank, with few exceptions.** Usually, you should write "N/A" or "not applicable" if the question does not apply. Write "none" if that is the answer.
- **Make sure that you provide the same information about the client on all forms you submit.** Often you will complete more than one type of form for an application. Before you hand in an application, go through each form one last time to make sure names,

⁵⁵ *Padash v. INS*, 358 F.3d 1161 (9th Cir. 2004).

addresses, dates, number of trips out of the country, manner of entry, and all other information are correct and consistent on all forms.

- **Read each question carefully, especially if it involves a legal issue** (for example, questions about criminal convictions, welfare, manner of entry, length of time in the United States). If you do not understand a question, get help. A wrong answer could cause USCIS to reject the application and result in months of delay, or even a denial. Also even the right answer may have seriously negative legal repercussions, so it is important to understand the law with respect to your particular client's situation before you both make the decision to actually file the form with the government.
- **If your client will go to an interview, make sure that he or she practices answering all the questions on the form with you or a friend or family member beforehand.** If a question on the form involves a legal issue, tell the client why the government is asking the question and talk about how the client's answer relates to the issue.

NOTE: Changes in the Law and Regulations. Immigration law and the rules for submitting applications are constantly changing. From one year to the next, the fee and the documents that are required, the procedure for filing applications and even the legal issues in an application may change. You should always consult the USCIS website at www.uscis.gov for the latest version of forms and filing processes before submitting anything.

§ 2.12 Completing the Visa Petition, Form I-130

The visa petition is Form I-130. A copy of a sample completed form is at **Appendix 2-B**. The I-130 form is fairly straightforward as long as you know that “you” refers to the petitioner (the U.S. citizen or lawful resident) and “your relative” refers to the beneficiary (the person who wants to immigrate), though some questions and corresponding answers do have potential risks for the beneficiary, which are important to understand in advance.

Every question is important, and is asked for a reason. Below we will discuss several of the questions on the form. Even if you have completed I-130s before, you should review this section.

WARNING: Special Rules Apply to People Who Immigrate through Marriage. Additional rules apply if either person has been married before. See § 3.10. Before you complete an I-130 visa petition for a married couple, be sure to analyze the case to see if any special rules apply.

GUIDELINES ON SOME QUESTIONS FROM THE I-130 FORM

As you read this section you may want to look at the copy of the I-130 that was correctly filled out at **Appendix 2-B**.

A. Sections B and C Start Off with the Same 12 Questions; Section B Asks about the Petitioner and Section C Asks about the Beneficiary

1. Questions 1 and 2: Name and Address

Write the last name in capital letters first. A person who uses two last names should write them both, usually with just *one* in capital letters. Then write the first name and middle name (if any), not in capitals.

Example: Ana’s father’s name is Gomez and her mother’s name is Romero. She prefers to use both names, hyphenated. She writes “GOMEZ-Romero, Ana” on the form.

On question 2, write the real address of the beneficiary, even if he or she lives in the United States and does not have lawful immigration status.⁵⁶

WARNING: If the beneficiary has been previously excluded, deported or removed, this information could lead to a “reinstatement of removal” and it may be best not to file the petition.

Also, if a married couple does not live together, USCIS will suspect that the marriage is a fraud. See § 3.10.

2. Question 7: Other Names Used

Write any other names used, including maiden name, previous name, false names, or complete formal name if the person did not list it at Question 1.

3. Questions 8, 11 and 12: Date of Marriage; Prior Marriages

The prior marriage must have been legally terminated before the date of the current marriage. If it was not, the couple is not legally married and must re-marry before proceeding with the petition.

WARNING: If a client has ever used a false name, he or she should be asked about when and how that name was used, as it may mean the client is inadmissible for visa fraud, has been convicted of crimes that make him or her inadmissible, has been previously deported under a different name, or has made a false claim of U.S. citizenship.

Also, USCIS may be particularly suspicious of people who have been married before and may question them about the marriage.

⁵⁶ USCIS has accepted petitions with PO Box addresses, however, so that may be sufficient at this stage, although it could also result in an initial rejection.

B. Section B, Questions 10, 13 and 14, Concern the Petitioner’s Immigration Status

1. Question 13: Naturalized citizens

The number from the naturalization certificate is the seven-digit number at the top right hand side. The date and place of naturalization are listed on the certificate.

2. Questions 10 and 14a: Lawful permanent residents

The alien registration number is the eight or nine-digit number beginning with “A” on the green card. The date of admission or adjustment on older cards is on the back, and on newer cards on the front. For “class of admission,” write how the person immigrated: cancellation of removal, amnesty, 2nd preference visa (F2A or F2B), etc. The “class of admission” is on the front of the card as a code under “category.” You can find current classification codes as well as references to older versions in the Code of Federal Regulations at 22 CFR § 42.11.⁵⁷

C. Section C Asks for Information about the Beneficiary (The Relative Who Wants to Immigrate)

1. Question 14: Entry into United States

This question has three parts. First, you must mark whether the beneficiary last entered the United States legally on a visa, or simply crossed the border without papers. If the person entered illegally, write “entered without inspection” or “EWT” and go on to question 15.

If the person entered legally, he or she probably entered with a border crossing card, an **I-94 card** or an **I-94** that was processed electronically at the Port of Entry.

Reading an I-94 Card. Prior to April 30, 2013, an I-94 was a small white cardboard card marked I-94 that was loose or stapled to the passport. Since April 30, 2013, I-94s have been processed electronically. You must read the card or the electronic printout equivalent to answer question 14. Look at the sample old I-94 card and the new electronic processing print-out in **Appendix 2-C**.

If the beneficiary entered before April 30, 2013 but does not have the card, you can mark it “lost” or file an I-102 form to request a copy. It is sufficient to mark it “lost” where the numbers would go, if the person has other documentation of legal entry, such as a stamp in his or her passport.

If the beneficiary entered after April 30, 2013 and the I-94 was processed electronically, it can be accessed online and printed out.⁵⁸

The first part of question 14 asks what type of nonimmigrant visa the person used to get into the country. This should be written by hand on the I-94. This will often be a visitor (noted as “B-1” for business visitor or “B-2” for tourist) or student (noted as “F-1”) visa. You can also find the visa stamp in the person’s passport.

⁵⁷ The admission codes can also be found in the USCIS Adjudicator’s Field Manual, Appendix 23-7 at www.uscis.gov/sites/default/files/ocomm/ilink/0-0-0-32054.html.

⁵⁸ See <https://i94.cbp.dhs.gov/I94/consent.html>.

The second part asks for the identification number and arrival date from the I-94. This is the printed number with 11 digits on the top left-hand corner of the I-94 card, if the person entered prior to April 30, 2013. Otherwise it is clearly indicated on the I-94 electronic print-out as the “Admission (I-94) Record Number.”

The third part asks for the date that the person’s permission to stay in the United States ended or will end. This handwritten date appears on the I-94 card or possibly in the passport, unless the person was given “duration of status” indicated by “D/S” which is usually the case for F-1 and J-1 visa holders, but not always. In that case, you can indicate D/S or “duration of status” on the petition. Also, it is possible that your client extended her stay, in which case there may be a notation on the I-94, or there may be an additional I-94 card or I-797 Notice of Action which indicates an approval of an extension of stay. If you are not certain when status actually expired, it is better to leave this *blank* as a wrong answer could lead USCIS or the U.S. Department of State (DOS) to believe the person has accrued more or less unlawful presence than is actually the case, and use the petition as evidence of that in a way that could harm the beneficiary.

If the I-94 Card Is Lost. If your client will immigrate through consular processing, and entered prior to April 30, 2013, it is not that important to have the I-94, unless it is evidence you need to show the client did not accrue too much unlawful presence. Just write “lost” where the numbers would go. If your client will immigrate through adjustment of status, you must have the I-94 or some other official proof of your client’s legal entry, unless the client can adjust under INA § 245(i) or some other special provision that does not require proof of lawful entry. See **Chapter 3**. An admission stamp in his or her passport would serve as proof of lawful entry. You may be able to obtain a replacement I-94, particularly for entries in the last ten years or so prior to April 30, 2013, by filing a Form I-102 with the appropriate USCIS service center. Again, post-April 30, 2013 I-94s should be easily accessed online.

If the I-94 Contains Erroneous Information. If your client was issued an I-94 with incorrect information, he or she may request that the Customs and Border Protection (CBP) office at the port of entry that issued the I-94 correct the I-94. This is often done informally by contacting that office and providing documentation regarding the error. Sometimes, for example, the CBP officer looks at the wrong visa in the passport, and admits the person in the wrong status (someone is admitted under their old B-2 tourist visa, instead of the newer student or worker visa, for example).

If your client entered with a **border crossing card**, write “Border crossing card” and the date and place of last entry.

2. *Question 16: Immigration Court*

Mark “yes” if the person has ever appeared before an immigration judge. If the person is not sure of this or other information, *do not complete the form!* It could lead to a request for an interview, an arrest and/or reinstatement of removal (quick deportation without a hearing) against your client. Make sure you know what happened to your client before filing.

You can often find out by having their fingerprints checked by the FBI. The FBI printout *may* reveal any arrests and deportations by the Border Patrol, CBP, ICE or legacy INS. If the person

has an A number, or is unsure as to whether he or she has appeared before an immigration judge or may have had an “expedited removal” from the border, file a Freedom of Information Act (FOIA) request, or more than one FOIA request—one with each agency that might have information about the person.

NOTE: For detailed information about filing FOIA requests with different DHS agencies, see **Appendix 2-D, A Step-By-Step Guide to Completing FOIA Requests**. This Guide will help you determine the DHS agency most likely to have the information you need and provide you with specific instructions about how to complete the request.

Bottom Line: Do not complete the I-130 until you are certain you know the correct answer to this question, and that your client will not be harmed by the correct answer!

WARNING: Individuals Previously Removed or Deported Are Subject to Reinstatement of Removal under INA § 241(a)(5). A person who has been removed in the past generally cannot adjust in the United States based on a family visa. If the person attends an adjustment interview ICE may simply arrest and remove (deport) the person.

3. Question 17: Beneficiary’s Spouse and Children

List *all* children, including children born out of wedlock, adopted children, stepchildren, and even children who do not plan to immigrate. If either the husband or wife had a child with someone else, other than the spouse, close to the time of the marriage or during their marriage to the petitioner, the USCIS is likely to be suspicious that the marriage is a fraud, and you will want to be prepared to provide explanations.

Also, if the beneficiary had a child outside the United States during the time the beneficiary is claiming to have been inside the United States, this will also raise questions relating to unlawful presence and other potential grounds of inadmissibility. If the petitioner is the beneficiary’s spouse, a birth abroad of one or more of the couple’s children could raise questions regarding the possible abandonment of permanent residency by the petitioner, depending on how long the petitioner was outside the country.

4. Question 20 is for persons with a different native alphabet, e.g., Chinese or Arabic

5. Question 22 asks how the person will immigrate

If your client will adjust status, write the closest local USCIS office to your client’s residence. Adjustment of status is discussed in **Chapter 3**. If the person will go through visa processing at a U.S. consulate, write the city where the consulate is located. Consular Processing is discussed in detail in **Chapter 4**. See the box below for instructions on which consulate the client can use. Even if the client will be adjusting status, you must still indicate on the form where (which consulate) the client intends to apply for an immigrant visa should the client be found ineligible for adjustment of status.

PRACTICE TIP: Choosing the Consulate. The USCIS no longer sends the approved petition directly to the consulate, but rather to the State Department’s National Visa Center (NVC). The NVC normally directs which consulates have jurisdiction over individual cases. “Orphan cases” (where there is no U.S. consulate serving, such as in Iran, Libya, Afghanistan, Lebanon, etc.) are usually directed to designated consulates in other countries. Contact the NVC, visit the State Department’s website, or contact an experienced practitioner/agency for guidance about current State Department policy on discretionary acceptance of out-of-district visa cases.

The immigrant visa will normally be processed by the U.S. consulate with jurisdiction (legal control) over the area where the beneficiary resides or last resided before entering the United States. This is true even if the person was born in or is a citizen of another country.

Example: Jacques was born in France but lived in Portugal for the years immediately before coming to the United States. He will process his visa at the U.S. consulate in Portugal.

USCIS will send the petition to whatever consulate you name on Question 22 of the I-130. But the consulate will not accept the petition unless it believes it has jurisdiction, or it can be convinced to accept a “third country” case. It will forward the visa petition to a consulate, which it believes is the right one, or notify you that another consulate must be found.

Small countries often have only one U.S. consulate office (the U.S. Embassy), located in the capital. If your client resides in a large country with more than one U.S. consulate and you are not sure which one should handle it, consult the Foreign Affairs Manual (FAM) or the U.S. State Department website “Find U.S. Embassies & Consulates” link at www.travel.state.gov. You can also find the FAM online at <https://fam.state.gov/>. The FAM is discussed in **Chapter 4**. You can also go to the U.S. Consulate’s website for that country, click on “immigrant visas” and usually the website will indicate which consulate in the country handles processing of immigrant visa applications.

Sometimes there are problems returning to the home country. If your client is afraid to return to the country of last residence, it is possible that another consulate might accept the case on a humanitarian basis. Usually it takes a great deal of effort to convince a consulate to do this. If there is no U.S. consulate in your client’s country of last residence (for example, as in Iran), another consulate will be handling those cases. In either situation, contact an experienced visa practitioner or resource center for guidance.

D. Section D Asks for Information about Other Petitions and Your Office

1. Question 1 asks for information about other petitions that are being submitted by the same petitioner at this time. For example, if the petitioner is filing separate I-130 petitions for his or her two children, the name and relationship of each child would need to go on the other child’s petition under Section D.
2. Question 2 asks for information about other petitions that may have been submitted by the same petitioner in the past.

3. Anyone who assists a person to complete a form should include their information as “Person Preparing Form.” Additionally, if your office will represent the person, you should also submit a Form G-28. The VOLAG number is an official number USCIS may have given your agency.

§ 2.13 The G-325A and Photograph: Required in a Petition for a Husband or Wife

If the visa petition is for a *husband or wife*, you must submit other forms in addition to the I-130. The husband and wife each must submit a form G-325A and a photograph. USCIS will use these to run a background check on the couple, as a guard against marriage fraud.

The G-325A Form. The USCIS uses the G-325A form to obtain background checks on the husband and wife here and in other countries. The form asks for much of the same information that appears on the I-130. *Be sure to check the G-325A and the I-130 to make sure that you give the exact same information on both forms.*

The locations where each spouse actually lived and worked during the last five years may raise additional questions and problems, such as abandonment of residency for the LPR petitioner, marriage fraud issues for spouses living separately, public charge, work without authorization, etc., so it is important to not only record the information correctly, but to analyze it completely for additional legal issues.

You will see the following section to the left of where the signature goes. Mark the box that says “Other” and indicate you are filing an I-130 petition, as follows:

This form is submitted in connection with application for:	
<input type="checkbox"/> Naturalization	<input type="checkbox"/> Status as Permanent Resident
<input checked="" type="checkbox"/> Other (Specify): <i>I-130 visa petition</i>	

The section below that, which asks the person to write his or her name in non-Roman alphabet, refers to people whose native language employs a different alphabet, for example, Chinese or Arabic.

Photographs. The husband and wife each must submit a color, full-frontal facial image, passport-style photograph of him or herself. Clients who are adjusting status will need two to six identical passport-style photos.⁵⁹ See the Department of State’s photo requirements online at <http://travel.state.gov>.

⁵⁹ The I-485 adjustment of status application, the I-131 advance parole travel permission application and the I-765 employment authorization application each require the submission of two photos. Some who have filed all three together, as is usual for a family adjustment of status application, have successfully submitted fewer than six photos. Others have had adjustment packets rejected for not submitting enough photos.

The next step is to obtain documents that will prove the clients' family relationship and immigration status of the petitioner.

§ 2.14 Documenting the Visa Petition

In every immigration case, you must present documents to prove eligibility. In visa petitions, it is absolutely required that you present documentary proof of the facts.

Two facts must be proved in a visa petition: the family relationship between the petitioner and the beneficiary, and the immigration status of the petitioner. This section will discuss how to obtain and prepare documents that prove these facts.

Many of the rules about documentation are found in the regulations. Other rules are found in the instructions attached to each government application form; these instructions are supposed to have the same effect as a regulation. See 8 CFR § 103.2.

WARNING: Forms sometimes contain incomplete or out of date information, especially about application fees and filing addresses. The way to get the most current information on forms and fees is from the USCIS website, which is found at www.uscis.gov. You can also look up the name of the form (for example, "I-130") in the latest version of the regulations, 8 CFR § 103.7. (Note, however, that fees may have changed since the regulation was published).

If you do not follow these rules in preparing documents, USCIS may refuse to accept your petition or application. On the other hand, USCIS also is required to follow its own regulations. If you have to fight USCIS to make them accept your documentation, the fact that you have followed the regulations will be your main weapon.

An application may be "rejected" and returned without assigning a priority (filing) date, if it is unsigned, undated or lacks the correct filing fee. Initial evidence for a relative visa petition is a signed, dated and completed I-130, the correct fee, proof of the petitioner's status and proof of the relationship between petitioner and beneficiary. USCIS will generally not deny a case for lack of initial evidence, but rather will give the individual 12 weeks to submit the missing evidence. If the evidence is not received in that period, the USCIS will deny the application. The normal processing time will be extended to reflect any delay caused by submitting required evidence.⁶⁰

§ 2.15 Documents to Prove Family Relationship?

Family relationship must be proved through official birth, death, marriage and divorce certificates. Different documents are required depending on the relationship.

1. **To file a visa petition for a spouse**, the petitioner must show two things to prove the family relationship: (a) that the petitioner has a **legally valid marriage** to the beneficiary and (b) that the marriage is "**bona fide**," in other words at the time of the marriage, the

⁶⁰ 8 CFR §§ 103.2 (b)(1), (b)(8), (b)(10).

spouses intended to live in a marital relationship, not just get married for the sole purpose of immigration benefits. To prove that the marriage is **legally valid**, the couple must provide a marriage certificate issued by civil authorities and proof of the termination of all previous marriages by both the beneficiary and petitioner.⁶¹

To prove that the marriage is “bona fide” a variety of documents are acceptable. If the couple has a child together, the child’s birth certificate listing both parents is usually sufficient. If there are no children together, photos of the couple together, tax returns, joint bank accounts, deed to home, rental/lease agreements, insurance, cards and letters to both, etc. are all potentially good documentation of the bona fides of a relationship. It is usually a good idea to submit several such documents.

Example: Zsa Zsa has been married eight times before this one. One of her husbands died and the other marriages ended in divorce. She now wants to immigrate Ronald, whom she has just married. What documentation must she submit to prove family relationship?

Zsa Zsa needs her marriage certificate with Ronald, seven divorce certificates and one death certificate. Ask Ronald if this is his first marriage. If not, you also need proof of termination of all of his previous marriages.

2. **To prove a parent-child relationship**, submit the child’s birth certificate showing the parent’s name.⁶² If the parent is a father, submit the marriage certificate to show that the child was born in wedlock, along with proof of termination of any prior marriages of the father and mother.

Stepchildren, adopted children, and children born out of wedlock all may require additional documents.⁶³

3. **To prove a sibling (brother/sister) relationship**, submit both siblings’ birth certificates showing that they have at least one parent in common.⁶⁴

Example: Jack and Jill both have the same mother, but different fathers. Their mother’s name appears on each of their birth certificates. This is sufficient proof. If instead they both have the same father but different mothers, more documentation is required.⁶⁵

a. Obtaining documents in the United States to show family relationship

Your clients can give you valuable help in obtaining documents. They may already have certified copies of important documents, or they may be able to obtain them themselves or through relatives.

⁶¹ 8 CFR § 204.2(a)(2).

⁶² 8 CFR § 204.2(d)(2)(i).

⁶³ 8 CFR § 204.2 (d)(2)(ii)–(vii).

⁶⁴ 8 CFR § 204.2(g)(2)(i)–(iv).

⁶⁵ See 8 CFR § 204.2(g)(2)(iv).

To obtain a certified copy of a U.S. birth, death, marriage or divorce certificate, contact the appropriate state or county agency where the event took place. Find out the correct fee, if any; whether the fee must be paid by money order instead of personal check; and whether the person needs to sign a release form. You may also want to find out how long it will take to get the document; and, if necessary, if there is a way to obtain the document more quickly.

An excellent resource guide is *Where to Write for Vital Records*. It provides information on how to get records from all 50 states, and the information is updated each year. It can be downloaded from the website of the Centers for Disease Control and Prevention at www.cdc.gov/nchs/w2w.htm.

NOTE: You must get a certified copy of a document from a government agency. Hospital birth certificates, church or “souvenir” (issued on same day of marriage) marriage certificates, and funeral home death certificates generally will not be accepted, unless you show that the government certificate is not available and other conditions are met.⁶⁶

b. Obtaining documents from other countries

Obtaining documents from other countries can be difficult. Again, your client is probably the best source of information and help in getting the documents. Often the client can contact friends or family members who will obtain the papers and send them. If not, you must phone or write the government agency that keeps documents in the country. It may take several weeks to receive the document.

NOTE: Consulting the FAM. You can find out which type of document is considered acceptable and also get ideas for how to locate the document by consulting the U.S. Foreign Affairs Manual (FAM) or the State Department’s Visa Reciprocity and Country Documents Finder. The FAM is the State Department regulations and internal instructions for U.S. consulates in other countries. See **Chapter 4**. The State Department’s website provides a country-by-country discussion of what foreign documents are available and the sources of those documents which are accepted by the U.S. government. You can access this information online by going to <https://travel.state.gov/content/visas/en/fees/reciprocity-by-country.html> .

On the website, you simply need to enter the name of the country where the event happened that you must document (i.e., the birth, death, marriage, adoption, etc.) and then choose the type of documents for which you are searching. You will find instructions on how to obtain each required document. Follow the requirements exactly.

If your client will eventually immigrate through a U.S. consulate abroad, you will have to produce documents according to the State Department requirements. It may be more efficient to get these documents according to the requirements now.⁶⁷

⁶⁶ See generally 8 CFR § 204.1(g); 8 CFR § 103.2(b)(1).

⁶⁷ Note, however, that the police certificates required for consular processing may in practice not actually be presently required (such as for Mexico), even though the DOS website states they are available. Also, if

Some countries may provide “short form” birth certificates that do not list both parents. USCIS will not accept these birth certificates.

Some documents simply are not available, because the government does not keep them or because the place where they were stored has been destroyed. If the document is not available, you need to prove that it is unavailable and obtain a substitute document.

Here are suggestions to prove a document is not available. Consult 8 CFR § 204.1(f) for the regulation on the subject.

4. **See if the U.S. Foreign Affairs Manual (FAM) lists the document as unavailable**, for example because natural disaster or war destroyed the records, or the FAM considers the records to be untrustworthy. If the FAM lists the document as unavailable, USCIS will probably permit you to submit a substitute document.
5. **If the FAM does not say the document is unavailable** (e.g., a birth certificate), you must submit an original statement on official government letterhead that states the reason that the document does not exist and whether similar documents (e.g., a church record of birth) are available for the time and place in question.

Once you have shown that the document is not available, you can present secondary evidence such as medical records, school records, and religious documents prepared around the same time as the missing primary document, or even affidavits. There are rules about what documents can be submitted. See, for example, 8 CFR § 204.1(g)(2) for the rules about substitute documents for a birth certificate. Remember, the USCIS and State Department will not accept this secondary evidence unless you have shown that the preferred document is not available.

§ 2.16 Making Proper Copies of Documents

The paper that you will finally receive, whether it is from the United States or another country, will probably be a photocopy of the document you requested, with an original *certification stamp or signature* from the government office. This is your “original” document. There are two things to remember about original documents:

A. Do Not Submit Original Documents to USCIS Unless You Are Told to Do So

Instead of sending the original document, USCIS generally permits the filing of photocopies instead of original documents with applications and petitions, and the applicant does not need to individually certify the copies.⁶⁸ USCIS views the signing of the form or application as certification under penalty of perjury that all evidence submitted with a form or petition is true and correct. It is important to make sure that legible photocopies are submitted with the

a police certificate can only be obtained via a personal appearance by the applicant, the NVC will usually allow consular processing to proceed and the applicant may obtain the police clearance when he or she departs for consular processing for the interview abroad. Careful timing and coordination is required.

⁶⁸ 8 CFR § 204.1(f)(2).

application. Where USCIS determines it needs to review the original of a document, the applicant generally has twelve weeks in which to submit the original.⁶⁹

NOTE: Although submitting originals is not recommended, if originals are submitted instead of copies, it is possible that you may be able to have the originals returned to you. To request the return of original documents, use the Return of Original Documents Form G-884.

B. Keep Original Document in a Safe Place and Be Prepared to Show It at Interview

Keeping a client's original document in the office is a major responsibility, and losing it can be a nightmare. If at all possible return all original documents to the client and ask the client to keep them safe. If you must keep original documents, it is important to set up a procedure to protect the documents. Many offices, for example, prefer to keep original documents in an envelope that is securely fastened to the client's office file.

§ 2.17 Making Certified Translations of Documents

All documents which are not in English must be submitted to USCIS with English translations made by a person who is competent to translate. Summary translations are officially no longer accepted, but in practice if a birth or marriage certificate summary contains all pertinent information desired by USCIS, it often will be considered sufficient.

All foreign language documents must be accompanied with a full English translation.⁷⁰ The translation document will need to be accompanied by a signed certificate of translation stating the following: "I certify that I am competent to translate from [the original language] to English and that the above is a correct and true translation to the best of my knowledge and belief." Note that anyone who is competent to translate may make the translation; it does not have to be an attorney, BIA accredited representative or notary public.

However, neither the petitioner, the beneficiary, nor their representative should translate the document *unless* a third party can then certify its accuracy separately. The translation does not need to be certified by the same person who translates the document. Therefore, it is okay for anyone, including the petitioner, the beneficiary, the representative or an unknown person to have translated the original document, so long as a third party certifies it as such: "I certify that I am competent to translate from [the original language] to English, that I have reviewed the attached translation and the original document and that the above is a true and accurate translation of the original English document." The certification should be signed and dated.

PRACTICE POINTER: Reviewing the Documents. After receiving the documents from your client, review them carefully for any inconsistencies or unusual facts. For example, is the date of the current marriage of the petitioner to the beneficiary *after* the final judgment date of the petitioner's divorce to her first husband? If not, the present marriage may be invalid and the

⁶⁹ 8 CFR § 103.2(b)(5).

⁷⁰ 8 CFR § 103.2(b)(3).

couple may need to remarry before submitting the petition. For children, it is extremely important to note whether the birth certificate was issued immediately following the birth of the child. “Delayed” birth certificates may not only be considered unreliable, but they also can indicate fraud. Sometimes people are mistaken regarding the facts they tell you, and you must be certain the information on the form is consistent with the documents and that the documents to be submitted do not raise additional legal issues or concerns. You can also help your clients not to submit well-meaning but fraudulent petitions for relatives or friends.

§ 2.18 Documenting the Immigration Status of the Petitioner

There are several ways to prove the petitioner’s status as a U.S. citizen or lawful permanent resident. However, you should never submit an original naturalization certificate or lawful permanent resident card to USCIS, because of the risk that it might get lost.

A. Proof of U.S. Citizenship

The regulations are very specific about what documents prove U.S. citizenship.⁷¹

A person born in the United States must submit either a copy of his birth certificate, or a valid U.S. passport issued for ten years after the petitioner was eighteen; or a valid U.S. passport issued for five years before the petitioner turned eighteen; or a statement by a U.S. consular officer certifying that the petitioner is a U.S. citizen and has a valid U.S. passport. If the Petitioner does not have any of these documents, he can show school records, baptismal certificates or other documents, if available. The regulation lists other documents that may be submitted to prove citizenship.

A U.S. citizen born outside the United States should submit a copy of his naturalization certificate, certificate of citizenship, or U.S. passport issued for a ten-year period.⁷²

B. Proof of Lawful Permanent Residency

You may submit a photocopy of the person’s permanent resident card (“Alien Registration Card”). Or you may submit a copy of a passport with a stamp indicating permanent resident status, or a judge’s order or a Form I-797 showing that the person has been granted adjustment of status. If the petitioner has lost his or her green card, you may have to submit some document showing the green card was granted, plus proof that an Application to Replace Permanent Resident Card on Form I-90 has been filed. Sometimes, USCIS may also ask whether or not the card has been reported stolen either to them or to the police, so you may need to provide an explanation of how you believe the card was lost.

⁷¹ Look at 8 CFR § 204.1(g)(1).

⁷² Other documents may also be used, please see 8 CFR § 204.1(g)(1).

§ 2.19 Filing the I-130 Packet

Once you have the I-130 completed and the supporting documentation, you are ready to send the whole I-130 packet to USCIS. *Always* send the packet via certified mail/return receipt requested or by a courier who will provide you with proof of delivery such as Federal Express or DHL.

The I-130 instructions contain a list of what items must be submitted.

At the present time, the requirements for an I-130 packet are:

1. I-130 visa petition;
2. Proof of petitioner's immigration status;
3. Proof of family relationship;
4. If the petition is for a married couple, one passport-style photo and a G-325A for both husband and wife;⁷³
5. Check made out to "U.S. Department of Homeland Security" for the correct fee; and
6. Notice of Entry of Appearance as Attorney or Accredited Representative on Form G-28, if filed by attorney or accredited representative;
7. If a spousal petition, it is essential to include evidence that the marriage is bona fide.

Where to File? Where you send this packet depends on where the petitioner lives and whether or not the beneficiary is eligible to apply for adjustment of status on form I-485 at the same time.

Chapter 3 will discuss who is eligible to adjust status. Please check the USCIS website at www.uscis.gov/i-130 for exact mailing addresses, as these will differ depending on whether you use the postal service or send the petition via express mail or courier delivery.

KEEP A COPY! USCIS or the Post Office could lose your package. Never submit any documents to USCIS without making a copy for your files. If you are helping someone that you will not represent, make sure that the person keeps a copy. Keep your receipt from the certified mail/return receipt requested mailing or courier proof of delivery with the copy. If there is ever a problem, this will be your proof of filing and priority date.

§ 2.20 When Is a Visa Petition Terminated or No Longer Valid?

A. Automatic Revocation of a Visa Petition

Pursuant to 8 CFR § 205.1(a)(1)–(3), approval of a visa petition as the relative of an U.S. citizen or of a lawful permanent resident is automatically revoked retroactive to the original approval date if:

⁷³ Note that for transgender spouses, the regulations will require a photograph that "reflects a good likeness of, and satisfactorily identifies the applicant ... agree[s] with the submitted identification evidence and reflect[s] the applicant's current and true appearance." See USCIS Interim Policy Memorandum, *Adjudication of Immigration Benefits for Transgender Individuals; Addition of Adjudicator's Field Manual (AFM) Subchapter 10.22 and Revisions to AFM Subchapter 21.3 (AFM Update AD 12-02, (Apr. 10, 2012).*

1. The State Department terminates the beneficiary's registration for a visa because the alien failed to apply for an immigrant visa within one year after being notified that a visa was available and the beneficiary failed to prove to the Service, within two years of the notice, that the failure to apply was due to circumstances beyond the alien's control.
2. The filing fee and any other charges are not paid within 14 days after notifying the petitioner or beneficiary that the original check was returned as not payable.
3. The petitioner files a formal notice of withdrawal with any Service officer who is authorized to approve such petitions;
4. Any of the following events happen before the beneficiary enters the United States after consular processing or, if in the United States, before the final adjudication of the adjustment of status:
 - a. For the beneficiary of a spousal petition, if the requisite marriage terminates by divorce or annulment;⁷⁴
 - b. Upon the marriage of a person granted second-preference status as the son or daughter of a lawful resident alien;⁷⁵

Example: Juana, an LPR, petitions her daughter Patricia (2B). Patricia gets married. Because LPRs cannot immigrate married sons or daughters, the petition is terminated.

5. A petitioner legally terminates his status as a lawful permanent resident, except when such termination occurs through the petitioner's naturalization.

Example: Carlos LPR petitions his wife Lorena (2A preference). Carlos is convicted for drug trafficking and deported for an aggravated felony. The petition for Lorena is terminated.

Example: Aaron LPR petitions his wife Meredith (2A preference). Aaron becomes a U.S. citizen. The petition is not terminated because Meredith becomes an immediate relative.

For adjustment of status, the petition is automatically revoked when the circumstance that triggers revocation occurs before a final decision on the application. In consular processing cases, the petition is revoked if the circumstance occurs before the beneficiary or self-petitioner commences her or his journey to the United States.⁷⁶

Example: Carolina, an LPR, petitioned a number of years ago for Austin who lives in Mexico, as her unmarried son (preference category 2B). Austin goes to his consular appointment and his application is approved. After getting his visa but before going to the United States, he gets married to his girlfriend, Barbara. Austin's visa application is revoked because he no longer qualifies as a 2B beneficiary because he is no longer is the *unmarried* son of an LPR.

⁷⁴ Note that if the beneficiary is or was the victim of "battery or extreme cruelty" at the hands of the petitioner, he or she may file a VAWA self-petition on Form I-360 per INA § 204(a)(1)(A)(iii) and recapture the priority date from the I-130 previously filed by the petitioner.

⁷⁵ See 8 CFR § 205.1(a)(3)(i)(I); INS Adj. Filed Manual 21.4.

⁷⁶ 8 CFR § 205.1(a)(3).

There is no provision for appeal of an automatic revocation of a visa petition, and no requirement that USCIS give notice of revocation or take any other action to effect the revocation of a petition that is automatically revoked.

PRACTICE TIP: Effect of an Annulment. Depending on the reasons for annulment and on the pertinent state law, an annulment may “relate back” to the date of marriage as if the marriage had never happened.⁷⁷ The courts apply this principle for immigration purposes where it promotes justice and the intended outcome of the law.⁷⁸ For example, in the case of a marriage between a USC or LPR and a noncitizen, a retroactively applied annulment of the marriage forming the basis of the immigrant petition may lead to the revocation of the petition and the denial of any subsequent application for adjustment or for an immigrant visa.⁷⁹ The main factor considered by the courts is whether the retroactive application of the annulment would serve the interest of justice. Therefore, where there is no evidence that a marriage was entered into for the purposes of applying for an immigration benefit, an annulment may not be applied retroactively.⁸⁰ Similarly, the annulment of a prior marriage may or may not be applied retroactively for purposes of validating the current marriage that is the basis for an immigrant petition, depending on whether or not the courts find that the annulment was sought for the purposes of gaining an immigration benefit.⁸¹

Example: Karthik, a U.S. citizen, files an I-130 for his wife, Sureikha. After Sureikha enters the United States and becomes an LPR, she and Karthik obtain an annulment. The annulment may or may not be given retroactive effect, causing the revocation of Sureikha’s LPR status, depending on whether or not it is determined that the marriage was entered into for immigration purposes.

The case is similar for the beneficiary of a second preference visa petition. The son or daughter of an LPR must be unmarried at the time the LPR parent files the immigrant petition and until the beneficiary becomes a lawful permanent resident. Such a visa petition may, therefore, be revoked if the beneficiary son or daughter married after the LPR filed the visa petition, even if the marriage was later annulled. Whether or not the annulment is given retroactive effect may depend on whether or not it is found to have been sought in order to grant an immigration benefit to the beneficiary. An annulment will, therefore, not be given retroactive effect in order to cure an otherwise invalid application for LPR status.

⁷⁷ *Sefton v. Sefton*, 45 Cal.2d 872 (1955).

⁷⁸ See West’s Ann.Civ.Code, §§ 84, 85, 86.

⁷⁹ See *Matter of Samedi*, 14 I&N Dec. 625 (BIA 1974); *Matter of V--*, 6 I&N Dec. 153 (BIA 1954); *McCreath v. Holder*, 573 F.3d 38 (1st Cir. 2009); *Nakamoto v. Ashcroft*, 363 F.3d 874 (9th Cir. 2004).

⁸⁰ See *Matter of T--*, 8 I&N Dec. 493 (BIA 1959).

⁸¹ See *Matter of Magana*, 171 I&N Dec. 11 1 (BIA 1979) (court refused to give retroactive effect to a prior marriage, finding that beneficiary misrepresented his marital history for purposes of obtaining an immigrant visa); see also *Matter of Astorga*, 17 I&N Dec. 1 (BIA 1979) (upheld retroactive application of annulment of previous marriage, finding that beneficiary did not obtain immigration benefit through fraud or misrepresentation).

Example: Aminata, an LPR, files an I-130 petition for her unmarried daughter, Binta. Binta subsequently marries, while she waits for her priority date to become current. When an immigrant visa becomes available for her, she goes to her consular interview and enters the United States. Once in the United States, she obtains an annulment of her marriage. Her visa petition may be revoked and she may be placed in removal proceedings.

B. Relief from Revocation When the Petitioner Dies

In 2009 the INA was amended to add § 204(l) relating to the adjudication of immediate relative or family-based immigrant visa petitions, and all related applications, upon the death of the qualifying relative, that is, the petitioner or the principal beneficiary. Pursuant to § 204(l), both the principal and the derivative beneficiaries of a pending or approved I-130 visa petition (whether in the immediate relative category or one of the preference categories) may request “relief” from revocation of the petition should the petitioner or the principal beneficiary/applicant die before the final adjustment of status application is adjudicated under certain conditions. The death of an I-130 petitioner does not automatically revoke the underlying petition and neither does the death of the principal beneficiary/applicant revoke the derivative beneficiary’s application if certain conditions are met.⁸² While USCIS at the time of this writing considers approval of a petition or adjustment application under § 204(l) a “discretionary” adjudication, it has stated that the relief will be broadly approved. Eligible beneficiaries must affirmatively request this relief from USCIS. There are currently no regulations and no form exists to apply for § 204(l). Instead, USCIS presently requires notification by letter. Check current procedures on the USCIS website under “§ 204(l)” as these will likely evolve.⁸³

Residence Requirement for Qualifying Beneficiaries. In order to qualify for this protection, the beneficiary of a pending or approved I-130 petition must have resided in the United States when the qualifying relative died and must continue to reside in the United States on the date the decision on the pending petition or application is made. This does not mean that the beneficiary must have been physically present in the United States when the qualifying relative died, but simply that the beneficiary’s actual residence was in the United States. Additionally, if any one of the beneficiaries of a petition meets this residence requirement, then all the beneficiaries meet it as well. It is not necessary for each beneficiary to meet the residence requirement on their own. Therefore, if it is the principal beneficiary who has died, the petitioner may continue to seek approval of the petition so long as at least one derivative beneficiary meets the residence requirements. However, note that this does not give derivative beneficiaries any right to the petition. The petitioner continues to retain his or her right to withdraw the petition at any time.

⁸² See INA § 204(l); see also USCIS Policy Memorandum, *Approval of Petitions and Applications after the Death of the Qualifying Relative under New Section 204(l) of the Immigration and Nationality Act*, (Dec. 16, 2010).

⁸³ As of this writing, current § 204(l) instructions may be found at: www.uscis.gov/green-card/green-card-through-family/basic-eligibility-section-204l-relief-surviving-relatives.

If a petition beneficiary has obtained § 204(l) relief under this new provision of the INA but does not qualify for adjustment of status, he or she may leave the United States to undergo consular processing.

Waivers of Inadmissibility. This protection extends not only to the underlying I-130 visa petition but to the adjustment of status and any other related application based on that I-130 petition, such as a waiver of inadmissibility. Therefore, USCIS has the discretion to approve an inadmissibility waiver application, or any other form of relief from inadmissibility, regardless of whether or not the qualifying relationship necessary to qualify for the waiver application has ended as a result of the relative's death. Additionally, it is not required that the waiver application was pending when the qualifying relative died. The waiver application can be filed after the petitioner's death as long as the surviving beneficiary qualifies under INA § 204(l). The death of the qualifying relative will be deemed to be the equivalent of a finding of extreme hardship necessary for some waivers.

The Affidavit of Support. The death of the qualifying relative does not relieve the alien beneficiary of the requirement to have a sponsor file the Affidavit of Support on Form I-864. Therefore, if the sponsor on the Affidavit of Support dies, another individual who qualifies as a "substitute sponsor" must submit a Form I-864 under INA § 213A.

Motion to Reopen and Humanitarian Reinstatement in Case of a Denial. This new rule applies to any petition or application adjudicated on or after October 28, 2009, even if it was filed before that date. For petitions or applications that were denied before that date due to the death of either the petitioner or the principal beneficiary, the surviving beneficiary may file an untimely motion to reopen with the proper filing fee and request that the pending petition or application be adjudicated according to INA § 204(l).⁸⁴ Additionally, the USCIS has found that it would be appropriate to reinstate the approval of an immediate-relative or family-based petition that was automatically revoked upon the death of the petitioner or the principal beneficiary before October 28, 2009, if the beneficiary was residing in the United States upon said death and continues to do so.⁸⁵ Also, if a petition or application that should have been adjudicated in compliance with INA § 204(l) was denied on or after October 28, 2009, USCIS must reopen the case on its own motion for a new decision.

If the beneficiary does not meet the residence requirement of the new INA rules, the USCIS continues to have authority to reinstate the petition on a case-by-case basis under 8 CFR § 205.1(a)(3).

Widows and Widowers. Following from INA § 203(l) described above, as of October 28, 2009, the death of a petitioning spouse is no longer cause for revocation of a family-based immigrant visa petition. Instead, if the U.S. citizen petitioning spouse dies while the visa petition is pending, Form I-130 is automatically converted to a widow(er)'s Form I-360, and the widow or widower becomes a self-petitioner. This is so even when the citizen and his or her alien spouse had been

⁸⁴ See Adjudicator's Field Manual (AFM) 10.21(c)(8) for guidance on this issue.

⁸⁵ See USCIS Policy Memo; 8 CFR § 205.1(a)(3)(iii)(C)(2); AFM chapter 21.2(h)(1)(C).

married for less than 2 years when the citizen died.⁸⁶ Furthermore, in that case, the immigrant will be granted lawful permanent residence and not conditional residence. Therefore, he or she will not be required to file an I-751 Petition to Remove the Conditions on Residence. If the widow or widower remarries before becoming an LPR, he or she loses eligibility for adjustment based on the pending or approved I-360. However, if the prior U.S. citizen spouse had already filed an I-130 before the spouse died, the widow(er) may utilize § 204(l) to request adjudication of the I-130, and proceed to adjust status or consular process under § 204(l) instead of the I-360 widow(er) provisions.⁸⁷

C. Revocation upon Notice

In addition to automatic revocation, USCIS may revoke the approval of an immediate relative or family-sponsored visa petition on grounds other than those specified above.⁸⁸ In such cases, the USCIS must give notice to the petitioner, and the petitioner must have the opportunity to oppose the proposed revocation. If USCIS decides to revoke the petition approval, the agency must explain the reasons for the revocation.

The action to revoke the petition may be initiated by the consular office due to information acquired during their review of the petition or during an interview with the beneficiary. In that case the consular office returns the petition to USCIS with a memo explaining the reasons why they believe the petition should be revoked.⁸⁹ The consular officer may suspend action in a petition case and return the petition, with a report of the facts, for reconsideration by USCIS if the officer knows or has reason to believe that approval of the petition was obtained by fraud, misrepresentation, or other unlawful means, or that the beneficiary is not entitled, for some other reason, to the status approved.⁹⁰

USCIS may find that the petition is not revocable for the reasons stated by the consular office. If that occurs, USCIS returns the petition to the consular office with an explanation of the decision not to revoke the petition.

If USCIS agrees with the consular officer that there is a basis to revoke the petition, the petitioner must be notified by USCIS of intent to revoke the petition. The intent letter should fully explain the reasons for the revocation and give the petitioner a reasonable period of time (usually 30 days) to submit evidence in opposition to the revocation. Additional time may be granted if the

⁸⁶ See § 2.3 above for more information on what happens to widows and widowers with K-1 or K-3 visas, and to their dependents.

⁸⁷ See USCIS Policy Memorandum, *Approval of a Spousal Immediate Relative Visa Petition under Section 204(l) of the Immigration and Nationality Act after the Death of a U.S. Citizen Petitioner*, (Nov. 18, 2015) available at www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-1118_Approval_of_a_Spousal_Immediate_Relative_Visa_Petition.pdf. Note that some of the special provisions for widow(er)s immigrating through I-360s will *not* then apply, such as allowing the widow(er) to bring derivatives, as well as the affidavit of support exemption. A substitute affidavit of support sponsor will be allowed, the same as for other relatives immigrating through § 204(l) provisions.

⁸⁸ 8 CFR § 205.2.

⁸⁹ See USCIS Adjudicator's Field Manual 20.3.

⁹⁰ 22 CFR § 42.43.

petitioner needs it to obtain documentation from abroad or other meritorious reasons. If the petitioner responds with satisfying evidence that the approval should not be revoked and USCIS agrees, the petitioner is advised of the decision to reaffirm the petition by a letter. The petition is then returned to the consular office with copies of the letter of intent to revoke, the petitioner's response, and the letter of reaffirmation. If the petitioner does not overcome the basis for the revocation, or fails to respond timely, USCIS prepares a decision of revocation on Form I-292.

A petitioner may appeal the revocation to the USCIS' Administrative Appeals Office (AAO), and the authorized period for filing the appeal is only 15 days regardless of the type of petition.⁹¹ Automatic revocation cannot be reviewed by the IJ or BIA.⁹² A motion to reopen or reconsider to the AAO is also possible.⁹³

D. Termination for Abandonment

An unfortunately common reason presently for termination of a visa petition by the Department of State in consular processing cases is abandonment or a "failure to apply" for an immigrant visa within one year of availability.⁹⁴ The Department of State has been aggressively pursuing termination of petitions in cases where there is no contact or insufficient contact by the petitioner or beneficiary or attorney/accredited representative in the year since the priority date became current. It is extremely important to file or upload documents, notify the National Visa Center (NVC) of new addresses, notify the NVC of a plan to submit a "provisional waiver" to USCIS in the United States, submit new or updated affidavits of support, or take other action to make clear that the petitioner and beneficiary are still pursuing an immigrant visa and have not abandoned the case. Keep copies of emails to and responses from the NVC as well as other notifications. A termination may be rescinded if the applicant demonstrates that the failure to apply was due to "circumstances beyond the alien's control."⁹⁵

PRACTICE TIP: If the immigrant visa beneficiary is a "preference" beneficiary and has become eligible for adjustment of status while her petition was being processed for consular processing, it is also critical to remain in contact with the NVC, even after the adjustment of status application has been filed with USCIS. USCIS must still request a "visa number" from the Department of State (DOS) before the beneficiary applicant can adjust status and if DOS has terminated the petition for abandonment, e.g., a "failure to apply," the person will be unable to adjust to permanent resident through that petition, unless it is reinstated. This is particularly important for VAWA applicants utilizing the priority date of an I-130 filed by their LPR abuser spouses to subsequently adjust through VAWA. The NVC should be notified of the visa petition beneficiary's intent to apply for adjustment through a VAWA self-petition; the adjustment receipt application should be forwarded to the NVC as well as the adjustment interview notice, to avoid the potentially devastating complications of a termination and loss of the priority date.

⁹¹ See USCIS Adjudicator's Field Manual 20.3.

⁹² *Matter of Zaidan*, 19 I&N Dec. 297 (BIA 1985); *Matter of Aurelio*, 19 I&N Dec. 458 (BIA 1987).

⁹³ See USCIS Adjudicator's Field Manual 20.3(a)(2).

⁹⁴ INA 203(g); 22 CFR 42.83.

⁹⁵ *Id.*

E. Revoked Petitions and Recapturing of Priority Date

If a visa petition is revoked, a new petition filed by the same petitioner for the same beneficiary will *not* acquire the old priority date. However, if the petition is not revoked nor terminated under INA § 203(g), and the petitioner files a new petition for the same beneficiary in the same preference category, the petition can be given the earlier priority date.⁹⁶

Furthermore, if a *different* petitioner files for the same beneficiary, the new petition will not recapture the old priority date.

Example: Santana petitions his wife Clotilde. When the priority date becomes current, Santana is not able to immigrate his wife because they do not meet the affidavit of support requirements. The consulate denies Clotilde a visa. Clotilde and Santana divorce due to the stress of the visa process, and this results in an automatic revocation of the visa petition. If Clotilde and Santana later reconcile, a new petition must be filed, and because the old one was revoked, the old priority date cannot be recaptured.

Example: Clotilde and Santana do not divorce, despite the stress. Santana is promoted the next month and now makes enough money to meet the affidavit of support requirements. He wants to try to immigrate Clotilde again. Santana can recapture the priority date from the first petition because he's the same petitioner of the same beneficiary under the same category and the original petition was not revoked or terminated under § 203(g). In fact, he should not need to file a new visa petition.

Example: Clotilde waits over a year to submit additional evidence and is told that her application has been terminated. A new petition filed by Santana would be given a new priority date. (Clotilde and Santana should try to have the original petition reinstated first, however, if possible, and might have avoided this situation by regular contact with the consulate).

FOR MORE INFORMATION ON FAMILY VISAS, see:

Families & Immigration: A Practical Guide, 4th Edition (www.ilrc.org/publications/families-immigration)

For an excellent, easy-to-read discussion of family visas and other immigrant and nonimmigrant visas, but one that does not include legal citations, see *Immigration Procedures Handbook*.

⁹⁶ 8 CFR 204.2(h)(2).

APPENDIX 2-A

ANSWERS TO EXERCISES

Exercise

VISA BULLETIN FOR DECEMBER 2016

Family-Sponsored	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
F1	01DEC09	01DEC09	01DEC09	15APR95	15SEP05
F2A	22FEB15	22FEB15	22FEB15	15FEB15	22FEB15
F2B	08MAY10	08MAY10	08MAY10	15OCT95	01MAR06
F3	15FEB05	15FEB05	15FEB05	08DEC94	15AUG94
F4	22DEC03	01OCT03	01APR03	15MAY97	22MAY93

1. Oscar can immigrate now. The 3rd preference date for Nicaragua (All chargeability Areas) is February 15, 2005, and his date is before that.
2. Joel cannot immigrate yet. The 4th preference date for the Philippines is May 22, 1993, which comes before his priority date.
3. Marta cannot immigrate yet. The 2nd preference date 2A for Mexico is currently February 15, 2015, which comes before September 15, 2015. An alternative option would become available if her wife became a U.S. citizen, in which case she could immigrate as an immediate relative.
4. Fatoumata can immigrate now. The 2nd preference 2A date for Mali (All Chargeability Areas) is February 22, 2015. Her priority date is December 3, 2014.
5. Kim can immigrate now. First preference date for Korea (All Chargeability Areas) is December 1, 2009. Kim's priority date is August 3, 2009.
6. Julio is an immediate relative. He does not have to use the Visa Bulletin; there is no legal waiting period before he can immigrate.
7. Ravi can immigrate now because the 3rd preference date for India is February 15, 2005, and his date is earlier than that.

Department of Homeland Security
U.S. Citizenship and Immigration Services

OMB No. 1615-0012; Expires 12/31/2015

I-130, Petition for Alien Relative

DO NOT WRITE IN THIS BLOCK - FOR USCIS OFFICE ONLY

A# Section of Law/Visa Category <input type="checkbox"/> 201(b) Spouse - IR-1/CR-1 <input type="checkbox"/> 201(b) Child - IR-2/CR-2 <input type="checkbox"/> 201(b) Parent - IR-5 <input type="checkbox"/> 203(a)(1) Unm. S or D - F1-1 <input type="checkbox"/> 203(a)(2)(A) Spouse - F2-1 <input type="checkbox"/> 203(a)(2)(A) Child - F2-2 <input type="checkbox"/> 203(a)(2)(B) Unm. S or D - F2-4 <input type="checkbox"/> 203(a)(3) Married S or D - F3-1 <input type="checkbox"/> 203(a)(4) Brother/Sister - F4-1	Action Stamp	Fee Stamp Petition was filed on: _____ (priority date) <input type="checkbox"/> Personal Interview <input type="checkbox"/> Previously Forwarded <input type="checkbox"/> Pet. <input type="checkbox"/> Ben. "A" File Reviewed <input type="checkbox"/> I-485 Filed Simultaneously <input type="checkbox"/> Field Investigation <input type="checkbox"/> 204(g) Resolved <input type="checkbox"/> 203(a)(2)(A) Resolved <input type="checkbox"/> 203(g) Resolved
---	---------------------	--

Remarks:

A. Relationship You are the petitioner. Your relative is the beneficiary.

1. I am filing this petition for my: Spouse Parent Brother/Sister Child

2. Are you related by adoption? Yes No

3. Did you gain permanent residence through adoption? Yes No

B. Information about you

1. Name (Family name in CAPS) (First) (Middle)
 RAMIREZ MARTUCCI Monica

2. Address (Number and Street) (Apt. No.)
 321 14th St. B
 (Town or City) (State/Country) (Zip/Postal Code)
 San Francisco California 94110

3. Place of Birth (Town or City) (State/Country)
 Mexico City Mexico

4. Date of Birth 02/15/1980

5. Gender Male Female

6. Marital Status Married Single Widowed Divorced

7. Other Names Used (including maiden name)
 Monica Ramirez Barragan

8. Date and Place of Present Marriage (if married)
 03/15/2015 Reno, Nevada

9. U.S. Social Security Number (if any) 246-81-9642

10. Alien Registration Number A123-456-789

11. Name(s) of Prior Spouse(s) None

12. Date(s) Marriage(s) Ended

C. Information about your relative

1. Name (Family name in CAPS) (First) (Middle)
 MARTUCCI Renato

2. Address (Number and Street) (Apt. No.)
 321 14th St. B
 (Town or City) (State/Country) (Zip/Postal Code)
 San Francisco California 94110

3. Place of Birth (Town or City) (State/Country)
 Milan Italy

4. Date of Birth 10/14/1983

5. Gender Male Female

6. Marital Status Married Single Widowed Divorced

7. Other Names Used (including maiden name)
 None

8. Date and Place of Present Marriage (if married)
 03/15/2015 Reno, Nevada

9. U.S. Social Security Number (if any)

10. Alien Registration Number

11. Name(s) of Prior Spouse(s) None

12. Date(s) Marriage(s) Ended

13. If you are a U.S. citizen, complete the following:
 My citizenship was acquired through (check one):
 Birth in the U.S.
 Naturalization. Give certificate number and date and place of issuance.
 Parents. Have you obtained a certificate of citizenship in your own name?
 Yes. Give certificate number, date and place of issuance. No

13. Has your relative ever been in the U.S.? Yes No

14. If your relative is currently in the U.S., complete the following:
 He or she arrived as a: F-1 student
 (visitor, student, stowaway, without inspection, etc.)
 Arrival/Departure Record (I-94) Date arrived
05/05/2010
 Date authorized stay expired, or will expire, as shown on Form I-94 or I-95 03/01/2016

14. If you are a lawful permanent resident alien, complete the following:
 Date and place of admission for or adjustment to lawful permanent residence and class of admission.
05/11/2007 San Francisco, CA F2B

15. Name and address of present employer (if any)
 None
 Date this employment began

14b. Did you gain permanent resident status through marriage to a U.S. citizen or lawful permanent resident?
 Yes No

16. Has your relative ever been under immigration proceedings?
 No Yes Where _____ When _____
 Removal Exclusion/Deportation Rescission Judicial Proceedings

INITIAL RECEIPT RESUBMITTED RELEGATED: Rec'd Sent COMPLETED: App'd Denied Ret'd



Form I-130 (03/23/15) Y

C. Information about your relative (continued)

17. List spouse and all children of your relative.

(Name)	(Relationship)	(Date of Birth)	(Country of Birth)
Juliana Martucci	Child	04/05/2016	USA

18. Address in the United States where your relative intends to live.

(Street Address)	(Town or City)	(State)
321 14th St. #B	San Francisco	California

19. Your relative's address abroad. (Include street, city, province and country) Phone Number (if any)
None

20. If your relative's native alphabet is other than Roman letters, write his or her name and foreign address in the native alphabet.

(Name) Address (Include street, city, province and country):
Not applicable

21. If filing for your spouse, give last address at which you lived together. (Include street, city, province, if any, and country):

321 14th St. #B, San Francisco, CA 94110	From: 01/2015	To: present
--	-------------------------	-----------------------

22. Complete the information below if your relative is in the United States and will apply for adjustment of status.

Your relative is in the United States and will apply for adjustment of status to that of a lawful permanent resident at the USCIS office in:
If your relative is not eligible for adjustment of status, he or she will apply for a visa abroad at the American consular post in:

San Francisco	California	Naples	Italy
(City)	(State)	(City)	(Country)

NOTE: Designation of a U.S. embassy or consulate outside the country of your relative's last residence does not guarantee acceptance for processing by that post. Acceptance is at the discretion of the designated embassy or consulate

D. Other information

1. If separate petitions are also being submitted for other relatives, give names of each and relationship.

Not applicable

2. Have you ever before filed a petition for this or any other alien? Yes No

If "Yes," give name, place and date of filing and result.

WARNING: USCIS investigates claimed relationships and verifies the validity of documents. USCIS seeks criminal prosecutions when family relationships are falsified to obtain visas.

PENALTIES: By law, you may be imprisoned for not more than five years or fined \$250,000, or both, for entering into a marriage contract for the purpose of evading any provision of the immigration laws. In addition, you may be fined up to \$10,000 and imprisoned for up to five years, or both, for knowingly and willfully falsifying or concealing a material fact or using any false document in submitting this petition.

YOUR CERTIFICATION: I certify, under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct. Furthermore, I authorize the release of any information from my records that U.S. Citizenship and Immigration Services needs to determine eligibility for the benefit that I am seeking.

E. Signature of petitioner.

Date 04/26/2016 Phone Number (415) 231-0124

F. Signature of person preparing this form, if other than the petitioner.

I declare that I prepared this document at the request of the person above and that it is based on all information of which I have any knowledge.

Print Name Perry Legal Signature _____ Date 04/26/2016
Address 438 Mission St. #600
San Francisco, California 94103 G 28 ID or VOLAG Number, if any.



Department of Homeland Security
U.S. Citizenship and Immigration Services

G-325A, Biographic Information

Family Name SANCHEZ Romero	First Name Juan	Middle Name	<input checked="" type="checkbox"/> Male <input type="checkbox"/> Female	Date of Birth (mm/dd/yyyy) 06/15/1967	Citizenship/Nationality Mexico	File Number A
All Other Names Used (include names by previous marriages) None			City and Country of Birth El Ranchito Bonito Mexico		U.S. Social Security # (if any)	
Family Name		First Name	Date of Birth (mm/dd/yyyy)	City, and Country of Birth (if known)	City and Country of Residence	
Father Sanchez Delgado		Jose	03/03/1946	El Ranchito Bonito, Mexico	Deceased	
Mother Romero Vazquez		Martina	04/19/1943	El Ranchito Bonito, Mexico	El Ranchito Bonito, Mexico	
(Maiden Name)						
Current Husband or Wife (If none, so state) Family Name (For wife, give maiden name)		First Name	Date of Birth (mm/dd/yyyy)	City and Country of Birth	Date of Marriage	Place of Marriage
Ramos Hernandez		Gina	02/01/1972	Mexico City, Mexico	04/01/2003	Reno, Nevada
Former Husbands or Wives (If none, so state) Family Name (For wife, give maiden name)		First Name	Date of Birth (mm/dd/yyyy)	Date and Place of Marriage	Date and Place of Termination of Marriage	
de Jesus Berra		Lisette	06/12/1969	03/30/1997 Mazatlán Mexico	11/02/2000, Mazatlán, Mexico	

Applicant's residence last five years. List present address first.

Street and Number	City	Province or State	Country	From		To	
				Month	Year	Month	Year
321 14th St. Apt. #2	San Francisco	California	USA	05	2012	Present Time	
1451 Potrero St.	Bakersfield	California	USA	06	2005	05	2012

Applicant's last address outside the United States of more than 1 year.

Street and Number	City	Province or State	Country	From		To	
				Month	Year	Month	Year
Direccion Conocido	El Ranchito Bonito	Sinaloa	Mexico	02	1967	03	2001

Applicant's employment last five years. (If none, so state.) List present employment first.

Full Name and Address of Employer	Occupation (Specify)	From		To	
		Month	Year	Month	Year
Acme Landscaping, Union City, CA	Labor	06	2012	Present Time	
Leche Dairy Company, Bakersfield, CA	Dairy worker	06	2005	05	2012

Last occupation abroad if not shown above. (Include all information requested above.)

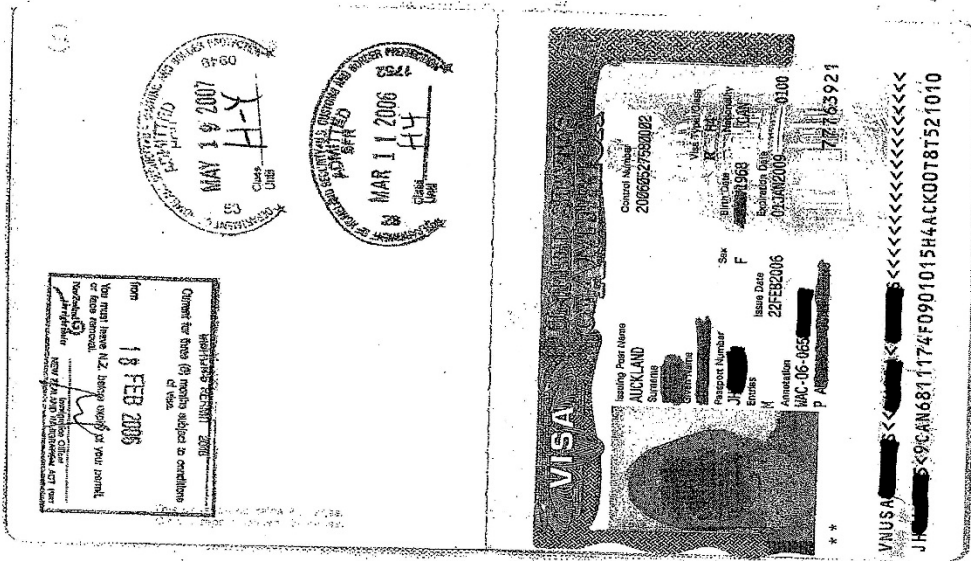
Agricultural labor self-employed	Labor - agriculture	1983	03	2001
This form is submitted in connection with an application for:		Signature of Applicant		Date
<input type="checkbox"/> Naturalization	<input checked="" type="checkbox"/> Other (Specify): I-130			
<input type="checkbox"/> Status as Permanent Resident				

If your native alphabet is in other than Roman letters, write your name in your native alphabet below:

Penalties: Severe penalties are provided by law for knowingly and willfully falsifying or concealing a material fact.

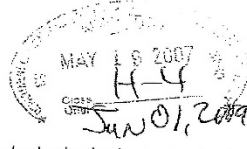
Applicant: Print your name and Alien Registration Number in the box outlined by heavy border below.

Complete This Box (Family Name)	(Given Name)	(Middle Name)	(Alien Registration Number)
SANCHEZ Romero	Juan		A



Departure Number
 634322050 11

Immigration and
 Naturalization Service
 I-94
 Departure Record



14. Family Name SMITH	
15. First (Given) Name LUCY	
17. Country of Citizenship CANADIA	16. Birth Date (Day/Mo/Yr) 10/11/63

See Other Side

ENGLISH

STAPLE HERE



U.S. Customs and Border Protection
Securing America's Borders

Most Recent I-94

Admission (I-94) Record Number: 656[REDACTED]0

Most Recent Date of Entry: 2015 June 28

Class of Admission: H1B

Admit Until Date: 07/14/2017

Details provided on the I-94 Information form:

Last/Surname: [REDACTED]

First (Given) Name: M[REDACTED] A[REDACTED]

Birth Date: 1980 August [REDACTED]

Passport Number: A[REDACTED]7

Country of issuance: Colombia

[Get Travel History](#)

▶ Effective April 26, 2013, DHS began automating the admission process. An alien lawfully admitted or paroled into the U.S. is no longer required to be in possession of a preprinted Form I-94. A record of admission printed from the CBP website constitutes a lawful record of admission. See 6 CFR § 1.4(d).

▶ If an employer, local, state or federal agency requests admission information, present your admission (I-94) number along with any additional required documents requested by that employer or agency.

▶ Note: For security reasons, we recommend that you close your browser after you have finished retrieving your I-94 number.

OAS No. 1651-0111
Expiration Date: 03/31/2016

[For inquiries or questions regarding your I-94, please click here.](#)

[Accessibility](#) | [Privacy Policy](#)



PRACTICE ADVISORY¹

November 2015

A STEP-BY-STEP GUIDE TO COMPLETING FOIA REQUESTS

By Alison Kamhi, Staff Attorney

Introduction

The Freedom of Information Act (“FOIA”) entitles every person access to certain information from the federal government.² A person can file a request under this act, called “a FOIA request,” to any federal agency to request documents about herself or others. A FOIA request can be an invaluable tool in immigration law to help an immigrant and her representative. There are many reasons a person may want to see the documents about her that the government has. When the person is applying for an immigration benefit or fighting removal, it is not only helpful, but also often critical to the success of the person’s case to have a copy of certain documents. The person might need to know what criminal records the government has that could affect her eligibility for relief or the person might need to see a paper trail of her previous immigration history to help piece together what happened.

The Department of Homeland Security (“DHS”) keeps an immigration file (also known as an “A-file”) on all immigrants with whom it comes into contact. Fortunately, a person is entitled under FOIA to request a copy of her A-file, as well as other immigration records, from any of the DHS agencies—U.S. Citizenship and Immigration Services (“USCIS”); U.S. Customs and Border Protection (“CBP”); U.S. Immigration and Customs Enforcement (“ICE”); or U.S. Office of Biometrics Identity Management (“OBIM,” formerly US-VISIT)—that may hold immigration records.³ This practice advisory will walk through how to file a FOIA request with these DHS sub-agencies because they are the main agencies that keep immigration records. Note, however, that a FOIA request is an option for any federal government agency. Depending on the case, you may want to file a FOIA request at the Department of State (for passport records) or the Department of Justice (for immigration court records).

PRACTICE TIP: Because each department within DHS is responsible for responding to requests for its own records, it is important that before submitting your request, you determine which department is likely to have the records you are seeking and direct your request to that department. For example, if you want to get a copy of your green card application, the request should be made to USCIS. However, if you are looking to get more information about your expedited removal at the border, then you should submit your request to CBP or OBIM. In some cases you may want to, and indeed it may be best, to submit requests to multiple departments.

Sometimes it can be complicated to determine which agency may have the records you are looking for. To help you make this determination, USCIS provides a list of records/request types, and the agency that is likely to keep those records. The list is available on the USCIS FOIA website at <http://www.uscis.gov/about-us/freedom-information-and-privacy-act-foia/how-file-foia-privacy-act-request/submitting-foia-requests>.

¹ The Immigrant Legal Resource Center is a national, nonprofit resource center that provides legal trainings, educational materials, and advocacy to advance immigrant rights. The mission of the ILRC is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. For the latest version of this practice advisory, please visit www.ilrc.org. For questions regarding the content of this advisory, please contact Alison Kamhi at akamhi@ilrc.org. Thanks to Aidin Castillo (ILRC) and former ILRC intern Rocio Sanchez for drafting earlier versions, and to Jose Magana-Salgado (ILRC) for his help in preparing this document.

² Freedom of Information Act, 5 U.S.C. § 552.

³ Because the process for submitting requests can differ between agencies, be sure to visit the agency’s website for the most up to date information.

All FOIA requests to DHS must be made in writing. The government created Form G-639, Freedom of Information/Privacy Act Request, to help people make their requests.⁴ [Form G-639](#) may be used to make a FOIA request to USCIS, ICE, and OBIM (but not CBP). Although Form G-639 is not required for any agency, we recommend using it where it is accepted or using an online fillable form where available. These options will help ensure that you provide the information necessary to process the request. This practice advisory will detail how to complete a FOIA request for USCIS, ICE, OBIM, and CBP. **Section II** charts the most common agencies holding immigration-related materials and the necessary steps to file a FOIA request with each of them. **Section III** details the requirements for submitting FOIA requests to USCIS, ICE, OBIM, and CBP. This section also includes alternatives to Form G-639, such as online submission options. **Section IV** provides step-by-step instructions on how to complete Form G-639. **Section V** discusses situations in which a FOIA request may not be the most effective tool and provides alternative ways to obtain information in those situations. A blank Form G-639 is also included for your reference.

For clarity, throughout this document the term “Requestor” will refer to a person who is seeking the records, usually an immigration advocate or the person herself. “Subject” will refer to the “Subject of Record,” the person whose documents are being requested. Lastly, we will use the term “you” to reference generally the person seeking the records.

⁴ Form G-639 is available at <http://www.uscis.gov/g-639>. If you do not use Form G-639, you could submit a written letter request, for example, but your request will likely take less time if you submit it using the standardized form or online options.

Brief Guide to Requesting Immigration Documents from Various Agencies

Agency	Records Held By Agency ⁵	How To Request Records	Additional Information
Department of Homeland Security (DHS)			
USCIS	<ul style="list-style-type: none"> A-file Removal, detention, deportation records Prior immigration petitions USCIS decisions Certification of non-existence of a record 	USCIS requests may be submitted using Form G-639 by mail, fax, or e-mail. USCIS requests may also be made through the DHS Online Request Form.	Form G-639 and Instructions: http://www.uscis.gov/g-639
		USCIS offers accelerated processing for certain people in removal proceedings.	Online Request Form: http://www.dhs.gov/dhs-foia-request-submission-form
CBP	<ul style="list-style-type: none"> Apprehensions and detentions at the border⁶ Interactions with CBP at the border or in the interior Form I-94 records Voluntary return records Records of entries⁷ Expedited removal orders Advance parole records 	CBP requests must be submitted online.	Online Form: https://foiaonline.regulations.gov/foia/action/public/request/publicPreCreate
ICE	<ul style="list-style-type: none"> Interactions with ICE SEVIS records Investigation records ICE arrest records Detention center records Bond requests Requests for detainer or notification forms 	ICE requests may be submitted using Form G-639 by mail, fax, or email. ICE requests may also be submitted electronically through the ICE online form or the DHS Online Request Form.	ICE Online Form: http://www.ice.gov/webform/foia-request-form
		All ICE requests must include a 1) phone number, and 2) if not submitted through an online form, an Affirmation/Declaration form.	DHS Online Request Form: http://www.dhs.gov/dhs-foia-request-submission-form Instructions: http://www.ice.gov/foia/request Affirmation/Declaration Form: http://www.ice.gov/doctlib/about/pdf/affirmation-declaration.pdf
OBIM	<ul style="list-style-type: none"> Interactions with Border Officials 	OBIM requests may be made via e-mail, mail, or fax and must include an original fingerprint card or A-number. OBIM requests may be made using Form G-639 or the DHS Online Request Form.	Online Request Form: http://www.dhs.gov/dhs-foia-request-submission-form

⁵ USCIS, *Submitting FOIA Requests*, available at <http://www.uscis.gov/about-us/freedom-information-and-privacy-act-foia/how-file-foia-privacy-act-request/submitting-foia-requests>.

⁶ Records of apprehensions before 2000 are maintained by USCIS.

⁷ CBP does not have records before 1982.

Department of Justice (DOJ)			
EOIR	<ul style="list-style-type: none"> • Court Orders • Charging Documents • Court Decisions 	<p>Requests should be made directly to EOIR via email or mail. Do not use Form G-639 with EOIR.⁸</p> <p>All requests should include 1) the Subject's A-number, 2) Subject's name, and 3) a description of the record.</p> <p>Requests must also include a verification of identity such as Form DOJ-361, a notarized statement, or a sworn statement.</p>	<p>DOJ FOIA Instructions: http://www.justice.gov/oip/department-justice-freedom-information-act-reference-guide</p>
	<th>Department of State (DOS)</th>		
DOS	<ul style="list-style-type: none"> • Consular processing and other consulate records • Visa applications • Passport applications 	<p>DOS requests can be made by mail or fax.⁹</p> <p>Requests must include a description of the records; the name, address, and telephone number of the requestor; the amount the requestor is willing to pay for the request; the timeframe for the records request; and an original signature.</p>	<p>Additional Information: https://foia.state.gov</p>

Instructions for Submitting FOIA Requests to USCIS, ICE, OBIM, and CBP

There are four main agencies within DHS that hold immigration records, (1) U.S. Citizenship and Immigration Services ("USCIS"), (2) U.S. Immigration and Customs Enforcement ("ICE"); (3) U.S. Office of Biometrics Identity Management ("OBIM," formerly US-VISIT); and (4) U.S. Customs and Border Protection ("CBP"). Because individual employees of DHS may change job positions, do not address the request to a specific person. If you are making your request by mail, you should include the notation "Freedom of Information Act Request" on the front of your envelope. This will help ensure that the responsible individual receives the request without delay.

1. **USCIS:** USCIS is the most common place to submit an immigration-related FOIA request because USCIS keeps records of prior petitions and decisions and often has the Subject's A-file. **Do not submit your FOIA request to your local USCIS office, Service Center, or Lockbox.** USCIS processes all FOIA requests at the National Records Center. The request should be submitted using Form G-639 by email, mail, or fax, or using the electronic DHS submission form:¹⁰

Mail: U.S. Citizenship and Immigration Services
National Records Center (NRC)
FOIA/PA Office
P.O. Box 648010
Lee's Summit, MO 64064-8010

For overnight or certified mail, send the request to:
U.S. Citizenship and Immigration Services
National Records Center, FOIA/PA Office
150 Space Center Loop, Suite 300
Lee's Summit, MO 64064-2139

⁸ DOJ, *Fact Sheet: How to File a Freedom of Information Act Request with EOIR*, available at <http://www.justice.gov/sites/default/files/eoir/legacy/2008/10/15/FOIAInstructions100908.pdf>.

⁹ DOS has an online submission option for FOIA requests, but the online option is not available for requests about personal information. See DOS, *How to Make a FOIA Request*, available at <https://foia.state.gov/Request/FOIA.aspx>.

¹⁰ From October 15, 2014 to May 1, 2015, USCIS piloted a FOIA online system for records that did not include personally identifiable information. This pilot program has ended, and USCIS no longer accepts requests through this system. Requests must be sent by mail, fax, email, or electronically through DHS.

Completing FOIA Requests
Immigrant Legal Resource Center

Fax: (802) 288-1793 or (816) 350-5785
Email: uscis.foia@uscis.dhs.gov
Electronically: <http://www.dhs.gov/dhs-foia-request-submission-form>

If you are submitting a FOIA request by email on behalf of someone other than yourself, scan and include the Subject's notarized signature or signature made under penalty of perjury.

For questions about filing a request, seeking a status update of pending requests, and assistance in obtaining records from USCIS, contact the USCIS National Customer Service Center at: (800) 375-5283 or (800) 767-1833 Hearing Impaired TTY. You may also fax inquiries to the National Records Center at (816) 350-5785 or e-mail your questions to uscis.foia@uscis.dhs.gov.¹¹

2. **ICE:** You should submit your FOIA request to ICE using Form G-639 and an accompanying Affirmation/Declaration form (see below) by mail, fax, or e-mail, or using the electronic ICE or DHS submission forms:

Mail: FOIA Office
U.S. Immigration and Customs Enforcement
800 North Capitol St., NW
5th Floor, Suite 585
Washington, DC 20536¹²
Fax: (202) 732-4265
E-mail: ICE-FOIA@dhs.gov
Electronic Submission: <http://www.ice.gov/webform/foia-request-form>; or
<http://www.dhs.gov/freedom-information-act-foia>

All requests to ICE **must** include a daytime phone number.¹³

If the request is submitted other than through the online form, ICE requires that an "Affirmation/Declaration" form be included, with the Subject's name, date of birth, and, if the Subject does not want to the records sent to her personally, the name and address of a third party. The Affirmation/Declaration form is available on the ICE FOIA website at <http://www.ice.gov/doclib/about/pdf/affirmation-declaration.pdf>. By signing the form, the Subject indicates that she is responsible for applicable fees and that she understands that knowingly or willfully seeking or obtaining access to records about another person under false pretense is punishable by a fine of up to \$5,000.

Although the online ICE FOIA form does not have a specific question regarding expedited processing, all FOIA requests can be expedited, per federal regulation.¹⁴ Requestors may request expediting processing on the online ICE FOIA form in the general description box.

¹¹ For more information about how to file a FOIA request with USCIS, visit the USCIS FOIA website at <http://www.uscis.gov/about-us/freedom-information-and-privacy-act-foia/how-file-foia-privacy-act-request/how-file-foiapa-request>.

¹² ICE lists two different FOIA addresses on its website. ICE officials have confirmed with the authors that either address can be used to submit FOIA requests and accompanying documents.

¹³ For more information, see the ICE FOIA request website, http://www.ice.gov/foia/submitting_request.htm.

¹⁴ 6 CFR 5.5(d)(1).

3. **OBIM:** You should submit a FOIA request to OBIM using Form G-639 by email, mail, or fax, or using the electronic DHS submission form. OBIM requests also require original fingerprint cards or A-numbers.

Mail:	OBIM FOIA 245 Murray Lane, SW Washington, DC 20598-0628
Fax:	(202) 298-5445
Email:	OBIM-FOIA@ice.dhs.gov
Electronically:	http://www.dhs.gov/dhs-foia-request-submission-form

DHS Online Request Submission Form

DHS recently created an online fillable FOIA request form at <http://www.dhs.gov/dhs-foia-request-submission-form>. This FOIA request form has a drop-down menu where the Requestor can select the department within DHS where the FOIA request should be sent. Through this online form, a Requestor can file a FOIA with USCIS, ICE, and OBIM, among others. The online form also allows the Requestor to seek FOIA fee waivers and expedited service, if eligible. The online form remains unavailable for CPB FOIA requests, which must be submitted using CBP's online form.

Filing Tips

- ✓ **Address** – The address can be either a mailing address or residential address. Many people who are here without legal status may be concerned about giving the government their current physical address through a FOIA request. We are unaware of anyone currently being picked up by immigration authorities based on filing a FOIA request; however there is no guarantee. It is always safest to list a mailing address (e.g., a post office box) instead of a residential address. For people who are enforcement priorities or who have had prior contact with ICE, we strongly recommend listing a mailing address instead of a residential address.
- ✓ **Description** – Providing a general description may assist DHS in locating the documents you need. It is best to be specific, but do NOT reveal anything about the Subject's immigration strategy or any facts that you do not want the government to know. If you are not requesting specific documentation, then we recommend you complete this section by writing, "Requesting copy of A-file and any other immigration records for personal review." If seeking records from USCIS, the Requestor should note the Subject's date of birth and A-number in the description box.
- ✓ **Requestor Category** – If the request is for an individual's immigration case or personal review only, choose the first option ("An individual seeking information for personal use and not for commercial use").

DHS eFOIA App

DHS released an Apple and Android friendly FOIA application of its online submission form. Using mobile devices, users can now submit and check the status of FOIA requests. The mobile application mirrors the Online Request Submission Form and can be used to request USCIS, ICE, or OBIM FOIAs. Users can also request expedited service and fee waivers via their cellular phones. For more information and links to download the app, please visit: <http://www.dhs.gov/efoia-mobile-app>.

Completing FOIA Requests
Immigrant Legal Resource Center

4. **CBP:** If you would like to obtain records from CBP, you *must* submit an online request by going to <https://foiaonline.regulations.gov/foia/action/public/request/publicPreCreate>.

CBP currently processes FOIA requests differently than the sections of DHS listed above. CBP only accepts requests through the online link above. Form G-639 is not required and in fact will not be accepted except as a supporting document to the online submission. At the time of writing, CBP is experiencing a severe backlog of FOIA requests, and many requests are taking longer than one year. If you are looking for records of border entries and exits, it is prudent to file a FOIA request with OBIM (formerly US-Visit) as well, as OBIM also has similar records and will likely respond much faster.

Filing Tips

- ✓ **Address** – The address can be either a mailing address or residential address. Many people who are here without legal status may be concerned about giving the government their current physical address through a FOIA request. We are unaware of anyone currently being picked up by immigration authorities based on filing a FOIA request; however there is no guarantee. It is always safest to list a mailing address (e.g., a post office box) instead of a residential address. For people who are enforcement priorities or who have had prior contact with ICE, we strongly recommend listing a mailing address instead of a residential address.
- ✓ **Type of Records Requested** – CBP provides categories of records, including border apprehension and encounters; commercial documents; contracts; entries and exits; fines, penalties, forfeitures, and seizures; I-94; imports and exports; media; travel (including advance parole documents) and apprehension; and “other.” If you are looking for one of these in particular, select that category. If you are looking for multiple categories, CBP advises the Requestor to list “other,” and include in the description box all of the categories you are seeking.
- ✓ **Attach Supporting Files** – The CBP form permits Requestors to upload supporting files. We recommend not uploading additional files unless the Requestor is seeking specific, difficult to locate documents, where additional information could be helpful. In general, there is no need to provide additional files; if CBP requires more information than what was provided on the online form, it can contact the Requestor.

Expediting a FOIA Request

DHS departments use a multi-track system to process FOIA requests on a first-in, first-out basis. This means that requests can take many months, depending on the department. If you have a compelling reason why you need your documents sooner, you can ask the department to **expedite** the FOIA request. Federal regulations provide that a request can be expedited if it involves “i) circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; [or] ii) an urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information.”¹⁵ The latter ground only applies to requests for certain kinds of information about the government sought for the purpose of educating the public, and will rarely apply in individual FOIA requests. But if you believe that the first ground applies to you, you should write a detailed explanation and submit supporting evidence of why you need the response urgently.

A request for expedited processing can be made at the time of the initial request or at a later date.¹⁶ The governmental agency must inform the Requestor if it will expedite the request within ten days of receiving the request for expediting processing.¹⁷

¹⁵ 6 CFR 5.5(d)(1).

¹⁶ 6 CFR 5.5(d)(2).

¹⁷ 6 CFR 5.5(d)(4).

Completing FOIA Requests
Immigrant Legal Resource Center

In addition to expediting a request, USCIS also offers Requestors the option to accelerate a request for Subjects who have hearings scheduled in immigration court.¹⁸ USCIS uses a three-track system for its FOIA requests. Track 1 is for simple requests for a few documents; Track 2 is for more complex requests, such as for a complete copy of the person's file; and Track 3 is an accelerated process for certain cases in removal proceedings.¹⁹ In order to receive Track 3 processing with USCIS, you need to write a brief cover letter requesting Track 3 processing and provide a copy of the Notice to Appear, Order to Show Cause, Notice of Referral to Immigration Proceedings, or Notice of Hearing. USCIS has stated that a person can request an expedited FOIA request or Track 3 processing, but not both simultaneously.

FOIA Fees

Most FOIA requests filed for immigration purposes are free. Although federal agencies can recover certain costs for the time spent searching for records and the number of pages copied, the first two hours of search time is free, and the first 100 pages copied are free.²⁰ Additionally, agencies currently do not charge even beyond that if the total amount is \$14.00 or less.²¹ Most FOIA requests, especially for people who have had little to no interaction with immigration authorities, fall well under this threshold and cost the Requestor nothing.

Technically, however, by submitting a FOIA request, the Requestor is agreeing to pay all applicable fees up to \$25.00, should the costs go over what is provided for free.²² The Requestor will be notified if she owes any money up to \$25.00 and is expected to pay that amount. If the agency expects the work to cost more than \$25.00, no additional work in excess of \$25.00 will be done unless the Requestor agrees to pay the additional amount. If the Requestor does not wish to agree to \$25.00 upfront, the Requestor can specify a greater or lesser amount when making FOIA request and/or submit a fee waiver.²³ Most of the online submission forms take this into consideration and require the Requestor to state the maximum amount that she will pay.

Fee waivers are generally not available for FOIA requests for individual immigration cases. A person can qualify for a fee waiver only if she demonstrates 1) disclosure of the documents is in the public interest because they are likely to contribute significantly to the public's understanding of the government; and 2) disclosure of the documents is not primarily for commercial interests.²⁴ Most FOIA requests for immigration cases would not meet this standard;²⁵ you should thus think through how much money you can pay for the FOIA request and state that amount upfront, especially if it is less than \$25.00. If the Requestor states \$0, she will be given all of the records up to the \$14.00 mark over which agencies begin charging. If possible, however, we recommend agreeing to the stated minimum of \$25.00. This is because agency representatives have been unclear on whether a person will be notified if there are responsive records that exist above the maximum amount listed, when that amount is less than \$25.00.

¹⁸ Track 3 is for individuals who have been served with a charging document and scheduled for a hearing in immigration court as a result. See 72 Fed. Reg. 9017. This covers many, but not all, individuals in removal proceedings. Anyone who does not have a hearing scheduled, such as people who have final orders of removal, are awaiting pending appeals, or have missed their scheduled hearings, are not eligible for Track 3. See *id.*

¹⁹ USCIS, *FOIA/Privacy Act Overview*, available at <http://www.uscis.gov/about-us/freedom-information-and-privacy-act-foia/foia-privacy-act-overview/foiaprivacy-act-overview>.

²⁰ 6 CFR 5.11(d)(3).

²¹ 6 CFR 5.11(d)(4); DHS, *FOIA Requirements, Limits, and Fees*, available at <http://www.dhs.gov/how-submit-foia-or-privacy-act-request-department-homeland-security>.

²² 6 CFR 5.3(c).

²³ 6 CFR 5.11(e).

²⁴ 6 CFR 5.11(k).

²⁵ An individual case that may meet this standard would be a Requestor that seeks her immigration file for purposes of understanding, criticizing, or publicizing broader immigration policies. For example, an individual working with a not-for-profit organization to highlight information from her case in order to inform the public about the implementation of the enforcement priorities could make an argument that such request would fall under the "public interest" prong of the FOIA statute.

Completing FOIA Requests
Immigrant Legal Resource Center

Instructions for Filling Out a FOIA Request on Form G-639

In this section, we walk through each numbered section of Form G-639. Type your responses or write them in black ink. If you do not know the information requested, the request could be delayed or the documents provided in response to the FOIA request could be incomplete.

USCIS created a new Form G-639 with an issue date of March 31, 2015. Make sure you are using the correct form because previous versions are no longer accepted. The latest version of the form can always be found at <http://www.uscis.gov/g-639>.

Part 1: Type of Request

- ✓ **Item 1a – c:** Check the **box** that describes the request type. You should only check one box.

If submitting a FOIA request, you should check the first box. If you are submitting a Privacy Act request, you should check the second box. If you are seeking to amend a government record covered by the Privacy Act, check the third box.²⁶ Privacy Act requests are only available for U.S. citizens and lawful permanent residents and allow these requestors to access and amend certain records the government maintains on individuals, such as service records for people who served in the U.S. armed forces or employment records for U.S. government employees. Requests under the Privacy Act are beyond the scope of this advisory.²⁷

Part 2: Requestor Information

Item 1:

- ✓ Check the **Yes** box if you are requesting your own records. Attorneys or representatives who are filling out the G-639 on behalf of their clients should check the **No** box. In these cases, the attorney is the Requestor.

If you are seeking your own records, skip the remainder of the questions in Part 2. Requestors seeking records on behalf of someone else should complete all of Part 2.

Items 3a – i:

Requestor's Mailing Address

- ✓ *In Care of Name (if any)* – Write the name of the person receiving the documents, if other than the Requestor, or the name of the agency where correspondence should be delivered.
- ✓ *Street Number, Street Name, State, Zip Code* – Write the full address of the Requestor. The address can be either a mailing address (including a post office box) or a residential address.
- ✓ *Province* – If the mailing address is within the United States, then in the province box you should write “N/A.” If the mailing address is outside the United States and the country uses the province system, then you should write the name of the province where correspondence should be delivered.
- ✓ *Postal Code* – If the mailing address is within the United States, then you should write “N/A” in the postal code box. If the documents will be mailed to a country that uses the postal code system, then you should write the postal code where correspondence should be delivered.
- ✓ *Country* – Write the name of the country where the mailing address is located. If the address is within the United States, then write, “United States.”

²⁶ Many agencies automatically treat applicable requests as being made under both FOIA and the Privacy Act. This approach is beneficial because it provides requestors the maximum amount of information available under the law.

²⁷ For more information on the Privacy Act, see U.S. House of Representatives, *A Citizen's Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records*, available at <http://oversight.house.gov/wp-content/uploads/2012/09/Citizens-Guide-on-Using-FOIA-2012.pdf>.

Completing FOIA Requests
Immigrant Legal Resource Center

Items 4 – 6:

Requestor's Contact Information

- ✓ *Requestor's Daytime Telephone Number* – Write the Requestor's telephone number where she can be reached.
- ✓ *Requestor's Mobile Telephone Number (if any)* – Write the Requestor's cell phone number if it is different from the daytime phone number.
- ✓ *Requestor's E-mail Address* – Write the Requestor's email address.

To avoid delays caused by communication problems, include only telephone numbers that are regularly checked and not likely to change in the foreseeable future. If including an email address, only include one that is regularly checked.

Items 7a – b:

Requestor's Certification

By signing, the Requestor agrees to pay all costs for the search, duplication, and review of the documents up to \$25.00, when applicable. DHS will not charge for the first two hours of research or the first 100 pages copied. This means that if the file is small, DHS may not charge the requester at all.

- ✓ *Requestor's Signature* – The Requestor should sign her complete name here with the date. A stamped or typed name in place of a signature will not be accepted.

If you are representing the Subject and signing the form as the Requester, you should include a completed Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative.²⁸

PRACTICE TIP: The previous Form G-639 version listed the Requestor certification at the end of the form, but it is now included upfront. If you are the Requestor, do not forget to sign Part 2 7a-b, in the middle of Page 1 of the form.

Part 3: Description of Records Requested

Item 1:

Purpose

This portion is optional. However, providing a general purpose may assist DHS in locating the file. It is best to be specific, but do NOT reveal anything about your immigration strategy or any facts that you do not want the government to know. For example, if you want to know whether the government has any evidence that the Subject may have used a false document when she applied for an immigration benefit, you do NOT want to disclose this possibility on the FOIA request by writing that the purpose is to search for records related to the Subject's use of fraudulent documents. Instead, you may want to use the *Purpose* section to request the entire A-file.

If you are not requesting specific documentation, we recommend you complete the *Purpose* section by writing, "Requesting copy of A-file and any other immigration records for personal review." Although it is likely that the whole A-file will be provided even if not specifically requested, it is best to explicitly state that you seek all available documentation regarding the Subject.

Items 2a – c:

Full Name of the Subject of Record

- ✓ *Family Name* – Write the Subject's *current* last name.
- ✓ *Given Name* – Write the Subject's *current* first name.

²⁸ Be sure to use the most recent version of Form G-28, available at <http://www.uscis.gov/g-28>.

Completing FOIA Requests
Immigrant Legal Resource Center

- ✓ *Middle Name* – Write the Subject’s *current* middle name.

Items 3a – c:

Other Names Used by the Subject of Record

- ✓ *Other Names Used* – List any names or permutations that the Subject has ever used. If the Subject has used more than one “other name,” include the additional name(s) in *Part 5 Additional Information* (discussed below). Include any maiden name, the adding/dropping of a middle initial, or the adding or dropping of the mother’s last name. For example, if the Subject’s legal name (as it appears on her birth certificate or other legal document) is Juana Morales Gonzales, and she often goes by “Juana Morales,” she should add “Juana Morales” as an *other name used*. If the Subject has not used other names, write “N/A” in each box. If the Subject is looking to find records in her file under a different name, even a fake name that she used in the past, she should add that name as well.

Items 4a – c:

Full Name of the Subject of Record at Time of Entry into the United States

Include the Subject’s complete name when she entered the United States. This may be the same as the Subject’s current full name.

Items 5 – 7:

Other Information for the Subject of Record

- ✓ *Form I-94 Number Arrival-Departure Record* – If the Subject entered with a visa, she may have received a little white card called Form I-94 from CBP upon entering the country that looks similar to the picture below. If she received certain forms of immigration relief, such as U nonimmigrant status, she should have received a paper I-94 in the mail from USCIS. Write in the Subject’s 11-digit I-94 number. If the Subject does not know the number or is unsure if she ever had an I-94, write “Unknown.” If the Subject is sure she does not have one (this will be the case for anyone who entered without papers and has never had immigration status), write “None.”

Departure Number OMB No. 1651-0111
626633123 12 I-94# (11-digit number)
I-94 Departure Record
14 Family Name S.A.M.P.L.E.
15 First (Given) Name J.A.N.E.
16 Birth Date (Day/Mo/Yr) 2,3,0,3,6,8
17 Country of Citizenship N.E.W. Z.E.A.L.A.N.D.
See Other Side CBP Form I-94 (10/04) STAPLE HERE

If the information the Subject seeks relates to a specific entry, provide the I-94 number for that entry and explain the request in the *Additional Information* section.

If the Subject was admitted into the United States by CBP at an airport or seaport after April 30, 2013, she was likely issued an electronic Form I-94. To retrieve a paper version of Form I-94, visit CBP’s website at www.cbp.gov/i94.²⁹

²⁹ The previous version of Form G-639 requested the Subject’s port of entry into the United States, date of entry, manner of entry, and mode of travel. The revised form no longer requests this information. This change is a big improvement because immigrants are no longer asked to speculate or concede any issues regarding their entries, which could affect their immigration case.

Completing FOIA Requests
Immigrant Legal Resource Center

- ✓ **Alien Registration Number (A-Number)** – A person usually has an alien registration number (“A-number”) only if she has been in contact with immigration authorities, filed an immigration petition, or had a certain type of immigration case in the past. This number begins with an “A” and is generally seven, eight, or nine digits long. If the Subject has an A-number, write it in the appropriate box. If the Subject does not remember her A-number or is unsure if she has one, write “Unknown.” If the Subject does not have one, write “None.” Sometimes people who have had multiple interactions with immigration authorities have multiple A-numbers. In this case, be sure to include all of the additional A-numbers in *Additional Information*.

The A-number is the single most important item of information to help DHS locate the Subject’s A-file. If the Subject does not know her A-number, then more identifying information should be provided to assist the government in locating the file. If a Subject does not have an A-number, her presence might not be known by DHS, and DHS might not have any records on that person.

- ✓ **Application, Petition, or Request Receipt Number** – If an immigrant petition has been filed for the Subject, write the petition receipt number here. Receipt numbers are found in the upper left corner of Form I-797C, Notice of Action. If the Subject does not know the number or is unsure if she has had a petition filed for her, write “Unknown.” If an immigrant petition has not been filed, write “None.”

Items 8 – 11:

Information About Family Members that May Appear on Requested Records

This information is used to collect records related to the Subject that might have been filed by or for family members. Write in information about relatives who may appear in the Subject’s records. For example, write in the name of any family members who submitted a family-based petition for the subject. If there are multiple relatives that you want to include, complete the information for additional family members under *Family Member 2* and by using *Additional Information*.

Items 12 – 13:

Parents’ Names for the Subject of Record

The G-639 Form asks specifically for information about the Subject’s parents. However, the G-639 does not ask about the family members’ address or immigration status. Because of this, there is minimal risk in including the full names of the Subject’s parents.

Part 4: Verification of Identity and Subject of Record Consent

Every person submitting a FOIA request, whether to USCIS, ICE, or OBIM must complete the *entire* Verification of Identity and Subject of Record Consent section for the agency to verify that the Subject is who she says she is.

PRACTICE TIP: The form requires the Subject of Record to include her name twice – in *Part 3, Description of Records Requested* and *Part 4, Verification of Identity and Subject of Record Consent*. When completing this information, always confirm that the name listed is consistent in both sections. This will help avoid any agency confusion. If you are using the fillable pdf form on the USCIS website, Part 4 items 1a – c will automatically populate based on your answers in Part 3.

Items 2a – i:

Mailing Address for the Subject of Record

- ✓ Previously, Form G-639 required a *residential* address; the new version thankfully requires only a *mailing* address. Many people who are here without legal status or who have certain criminal or immigration violations may be concerned about giving the government their current physical

Completing FOIA Requests
Immigrant Legal Resource Center

address through a FOIA request. We are unaware of anyone currently being picked up by immigration authorities based on filing a FOIA request; however there is no guarantee. It is always safest to list a mailing address (e.g., a post office box) instead of a residential address. For people who are enforcement priorities or who have had prior contact with ICE, we strongly recommend listing a mailing address instead of a residential address. If the mail is sent to someone other than the Subject, include an “In Care Of Name” as part of the mailing address.

Items 3 – 4:

Other Information for the Subject of Record

- ✓ *Date of Birth* – The date should be written as month/day/year. Ex.: 12/31/2015.
- ✓ *Country of Birth* – Write the name of the country in which the Subject was born. If the name of the birth country has changed since she was born, write the name the country used at the time of her birth.

PRACTICE TIP: For many immigrants, it may not be in their best interest to disclose in a FOIA request that they were born outside of the United States. For example, anyone contesting removability will not want to concede alienage. To avoid this, the Subject may simply decline to write her country of birth or write: “The government alleges [insert country name].” Although Form G-639 states that the information regarding country of birth is required, each reviewing officer has the discretion to determine how to handle a request when certain information is missing. Practitioners note that the government generally provides the A-file even when the country of birth is not listed.

Items 5 – 7:

Contact Information for the Subject of Record

Providing contact information for the Subject is optional. If the Subject is represented by the Requestor, we recommend not providing contact information for the Subject, and thereby forcing DHS to contact only the Requestor if there is any question. If you do provide contact information for the Subject, include only telephone numbers and email addresses that are regularly checked and not likely to change in the foreseeable future to avoid delays.

Items 8a – 8c:

Signature and Notarized Affidavit or Declaration of the Subject of Record

Whether the FOIA request is made by a person seeking her own file or another person’s file, the Subject must either (1) provide her signature before a notary public in item 8.a, OR (2) sign the declaration under penalty of perjury in item 8.b. The Subject should choose one and not sign both.

- ✓ *Notarized Affidavit of Identity* – The Subject should read and understand the certification, which states she agrees to pay costs incurred for the request up to \$25, and that she consents to USCIS releasing her file to the Requestor named on the form. In the presence of the notary, the Subject should sign her complete name above the *Signature of Subject of Record* line and write the date on which the form is signed above the *Date of Signature* line. The notary must provide the date on which she witnessed the signing of the form, her daytime telephone number, her signature, and the date on which her commission expires.

Notaries outside of the United States perform different functions and have differing levels of authority. Before signing this document outside of the United States, research the various requirements that will need to be satisfied before DHS recognizes the signature of a foreign notary.

- ✓ *Declaration under Penalty of Perjury* – The Subject may choose to sign the declaration under penalty of perjury. By signing the statement, the Subject verifies under penalty of perjury that the

information on the form is complete, true, and correct and that she agrees to pay up to \$25 for the request. By signing, the Subject also consents to release documents to the Requestor listed in Part 2 of the form. If the Subject chooses this option, she must sign under the statement.

- ✓ *Deceased Subject of Record* – If the Subject of Record is deceased, the Requestor must provide a **COPY** of the obituary, death certificate, funeral memorial, or other proof of death before any records are released.
- ✓ *Minor Subject of Record* – If a parent and/or legal guardian is submitting a FOIA on behalf of a minor or someone under a legal guardianship, she must show proof of that relationship.
- ✓ *Submitted Without Consent of Subject* – If the Requestor cannot get a signature from the Subject of Record (such as in the case of an estranged relative), the agency will respond to the FOIA request with information that is in the public record or that does not violate the Subject's personal privacy interest. In such situations, USCIS's policy is to release nonexempt applications, petitions, and documents related to the Subject.³⁰

Part 5: Additional Information

The revised Form G-639 adds an *Additional Information* section as Part 5 of the form. If you wish to explain an answer you provided on the form or if you wish to include additional information not requested by the form, it can be included in this section. If further space is needed, you can make additional copies of Page 4 and attach them behind the first four pages of the form.

If you provide information in this section, make sure to include the name of the Subject, the A-number, the Subject's signature, and the date of signature for each *Additional Information* page. You will also need to write what question your additional information is elaborating by listing the *Page Number*, *Part Number*, and *Item Number* in the appropriate boxes above the explanation.

PRACTICE TIP: The Requestor and Subject should each keep a copy of the G-639 filing to reference throughout the immigration case. Some practitioners submit the G-639 with a cover letter. This can be helpful if you are including additional documents, such as a G-28.

Other Ways to Request Records

Although a FOIA response can provide valuable information about a Subject's immigration history, it may not be complete or it may not be the most effective way to obtain the information you need. Below is a list of situations in which a FOIA request is not the best option, followed by the preferred method of obtaining that information:

Criminal Convictions

- FBI and state background checks: These requests will often provide documentation of an individual's arrests, charges, and convictions.
- Court-specific records request: These requests will often provide detailed records of an individual's arrests, charges, convictions, and sentencing.

Status of Pending Applications

³⁰ USCIS, *FOIA Request Guide*, available at [http://www.uscis.gov/sites/default/files/USCIS/About%20Us/FOIA/uscisfoiarequestguide\(10\).pdf](http://www.uscis.gov/sites/default/files/USCIS/About%20Us/FOIA/uscisfoiarequestguide(10).pdf).

Completing FOIA Requests
Immigrant Legal Resource Center

- Write to the USCIS office that received the application or call the National Customer Service Center at (800) 375-5283.

Consular Notification of a Visa Petition Approval

- Submit USCIS Form I-824 to the appropriate Lockbox facility.

The Return of Original Documents

- Submit Form G-884 to the USCIS office that is currently processing your application or to the office that last took action on the application.

Records of Naturalization Prior to September 27, 1906

- Contact the court clerk where the naturalization occurred.

Information on Records Prior to December 1982

- Contact the National Archives.

Proof of Status (i.e., Social Security benefit, Selective Service requirement)

- Contact the agency itself (SSA, Selective Service, etc.).



Freedom of Information/Privacy Act Request

Department of Homeland Security
U.S. Citizenship and Immigration Services

USCIS
Form G-639
OMB No. 1615-0102
Expires 03/31/2017

NOTE: Use of this request is optional. Any written format for a Freedom of Information or Privacy Act request is acceptable.

▶ **START HERE - Type or print in black ink.**

Part 1. Type of Request

Select **only one** box.

NOTE: If you are filing this request on behalf of another individual, respond as it would apply to that individual.

- 1.a. Freedom of Information Act (FOIA)
- 1.b. Privacy Act (PA)
- 1.c. Amendment of Record (PA only)

Part 2. Requestor Information

- 1. Are you the Subject of Record for this request?
 Yes No

If you answered "No" to **Item Number 1.**, provide the information requested in **Part 2.** If you answered "Yes" to **Item Number 1.**, skip to **Part 3.**

Requestor's Full Name

- 2.a. Family Name (Last Name)
- 2.b. Given Name (First Name)
- 2.c. Middle Name

Requestor's Mailing Address

- 3.a. In Care Of Name (if any)
- 3.b. Street Number and Name
- 3.c. Apt. Ste. Flr.
- 3.d. City or Town
- 3.e. State 3.f. ZIP Code
- 3.g. Province
- 3.h. Postal Code
- 3.i. Country

Requestor's Contact Information

- 4. Requestor's Daytime Telephone Number
- 5. Requestor's Mobile Telephone Number (if any)
- 6. Requestor's Email Address (if any)

Requestor's Certification

By my signature, I consent to pay all costs incurred for search, duplication, and review of documents up to **\$25.** (See Form G-639 Instructions for more information.)

- 7.a. Requestor's Signature
- 7.b. Date of Signature (mm/dd/yyyy)

Part 3. Description of Records Requested

NOTE: While you are not required to respond to every item in **Part 3.**, failure to provide complete and specific information may delay processing of your request or create an inability for U.S. Citizenship and Immigration Services (USCIS) to locate the records or information requested.

- 1. **Purpose (Optional):** You are not required to state the purpose of your request. However, providing this information may assist USCIS in locating the records needed to respond to your request.)

Full Name of the Subject of Record

- 2.a. Family Name (Last Name)
- 2.b. Given Name (First Name)
- 2.c. Middle Name

Part 3: Description of Records Requested
(continued)

Other Names Used by the Subject of Record (include nicknames, aliases, and maiden name, if applicable)

- 3.a. Family Name (Last Name)
- 3.b. Given Name (First Name)
- 3.c. Middle Name

Full Name of the Subject of Record at Time of Entry into the United States

- 4.a. Family Name (Last Name)
- 4.b. Given Name (First Name)
- 4.c. Middle Name

Other Information About the Subject of Record

- 5. Form I-94 Number Arrival-Departure Record
▶
- 6. Alien Registration Number (A-Number) (if any)
▶ A-
- 7. Application, Petition, or Request Receipt Number
▶

Information About Family Members that May Appear on Requested Records

For example, provide the requested information about a spouse or children. If you need extra space to complete this section, use the space provided in **Part 5. Additional Information.**

Family Member 1

- 8.a. Family Name (Last Name)
- 8.b. Given Name (First Name)
- 8.c. Middle Name
- 9. Relationship

Family Member 2

- 10.a. Family Name (Last Name)
- 10.b. Given Name (First Name)
- 10.c. Middle Name
- 11. Relationship

Parents' Names for the Subject of Record

Father

- 12.a. Family Name (Last Name)
- 12.b. Given Name (First Name)
- 12.c. Middle Name

Mother

- 13.a. Family Name (Last Name)
- 13.b. Given Name (First Name)
- 13.c. Middle Name
- 13.d. Maiden Name (if applicable)

Part 4: Verification of Identity and Subject of Record Consent

NOTE: The information requested in **Part 4** is **REQUIRED**. Complete all applicable **Item Numbers**. In addition, the Subject of Record **MUST** sign **Part 4** of this request.

Full Name of the Subject of Record

- 1.a. Family Name (Last Name)
- 1.b. Given Name (First Name)
- 1.c. Middle Name

Part 4. Verification of Identity and Subject of Record Consent (continued)

Mailing Address for the Subject of Record

2.a. In Care Of Name (if any) _____

2.b. Street Number and Name _____

2.c. Apt. Ste. Flr. _____

2.d. City or Town _____

2.e. State _____ 2.f. ZIP Code _____

2.g. Province _____

2.h. Postal Code _____

2.i. Country _____

Other Information for the Subject of Record

3. Date of Birth (mm/dd/yyyy) _____

4. Country of Birth _____

Contact Information for the Subject of Record

Providing this information is **optional**.

5. Daytime Telephone Number _____

6. Mobile Telephone Number (if any) _____

7. Email Address (if any) _____

Signature and Notarized Affidavit or Declaration of the Subject of Record

Select **only one** box.

NOTE: The Subject of Record **MUST** provide a signature in **Item Number 8.a.** Notarized Affidavit of Identity **OR** **Item Number 8.b.** Sworn Declaration Under Penalty of Perjury. If the Subject of Record is deceased, read **Item Number 8.c.** and attach proof of death.

8.a. **Notarized Affidavit of Identity** (Do **NOT** sign and date below until the notary public provides instructions to you.)

By my signature, I consent to USCIS releasing the requested records to the requestor (if applicable) named in **Part 2**. I also consent to pay all costs incurred for search, duplication, and review of documents up to **\$25** (if filing this request for myself).

Signature of Subject of Record

Date of Signature (mm/dd/yyyy)

Subscribed and sworn to before me on this _____
day of _____ in the year _____.

Daytime Telephone Number _____

Signature of Notary

My Commission Expires on _____

8.b. **Declaration Under Penalty of Perjury**

By my signature, I consent to USCIS releasing the requested records to the requestor (if applicable) named in **Part 2**. I also consent to pay all costs incurred for search, duplication, and review of documents up to **\$25** (if filing this request for myself).

I certify, swear, or affirm, under penalty of perjury under the laws of the United States of America, that the information in this request is complete, true, and correct.

Signature of Subject of Record

Date of Signature (mm/dd/yyyy)

8.c. **Deceased Subject of Record** (**NOTE:** You **MUST** attach an obituary, death certificate, or other proof of death.)

Part 5: Additional Information

If you need extra space to provide any additional information within this request, use the space below. If you need more space than what is provided, you may make copies of this page to complete and file with your request or attach a separate sheet of paper. Type or print the name of the Subject of Record and his or her A-Number (if any) at the top of each sheet; indicate the **Page Number**, **Part Number**, and **Item Number** to which the information refers; and sign and date each sheet.

1.a. Family Name (Last Name)

1.b. Given Name (First Name)

1.c. Middle Name

2. Alien Registration Number (A-Number) (if any)
▶ A-

3.a. Page Number 3.b. Part Number 3.c. Item Number

3.d. _____

4.a. Page Number 4.b. Part Number 4.c. Item Number

4.d. _____

5.a. Page Number 5.b. Part Number 5.c. Item Number

5.d. _____

6.a. Page Number 6.b. Part Number 6.c. Item Number

6.d. _____

Immigrant Legal Resource Center
December 2016

Chapter 2

CHAPTER 3

FAMILY VISAS: ADJUSTMENT OF STATUS AND CONDITIONAL RESIDENCE

This chapter includes:

§ 3.1	What Is Adjustment of Status?.....	3-2
§ 3.2	Understanding 245(a) and 245(i) Adjustment.....	3-2
§ 3.3	INA § 245(a): Adjustment of Status for Persons Who Entered the United States after Being Inspected and Admitted, or Paroled.....	3-3
§ 3.4	INA § 245(i): Adjustment of Status for Persons Who Did <i>Not</i> Enter the United States with Inspection or Face INA § 245(c) Bars.....	3-4
§ 3.5	Adjustment and Admissibility.....	3-9
§ 3.6	Should Your Client Adjust or Consular Process?.....	3-17
§ 3.7	What Forms and Documents Are Needed to Apply for Adjustment of Status?.....	3-18
§ 3.8	The Application for Adjustment, Form I-485.....	3-20
§ 3.9	Form G-325A, Fingerprints, Photos, and Medical Exam.....	3-21
§ 3.10	Submitting the Adjustment Application.....	3-22
§ 3.11	The Effect of Leaving the Country.....	3-23
§ 3.12	The Adjustment Interview.....	3-23
§ 3.13	The Decision: Approvals and Denials.....	3-26
§ 3.14	Conditional Residence.....	3-28
§ 3.15	Removal of the Condition on Residency if the Marriage Still Exists after Two Years: The I-751 “Joint Petition”.....	3-30
§ 3.16	When to File the I-751 Joint Petition.....	3-30
§ 3.17	Completing the I-751 Joint Petition.....	3-32
§ 3.18	Application Procedure: Filing, Interview, Standard for Approval, Denials.....	3-32
§ 3.19	Termination of Conditional Residency by USCIS during the “Testing Period”.....	3-35
§ 3.20	Waivers of the I-751 Joint Filing Requirement.....	3-36
§ 3.21	When to File.....	3-37
§ 3.22	How to File a Waiver.....	3-37
§ 3.23	The “Good Faith” Waiver.....	3-38
§ 3.24	The Extreme Hardship Waiver.....	3-39
§ 3.25	The Battery or Extreme Cruelty Waiver.....	3-39
§ 3.26	Filing a Waiver if the U.S. Citizen or Permanent Resident Spouse Has Died.....	3-40
§ 3.27	Dependent Sons and Daughters.....	3-40
§ 3.28	Special Situations Involving Conditional Residency and Waivers.....	3-41

There are two ways to become a permanent resident based on a family visa petition: through consular processing at a U.S. consulate abroad (usually in the person's home country), or through adjustment of status at a USCIS office in the United States.

In this chapter, we will look at how a person can immigrate through adjustment of status in the United States. First, we will discuss who is eligible to apply for adjustment of status. Next, we will look at adjustment procedure, how to prepare an application, and what will happen at the adjustment interview. We will then consider the special case of conditional residency. In **Chapter 4**, we look at the rules and procedures for consular processing.

§ 3.1 What Is Adjustment of Status?

Any time a person becomes a permanent resident without leaving the United States, she goes through an "adjustment of status." There are different types of adjustment of status, including based on asylum, registry, cancellation of removal and a special provision of the Immigration & Nationality Act (INA), § 245(i).

Example: Li entered the United States on a tourist visa and married a U.S. citizen who has filed a visa petition for him. Li may apply for adjustment of status to permanent residence. See INA § 245(a).

Example: Kwame was granted political asylum. Beginning one year from the day he wins asylum, he may submit an application to adjust status to permanent residence. See INA § 209(b).

Each kind of adjustment application has its own eligibility rules and procedures. And, different adjustment applications permit waivers for different grounds of inadmissibility. This section will focus only on adjustment of status to permanent residence based on a family visa petition under INA § 245, 8 CFR § 245. All of the rules discussed here apply only to this most common form of adjustment application. They do not apply to adjustment based on asylum, registry, cancellation of removal, U visas, SIJS, VAWA, etc.¹

Adjustment of status is granted in the "discretion" of USCIS. When a benefit is "discretionary," the adjudicator may deny the application even though the person meets the basic eligibility requirements. Although USCIS has at times denied adjustment of status based on a discretionary assessment of factors it considers adverse, it generally grants adjustment to those who meet the eligibility requirements in family-based immigration.

§ 3.2 Understanding 245(a) and 245(i) Adjustment

The most common form of adjustment is referred to as 245(a) adjustment because it is found in the first section of INA 245, INA § 245(a). Under INA § 245(a), people who entered the United States after **being inspected and admitted, or who were paroled**, into the United States and

¹ Note that these same rules do apply to employment based adjustment, diversity visa adjustment and some other less common means of immigrating to the United States which are not discussed in this manual.

meet other requirements may stay in the United States to adjust their status to permanent residence. In order to become a permanent resident under this rule, an immigrant must also be admissible (or qualify for and be granted a waiver) and not be barred under INA § 245(c), which sets out further restrictions on who can adjust.

INA § 245(c) provides that a person cannot adjust status if they are out of status at the time they apply, or have worked without authorization, among other bars. Luckily immediate relatives are exempt from these bars.² An **immediate relative** who entered with inspection and who is otherwise eligible for adjustment of status can adjust under INA § 245(a) even if she is out of status or has worked without authorization, because of this exception for immediate relatives. In contrast, a person immigrating under the preference categories cannot adjust under INA § 245(a) if she has fallen out of status or has worked without authorization, even if she entered with inspection and is otherwise eligible for adjustment.

A second type of adjustment is found in INA § 245(i) and applies to people who entered without inspection or falls within the other disqualifications or “bars” prohibiting INA § 245(a) adjustment which are set out in INA § 245(c). This is generally referred to as “245(i)” or a “245(i) adjustment.” INA § 245(i) permits some people ineligible under INA § 245(c), along with those who entered without inspection, to adjust their status. This provision can only help those that were the beneficiary of a visa petition or labor certification filed before May 1, 2001. With some exceptions, people who adjust status under INA § 245(i) must pay a penalty fee of \$1,000 in addition to the regular adjustment fees.

INA § 245(a) adjustment has two major advantages over INA § 245(i) adjustment. People who are able to qualify for INA § 245(a) adjustment do not have to pay the \$1,000 penalty fee. Also, INA § 245(a) adjustment does not require that the applicant be the beneficiary of an immigrant visa petition or labor certification filed before May 1, 2001 (This is often expressed as “on or before April 30, 2001”).

§ 3.3 INA § 245(a): Adjustment of Status for Persons Who Entered the United States after Being Inspected and Admitted, or Paroled

Under INA § 245(a) and § 245(c), people are eligible to adjust status in the United States as long as they:

1. Were inspected and admitted by a CBP officer or were paroled into the United States;
2. Are the beneficiary of an approved visa petition (or a pending visa petition, in the case of a beneficiary who is an immediate relative of a U.S. citizen);
3. Are immediately eligible to immigrate. This means that the applicant is an immediate relative of a U.S. citizen, or, if in the preference system, has a current priority date (see **Chapter 2**); and
4. If they are a beneficiary under one of the preference categories discussed in **Chapter 2**, they must have never worked without employment authorization, been out of lawful

² For more information on immediate relatives, preference categories and the visa classification system, see Chapter 2.

immigration status, and do not fall within the other, less common, INA § 245(c) bars to adjustment. Even if the person may have been out of status or worked without authorization during a previous trip to the United States, the person cannot adjust. (However, see discussion of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub.L. 104–208, 110 Stat. 3009-546, enacted September 30, 1996 (IIRIRA) § 245(c)(8) below.) These provisions do not apply to *immediate relatives* of U.S. citizens. See INA § 245(c)(2).

These provisions are found at INA § 245(a) and § 245(c).

Example: Juana entered the United States five years ago with a tourist visa and had permission to stay for 30 days. She has not left since that date. She has worked illegally. She just married Emilia, who is a U.S. citizen, so she is eligible to immigrate as an immediate relative. As an immediate relative, Juana can adjust under INA § 245(a). She entered the United States legally (that is, she was inspected and admitted by immigration authorities), and she is eligible to immigrate right away as an immediate relative. She lost her lawful immigration status after her thirty-day visa expired and she worked illegally, but those requirements do not apply to Juana since she is immigrating as an immediate relative (wife of a U.S. citizen). INA § 245(c)(2).

PRACTICE TIP: Parole can also qualify someone for adjustment under INA § 245(a). Travelling with Advance Parole then re-entering the United States with parole will meet the first threshold of requirement of being “inspected and admitted *or paroled*” Likewise, other parole programs, such as parole in place, grant parole to individuals, thereby making them potentially eligible for INA § 245(a) adjustment. Parole in place is currently available only for the undocumented spouses, children, and parents of people currently serving, part of an enlistment program, or who have served in the U.S. armed forces or reserves. Parole strategies for adjustment generally benefit only immediate relatives of U.S. citizens. This is because parole does not cure the INA § 245(c) bars discussed above. Those within preference categories, even with a parole entry, will generally still be barred from adjustment because they have failed to maintain lawful status.

§ 3.4 INA § 245(i): Adjustment of Status for Persons Who Did *Not* Enter the United States with Inspection or Face INA § 245(c) Bars

In 1994, Congress created another kind of adjustment of status under INA § 245(i) for people who did not qualify for regular adjustment of status under INA § 245(a). Under this law, the following noncitizens can apply to adjust status to permanent residency (if they meet the other INA § 245(i) requirements):

- People who entered without inspection;
- People who are not immediate relatives of a U.S. citizen and who overstayed a nonimmigrant visa or worked illegally;
- People who entered in transit without a visa;
- People who are “alien crewmen.”

The law creating this special adjustment provision described at INA § 245(i) has ended. For this reason, this special provision only helps those that could benefit from a petition filed before May 1, 2001. Nonetheless, many clients had petitions filed on their behalf before this cutoff date. Some undocumented persons might have been children before that date and qualify because they were derivative children on a petition filed on behalf of a parent. It is important to screen for these possibilities in all cases; INA § 245(i) eligibility might truly make the difference to obtaining the right to remain legally for our clients.

A. Date of the Petition and the “Physical Presence” Requirement

The initial INA § 245(i) provision ended in 1998. Subsequently INA § 245(i) was extended, with certain additional requirements. Congress ended the extensions of INA § 245(i) adjustment in 2001. As such, INA § 245(i) adjustment is only available to beneficiaries of an immigrant visa petition (Form I-130 or I-140) or labor certification application that was filed before May 1, 2001. In other words, the petition must have been filed on or before **April 30, 2001**. Petitions sent by mail are considered to be timely filed if postmarked on or before April 30, 2001.

Under the *initial* INA § 245(i) law, adjustment is available to beneficiaries of petitions or labor certifications filed on or before January 14, 1998. Under the LIFE ACT of 2000, which extended INA § 245(i), additional requirements apply to INA § 245(i) applicants who are the beneficiaries of petitions or labor certifications filed after January 14, 1998 and before May 1, 2001. To be eligible for INA § 245(i) adjustment, these persons must also demonstrate that they *were physically present in the United States on December 21, 2000*. See 8 CFR § 245.10(a)(2)(i). This additional physical presence requirement does not apply where the petition or labor certification was filed before January 15, 1998.

Example: Juan is an LPR who submitted an I-130 for his wife Aria in 1999. Aria entered the United States without inspection in 1997. Since the I-130 was submitted before May 1, 2001 and she was physically present in the United States on December 21, 2000, Aria is eligible for adjustment under INA § 245(i). She is not eligible for INA § 245(a) because she entered without inspection. Aria needs to establish physical presence in the United States on December 21, 2000 because Juan filed the I-130 after January 15, 1998.

Example: Charlie is a U.S. citizen who married Louisa in 1997, but he did not submit an I-130 petition for her until May 23, 2001. Louisa entered the United States without inspection in 1993. Louisa is not eligible for INA § 245(i) adjustment because her I-130 was filed after April 30, 2001. She is also not eligible for INA § 245(a) adjustment of status since she did not enter with inspection. Therefore, Louisa must consular process in order to immigrate. (Note that if she leaves the country to do consular processing she will need to file for a waiver of the ten-year bar for having a year or more of “unlawful presence.”)

For those that are required to show physical presence on December 21, 2000, they need to submit documentation that they were present with their adjustment application. USCIS will accept all types of evidence that might help show your client was present on the required date. A single document may suffice to establish physical presence on December 21, 2000. However, in the

absence of a document from that specific date, several documents can be submitted to prove physical presence in the United States just prior to and after December 21, 2000.³

In practice, practitioners must be creative using whatever documents might be available from that time period. Examples include: school transcripts; pay stubs; medical records; dated photographs from a specific event; utility bills; rent receipts; family photographs from the holidays; remittance receipts; etc.

PRACTICE TIP: Physical presence must only be shown for the principal beneficiary of the original petition. If your client qualifies for INA § 245(i) adjustment of status because they were once a derivative on a petition that qualifies, they must show the physical presence of the principle.

B. Adjusting Pursuant to a Different Visa Petition; the “Approvable at Filing” Rule

The government stated in memoranda⁴ that any beneficiary of any immigrant visa petition or labor certification filed by the INA § 245(i) deadline may adjust under INA § 245(i), even if the current adjustment is pursuant to a different I-130 petition. USCIS refers to this interpretation as the “alien-based” reading of the statute because eligibility for INA § 245(i) grandfathering attaches to the person (the beneficiary) rather than to a particular petition. To take advantage of this, the original petition must be approved (or have been approvable when it was filed) and there must be a visa number immediately available for the second petition. See 8 CFR § 245.10.

Example: Lamar, a U.S. citizen, petitioned his brother Teo in 1995. Teo, who entered the United States without inspection, married Lana, a U.S. citizen, in May 2001. Lana then submitted an immediate relative petition for Teo. Although the second I-130 (the one Lana submitted for Teo) was submitted after April 30, 2001, USCIS will allow Teo to adjust in the United States under INA § 245(i) because he had another I-130 pending (the one Lamar filed for Teo) prior to the April 30, 2001 deadline.

This “alien-based” approach is helpful in situations like that of Teo, above, where his original petition had a long backlog but his later petition would make a visa immediately available. It allows him to take advantage of the petition filed on or before April 30, 2001 to adjust status in the United States under INA § 245(i), but it also gives him the advantage of the shorter wait to immigrate under the new visa petition.

What happens to visa petitions that were valid when filed, but where changing circumstances make beneficiaries no longer eligible for the visa? According to USCIS, a petition filed on or before April 30 2001 only had to be “**approvable when filed.**” The I-130 that makes the person INA § 245(i) eligible did not need to be actually approved, and it could also cease to be viable, such as through divorce. Thus, if the beneficiary was eligible at the time of the original filing and

³ See USCIS website, Questions & Answers, www.uscis.gov/files/pressrelease/Section245ProvisionLIFEAct_032301.pdf.

⁴ See then-INS memoranda dated January 26, 2001, June 10, 1999; and April 14, 1999, currently posted at www.uscis.gov/files/pressrelease/245i.pdf, or in issues of *Interpreter Releases* published during that period.

later becomes ineligible for that petition, the individual can proceed with an adjustment under INA § 245(i) based on a new petition, even if there is no longer a basis to immigrate under the old I-130 petition. The “approvable when filed” approach is incorporated in the rule at 8 CFR § 245.10(a)(3).

Example: Tran, an LPR, petitions for his unmarried daughter Nicole in 1999. Nicole, who entered with a visitor’s visa that has now expired, marries an LPR in June 2001 and becomes ineligible to get a green card through her father. Her LPR husband files an I-130 for her the same month they marry. Assuming Nicole was present in the United States on December 21, 2000, can she adjust?

Yes, because Nicole was an eligible beneficiary of an I-130 petition filed by her father at the time he petitioned for her. That is, her father’s petition qualifies Nicole for INA § 245(i) because it was approvable when filed before the cutoff date. By being “grandfathered” into INA § 245(i) by her father’s petition, Nicole is able to take advantage of INA § 245(i) adjustment based on a new petition filed *after* the INA § 245(i) deadline of April 30, 2001.

The memorandum and the regulations recognize that even if a petition is denied, it may have been approvable when filed. Thus, the beneficiary of an I-130 filed on or before April 30, 2001 that USCIS later denied due to insufficient documentation may submit the missing documentation later to prove the petition was approvable when filed and that she is eligible to adjust under INA § 245(i).

Example: Jana, a U.S. citizen, filed a family visa petition in October 1999 for her brother Larry who had entered the United States illegally. She forgot to include a copy of her brother’s birth certificate to establish that she and Larry were siblings. She moved and did not receive the notice from USCIS that the application was incomplete. When USCIS did not get a response from her regarding the additional information, it denied the petition. Larry married a U.S. citizen in June 2012 who just filed a petition for him. Is there anything that can be done so that Larry can adjust under INA § 245(i)?

Yes, according to the memo and regulations, Larry can submit the receipt from the original I-130, and the needed information to complete the original petition in order to demonstrate that it was “approvable when filed.” This would cure the problem with the original petition filed before the INA § 245(i) deadline and permit him to submit his application for adjustment of status based on the more recent petition his wife filed on his behalf.

PRACTICE TIP: It is the applicant’s burden to prove that she qualifies for INA § 245(i) adjustment as a person for whom a petition was filed on or before April 30, 2001. Therefore, it is up to the applicant to produce the prior petition receipt or approval notice that establishes her eligibility for INA § 245(i) adjustment. If your client has lost her copy of an I-130 receipt or approval notice (Form I-797) you can obtain a duplicate replacement by filing an I-824 or Freedom of Information Act Request with USCIS. Also ask your client if she has kept the post office receipts for certified mail in order to verify that the petition was postmarked on or before

April 30, 2001. If an original I-130 was not approved, it is the applicant's burden to prove that it was "approvable" when filed.

C. Derivative Beneficiaries Qualify under INA § 245(i)

Depending on the circumstances, a spouse or child of someone who is grandfathered under INA § 245(i) may also be able to adjust status under INA § 245(i). Below, we consider specific scenarios.

a. Spouse or child relationship that existed at time of filing

If the principal beneficiary of an I-130 can demonstrate that a spouse or child relationship existed on or before April 30, 2001, then that spouse or child is grandfathered regardless of any subsequent changes in the relationship with the principal beneficiary. This means a spouse can remain grandfathered even after losing that marital status due to divorce, or a child can remain grandfathered even after turning 21 years old. In such cases, the spouse or child who is grandfathered can still seek to adjust status under the special provisions of INA § 245(i). This is true even if the derivative beneficiary was not listed on the original I-130, but can prove she was a qualifying relative at the time the original petition was filed.

b. Spouse or child relationship established after April 30, 2001

In this situation, the spouse or child may benefit from INA § 245(i) only if they are adjusting as the derivative of the principal beneficiary. The qualifying relationship must continue to exist at the time the principal beneficiary adjusts status in order for the spouse or child to obtain the derivative benefit of INA § 245(i). A spouse or child acquired after April 30, 2001 may not independently benefit from INA § 245(i). Thus, if the relationship ends before the principal adjusts status the spouse or child cannot benefit from INA § 245(i) in a later application based on a different relationship.

c. Spouse or child relationship established after the principal beneficiary adjusts status

In this situation, the spouse or child cannot adjust status under INA § 245(i) under the same petitions as the principal, as they were not derivatives at the time the principal adjusted. The principal should file a visa petition for the after-acquired spouse or child, but the family members will need to establish they qualify for a regular adjustment under INA § 245(a).

d. Effect of naturalization of the petitioner on derivative applicants

When a petitioner naturalizes, the former derivative is still grandfathered under INA § 245(i), as long as the person was a valid derivative beneficiary of the principal beneficiary on the original I-130, and the petition was approvable when it was filed. In this situation the person is still grandfathered under INA § 245(i) even if she loses her derivative status. See also 8 CFR § 245.10(a)(1)(i).

Example: Candido, an LPR at the time, petitioned his wife Marta in 2000. He did not petition for his daughter Janira separately because she was only one-year old and he had been told that she could immigrate as a derivative of Marta's application. In 2007, Candido became a U.S. citizen. Marta therefore became an immediate relative and as such her children could not immigrate with her as derivatives. Candido had to submit a new I-130 petition for Janira. Can Janira adjust even if her new I-130 petition will have a filing date after April 30, 2001?

Yes, she can adjust because her derivative status on the original I-130 petition filed by her father on behalf of her mother in 2000 was valid and the petition was approvable when it was originally filed. Therefore, she is grandfathered by INA § 245(i) and can now become the principal beneficiary of a newly filed I-130. Furthermore, she could file her adjustment of status application concurrently with her new visa petition because she would have a current visa available as an immediate relative of her father. Note, however, that if Marta and Janira last entered the United States with inspection, they probably qualify for "regular" adjustment under INA § 245(a) and then would not need INA § 245(i) once they both became immediate relatives when Candido became a U.S. citizen.

D. Filing for INA § 245(i) Adjustment

People who adjust under INA § 245(i) must file Supplement A to Form I-485 along with the regular Form I-485. Additional regulations on INA § 245(i) adjustment are found at 8 CFR § 245.10.

There is a penalty fee for filing under the INA § 245(i) adjustment law. With certain exceptions, people who adjust under this law must pay an extra \$1,000 penalty fee, along with the regular adjustment fee. The only exceptions to this are:

1. Children who are under 17 years old at the time of filing the adjustment application; and
2. Spouses and children of the petitioner who qualify for benefits under the Family Unity Program and have submitted a Family Unity application. See 8 CFR § 245.10(b).

The beneficiaries remain eligible for the waiver of the penalty fee when the petitioner, who is also the "legalized alien" on the Family Unity application, becomes a U.S. citizen. See 8 CFR § 236.11(3); 8 CFR § 245.10(c)(2)–(c)(3).

§ 3.5 Adjustment and Admissibility

In order to adjust status, a person must be admissible or, if the person is inadmissible, she must obtain a waiver of the ground of inadmissibility.

Before filing an adjustment application, it is important to screen for all possible grounds of inadmissibility. While some grounds might result in a denial of the application, others could also result in a referral to immigration court for deportation. We therefore want to make sure we are not putting our clients at further risk of removal from the United States. While some grounds of inadmissibility have waivers available, others do not. For instance, if someone falsely claimed to

be a U.S. citizen, she may be permanently barred from showing she is admissible.⁵ Likewise, inadmissibility grounds for controlled substance related offenses have no waiver available. It is therefore critical to screen for all issues before filing an application. To screen thoroughly, use a good intake tool and ask lots of questions. A sample intake questionnaire can be found at www.ilrc.org/screening-immigration-relief-client-intake-form-and-notes. A few important topics to investigate include:

- **Criminal history:** If the applicant has any criminal history, be sure you have reviewed it carefully and, if necessary, refer the applicant to a practitioner with sufficient expertise to give advice on its effect.
- **Intent at entry and visa fraud:** If the applicant entered with a non-immigrant visa, carefully review her intent at the time of entry and what she said at the consulate when applying for the visa and/or at the border at the time of entry to see if there is any indication of a material misrepresentation which might constitute visa fraud. Starting a job or getting married to a U.S. citizen right after entry with a non-immigrant visitor visa can be a red flag to officers that the person might not have intended to be a visitor at the time she entered, and could have made a misrepresentation. Advocates should explore this issue with their clients.
- **History of entries and exits, with particular attention to the unlawful presence bars.** **Persons should not apply for adjustment if they are subject to either the permanent bar of INA § 212(a)(9)(C), or reinstatement of removal of INA § 241(5)** (except as a defense if they are already in removal proceedings).
- Smuggling, even if assisting a relative.
- Other grounds of inadmissibility.

If the applicant has *any* history of contact with the INS, USCIS, ICE, or CBP, be sure you know exactly what occurred *in the eyes of the immigration authority*. You may need to do an FBI fingerprint check and/or a Freedom of Information Act (FOIA) request. If you have any doubt about your ability to assess your client's immigration record and its effects, refer the applicant to a practitioner with greater expertise. *Do not put your client at risk of arrest and removal.*

A. Unlawful Presence Bars

Two of the most common inadmissibility grounds are called the “three- and ten-year bars.” People who have been unlawfully present in the United States for between 180 days and one year are inadmissible (barred from entering the United States or getting a visa) for three years if they depart the United States. People who have unlawful presence of one year or more are inadmissible for ten years if they depart the United States.

⁵ See INA § 212(a)(6)(C)(ii). Note that this ground only applies to false claims made on or after September 30, 1996. Additionally, there are some defenses to this ground. Make sure to seek advice from an expert before concluding this ground applies.

These grounds were created by IIRIRA and went into effect on April 1, 1997. Unlawful presence in the United States before that date does not count for purposes of these bars. Furthermore, certain classes of people do not accrue “unlawful presence” for purposes of determining whether a departure from the United States triggers the three- or ten-year bar. These people include bona fide asylum applicants who have never worked without authorization, people with family unity protection, minors (under 18 years of age), approved VAWA self-petitioners, and certain others. INA § 212(a)(9)(B).

These particular unlawful presence bars apply only to people *who leave the United States*. This includes people who depart the United States in order to attend a consular appointment in their country of origin. One way to avoid coming within this ground is to not leave the United States, and instead *stay in the United States to adjust status if eligible under INA § 245(a) or § 245(i)*.

For those who trigger the three- or ten-year bar, a discretionary family waiver is available if they can show extreme hardship to a qualifying relative. Qualifying relatives for this waiver are limited to U.S. citizen or lawful permanent resident *wives* or *parents* (please note: children are not qualifying relatives for the waiver of the three- and ten-year bar). See **Chapter 5**.

Example: Patrick is a U.S. citizen. He met Mary in 2013 and they got married in June 2015. Mary entered the United States unlawfully in 1997 and has been here ever since. Patrick wants to get a green card for Mary. She is not eligible for INA § 245(a) because she had an unlawful entry. She is not eligible for INA § 245(i) because her family petition was filed after April 30, 2001. Therefore, Mary will have to do consular processing. However, when she leaves the United States for her consular interview, Mary will trigger the ten-year bar because she resided unlawfully in the United States for over a year and then departed the United States. She will have to request a waiver of the ten-year bar or leave the United States and wait 10 years before applying for admission. Mary can file for a provisional waiver before leaving the United States to consular process. See **Chapter 5** for more information.

PRACTICE TIP: Advance Parole When Adjustment Application Is Pending. A person who has a pending adjustment application can receive advance parole to travel outside the United States while her adjustment application is pending. Advance parole is discussed in more detail in **Chapter 8**. An application for advanced parole can be submitted when someone has an application pending (such as for adjustment) that she does not want to abandon, but wants to leave the United States briefly for some reason. Advance parole can also be granted for other reasons in other contexts, such as for those who have Deferred Action for Childhood Arrivals (DACA) or Temporary Protected Status (TPS). In *Matter of Arrabally and Yerrabelly* the Board of Immigration Appeals found that an individual who leaves the United States pursuant to advanced parole while her adjustment application is pending will **not** trigger the unlawful presence bars.⁶

⁶ *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012). See also DHS Memorandum “Directive to Provide Consistency Regarding Advance Parole” (Nov. 20, 2014) available at: www.dhs.gov/sites/default/files/publications/14_1120_memo_arrabally.pdf.

Example: Sarti, a U.S. citizen, marries Yari who entered on a tourist visa in 1995. Yari was in the United States without authorization for many years after her tourist visa expired. In December 2014, Sarti and Yari file an adjustment packet for Yari. Yari wants to go visit her very sick mother in Ecuador. Can she?

Yes, USCIS may grant her advance parole given the severe illness of her mother. In fact, an application for advance parole can be filed together with the initial application for adjustment of status, with no additional fee. For adjustment applicants, unlike some other applicants, no special reason is required for a grant of advance parole, just a desire to travel. Yari has lived in the United States without permission for over a year and therefore she must be concerned about the unlawful presence bar. However, pursuant to *Matter of Arrabally and Yerrabelly*, if she is granted advanced parole, she would be able to leave to visit her mother and return to complete the adjustment of status process in the United States without triggering the unlawful presence bars. If Yari left without getting advanced parole, she would abandon her application for adjustment and be subject to the unlawful presence bar as someone who lived in the United States for a year or more without permission. In that case, she would need to file a new adjustment application and include a waiver for unlawful presence. See **Chapter 5**.

Remember, advance parole should be secured before departing the United States as leaving the country *without* advance parole could trigger the 3- and 10-year bars.

1. Parole and adjustment strategies

An individual with DACA, TPS, or other forms of temporary immigration relief who travels on advance parole may gain the ability to adjust status in the United States upon her return if she meets the requirements for adjustment under existing immigration law.⁷ To adjust status, a person must have been inspected and admitted or paroled into the United States, among other requirements.⁸ Many individuals originally entered the United States without inspection, and therefore are not able to apply for adjustment of status within the United States under INA § 245(a). Obtaining DACA, TPS, or a similar status and then travelling and re-entering the United States with parole, may give some of these individuals the ability to adjust status after their return to the United States if they have a petitioning “immediate relative”⁹ family member.

Before the Board’s decision in *Matter of Arrabally and Yerrabelly*, this was generally impossible, because leaving the United States would trigger the unlawful presence bars, and they would be

⁷ This chapter applies to individuals with DACA, TPS, and other forms of immigration relief that allows them to travel with advance parole. For the purposes of brevity, however, this chapter will mostly refer to these individuals as “DACA or TPS recipients.”

⁸ See INA § 245(a).

⁹ “Immediate relatives” are parents of adult U.S. citizens, spouses, and minor unmarried children of U.S. citizens. Advance parole will not ordinarily help family preference beneficiaries be able to adjust status, because most of them would still face the INA § 245(c) bars to adjustment for failing to continuously maintain lawful status, and/or working without authorization. But these family preference beneficiaries may still be able to consular process.

inadmissible and unable to get a green card. But following *Arrabally* and President Obama's directive about advance parole,¹⁰ immigrants can be reasonably confident that travelling under a grant of advance parole will not trigger the unlawful presence bars in INA § 212(a)(9)(B).¹¹

WARNING: Adjustment May Not Be Available to Individuals Who Have Been Previously Deported or Removed. ICE May Arrest and Immediately Deport Such Persons.

"Reinstatement of Removal" authorizes ICE to remove individuals without a hearing who illegally re-enter after a removal or deportation order. See INA § 241(a)(5).

Reinstatement can also apply following expedited removal when the person has not had a hearing before an immigration judge. Expedited removal occurs at or near the border or a port of entry when ICE or CBP administratively removes a person pursuant to INA § 235(b), giving the person Form I-860.

It is important to look closely at your client's immigration history if she has had encounters with immigration authorities in the past because there is a serious risk that filing a new application will harm your client.

B. Public Charge Ground

Noncitizens whom the government believes are likely to receive cash welfare or to need long-term care at government expense can be refused admission as being "likely to become at any time a public charge." INA § 212(a)(4). The USCIS has issued a fact sheet entitled "Fact Sheet: Public Charge," released on April 29, 2011, and last updated November 15, 2013, which contains information pertaining to the public charge ground of inadmissibility and deportability.¹²

Under the traditional, general test, officials shall "at a minimum" consider the person's age, health, family status, assets, resources, financial status, education and skills, and can also consider an affidavit of support. INA § 212(a)(4)(B). An additional requirement added in 1996 applies *only* to persons immigrating through a **family visa petition** and in some cases, employment based petitions. Under this second test, most people immigrating through a family visa petition *must* have an **affidavit of support, Form I-864** submitted on their behalf, or they will be found inadmissible as a public charge. INA § 212(a)(4)(C). There are some exemptions and those who fall into these exemptions have to file Form I-864W instead.

Under the final rule *every* person immigrating through a family member *must* either 1) submit a qualifying Form I-864 Affidavit of Support in order to meet the public charge requirement, or 2)

¹⁰ Memorandum from Jeh C. Johnson, Secretary, U.S. Department of Homeland Security, on Directive to Provide Consistency Regarding Advance Parole to Stevan E. Bunnell, et al. (Nov. 20, 2014), available at www.dhs.gov/sites/default/files/publications/14_1120_memo_arrabally_0.pdf.

¹¹ *Matter of Arrabally and Yerrabally*, 25 I&N Dec. 771 (BIA 2012); Memorandum from Jeh C. Johnson, Secretary, U.S. Department of Homeland Security, on Directive to Provide Consistency Regarding Advance Parole to Stevan E. Bunnell, et al. (Nov. 20, 2014), available at www.dhs.gov/sites/default/files/publications/14_1120_memo_arrabally_0.pdf.

¹² This can also be found on the USCIS website at www.uscis.gov/news/fact-sheets/public-charge-fact-sheet.

if they are exempt from the affidavit of support requirement, submit Form I-864W, the Intending Immigrant's Affidavit of Support Exemption. Form I-864W can be filed under the following circumstances:

1. People who can "self-petition" under the battered spouse, child or parent provisions (VAWA);
2. People who file as widows or widowers of U.S. citizens;
3. People who already have earned or can be credited with 40 "qualifying quarters" of employment with social security payments; or
4. Persons under age 18 who become U.S. citizens at the same time that they become permanent residents, because of their parents' U.S. citizenship.

USCIS requires all applicants to submit the affidavit of support (Form I-864) with their adjustment applications. People immigrating through consular processing must also file the Form I-864 with the State Department's National Visa Center before they can complete the immigrant visa process. Under the final regulation, the sufficiency of the affidavit of support is based on the income reported for the year the Form I-864 was submitted, not the sponsor's income on the date the immigrant visa is adjudicated or on the date of the application for adjustment of status. Furthermore, officials must use the Federal Poverty Income Guidelines in effect at the time the affidavit is submitted, not at the time the affidavit is being reviewed. You should always confirm that you are using the most current edition by checking the form at www.uscis.gov.

1. Who is a sponsor

The person who submits an affidavit of support (Form I-864) is called the **sponsor**. Under INA § 213A(f)(1), a sponsor must be a U.S. citizen, a U.S. national, or a permanent resident, of at least 18 years of age. The sponsor must live in the United States, a U.S. territory or possession, or reside abroad temporarily and establish that she will live in the United States on or before the intending immigrant obtains lawful permanent residence.

The petitioner (the U.S. citizen or permanent resident who has filed an immigrant visa petition on behalf of the non-citizen) *must* be a sponsor. No matter how low the petitioner's income is, the petitioner must submit an affidavit of support on behalf of the intending immigrant.

Example: Antonio works in the fields to support himself and his mother, who does not work because she has a disability. His mother is petitioning for Antonio. She must submit an affidavit of support, even though she will have no income except for social security benefits, and even though *he* supports *her*.

2. What the sponsor must earn: Calculating the number of people in the household and 125% of the Poverty Income Guidelines

A sponsor signing an affidavit of support must demonstrate that she earns enough income to support the immigrant and the sponsor's entire household at an income level of at least 125% of the Federal Poverty Income Guidelines.¹³ Each year the federal government decides the amount

¹³ A copy of the latest poverty guidelines can be found at www.uscis.gov/i-864p.

of income that brings families to the official poverty level, and publishes this as the poverty income guidelines. Sponsors who are active in the U.S. Armed Forces only need to demonstrate 100% of the poverty line. Sponsors must state whether they have received public benefits. The USCIS asks for this information to determine whether the sponsor is counting any cash benefits to meet the 125% income guideline. If the sponsor is receiving cash benefits, these cannot be used to meet the 125% income guideline.

3. Determining the size of the household that must be counted in the 125%

The regulations, found at 8 CFR § 213a.1, provide that the following persons, in addition to the sponsor herself, must be counted as part of the household regardless of where they reside:

- The sponsor's spouse;
- The sponsor's children under the age of 21, unless they are emancipated and were not claimed as dependents on the sponsor's most recent tax return;
- The intending immigrant;
- All derivatives of the intending immigrant who are obtaining lawful permanent resident status at the same time or within six months;
- All dependents claimed on the sponsor's most recent tax return; and
- All noncitizens previously included in an I-864 affidavit of support (for immigration on or after December 19, 1997), unless the obligation has ended.

4. Proving income

The regulations place significant emphasis on the sponsor's current income to meet the income requirement. The rule states that the "greatest evidentiary weight" will be given to the sponsor's "reasonably expected household income" in the year the application is filed instead of the income reported on the most recent tax return. 8 CFR § 213a.2(c)(2)(ii)(C). Tax returns serve merely as evidence to show that the sponsor will likely maintain her income in the future. Regulations require the sponsor to submit only the most recent federal tax return. Sponsors, however, must provide the total income reported for the last three tax years in the I-864.

A sponsor does not have to be employed and can use income from sources such as a pension, retirement benefits, interest income, dividends, unemployment or workman's compensation, alimony, or child support to meet the income requirement. While receipt of cash public benefits to maintain income does not disqualify a person from being a sponsor, the sponsor cannot count any of these benefits towards income.

5. Household members, joint sponsors and significant assets

Some clients do not earn enough income by themselves to reach 125% of the poverty income guidelines. There are three other ways in which a sponsor may satisfy the 125% requirement:

1. Add **household members' income** to the sponsor's income;
2. Find a **joint sponsor** who meets the poverty guideline amount independently; and/or
3. Use "**significant assets.**"

a. Household income

The income of the sponsor's household members may be added to the sponsor's income in order to reach the 125% poverty income guideline amount. See 8 CFR § 213a.2(c)(2)(i)(C)(1). The following people can be contributing household members:

- The sponsor's spouse if residing with the sponsor (note: if the spouse is the intending immigrant she need not reside with the sponsor);
- The sponsor's children if residing with the sponsor;
- Any other relative¹⁴ residing in the household who is not a dependent and is at least 18 years old;
- Any dependents listed on the sponsor's tax return for the most recent tax year; and
- The intending immigrant, subject to limitations (see below).

To count the intending immigrant's income, she must be residing with the sponsor, be the sponsor's spouse, or be claimed dependent. The income must come from lawful employment in the United States or from some other lawful source that will continue to be available to the intending immigrant after she obtains permanent resident status. Lawful employment means work performed while the worker had an employment authorization document (EAD). This lawful employment requirement creates hardship for many intending immigrants who have been working, but without authorization. In addition, offers of employment are not enough to meet the intending immigrant's proof of income.

The household member whose income is to be counted must sign **Form I-864A**. This is a *contract between the contributing household member and the sponsor*. In that contract the household member agrees to accept "*joint and several liability*" for all of the sponsor's obligations under the affidavit of support. In other words, the household member would be just as responsible as the sponsor if the sponsor were sued and had to pay money. See discussion of liability in **Subsection D**. The one exception to this rule is that if the intending immigrant is the household member in question, she does not have to sign a Form I-864A contract with the sponsor, as long as she is immigrating alone (i.e., and not with a spouse or child).

Example: Rebeca has two children and wants to immigrate her husband Rodolfo, who is living in Mexico. Her income of \$24,000 is less than 125% of the poverty guidelines for a family of four, which is \$30,374 (125% of \$24,300). Rebeca's 18-year old daughter has always lived with her and earns \$8,000 per year. Can they count her income?

Yes, since Rebeca's daughter is considered a relative, currently lives in the household, and is 18 years old, she can sign an I-864A contract with her mother and her income will be added. Their total income is \$32,000, more than enough.

¹⁴ "Relative" is defined only to include the sponsor's spouse, child, adult son/daughter, parent, or sibling. 8 CFR § 213a.1(2).

b. Joint sponsorship

If the petitioner/sponsor does not make enough money to meet the requirements of the affidavit of support, then another person can also file an affidavit of support and become a joint sponsor. In addition to the primary sponsor, two joint sponsors per family on a single family petition are allowed. 8 CFR § 213a.2(c)(2)(iii)(C). No one person may have more than one joint sponsor, but all family members do not have to have the same sponsor.

The joint sponsor must meet the same requirements as the original sponsor, the petitioner. The joint sponsor must be a lawful permanent resident or U.S. citizen at least 18 years of age who lives in the United States or a U.S. territory or possession. See INA § 213A(f). The joint sponsor must sign a separate affidavit of support, Form I-864. By signing the affidavit, the joint sponsor agrees to accept joint and several liability for the affidavit of support. This means that the joint sponsor will have exactly as much responsibility as the original sponsor under the affidavit of support.

The joint sponsor must be able to meet the income requirement by herself. The petitioner's income and joint sponsor's income *cannot* be added together to meet 125% of the poverty income guidelines. (Compare this to the "contributing household member" described above. In that case, the income is added to the sponsor's).

c. Significant assets

A person who does not earn enough income can still meet the 125% test if she has enough "significant assets." INA § 213A(f)(6)(A)(ii). Generally, there are two requirements: (1) the assets must be convertible to cash within one year, and (2) the net worth of the assets must be five times the difference between the sponsor's actual income and the income the sponsor is required to have. There are two exceptions to this second requirement. First, if the sponsor is a U.S. citizen and the intending immigrant is the sponsor's spouse or a child over 18, the value of the assets must be only *three* times the difference between the sponsor's income and the required amount. See 8 CFR § 213a.2(c)(2)(iii)(2)(B)(1). Second, if the intending immigrant is an orphan to be formally adopted in the United States, the value of the assets only must equal the shortfall between the sponsor's income and the required amount. See 8 CFR § 213a.2(c)(2)(iii)(2)(B)(2).¹⁵

Savings accounts, stocks and bonds, certificates of deposit, life insurance policies, real estate, and personal property, are examples of significant assets. See 8 CFR § 213a.2(c)(1)(iii)(B).

§ 3.6 Should Your Client Adjust or Consular Process?

Consular processing means the person must go through the process abroad at a consulate in their country of origin. A person in the United States who is unable to adjust status will have to

¹⁵ Note also that some children of U.S. citizens, including adopted children, are exempt from the Affidavit of Support requirement if they would become U.S. citizens by operation of law immediately upon acquiring permanent resident status. See Subsection E.

consular process.¹⁶ For persons physically present in the United States, adjustment of status is generally preferred over consular processing because of the lower cost and comparative convenience of adjustment and because of the greater opportunities for administrative and judicial review. In addition, departing the United States to consular process may trigger inadmissibility under INA § 212(a)(9)(B), the three-year and ten-year unlawful presence bars. These particular unlawful presence bars *apply only to people who leave the United States and then apply for admission*.

For those who already live in the United States, it is best to find a strategy that does not involve the risk of leaving. For this reason, advocates screen carefully for possible 245(i) eligibility, consider whether parole will help an applicant adjust status, and last determine if a provisional waiver might make the consular process less risky. See **Chapter 5** for more information on the provisional waiver.

§ 3.7 What Forms and Documents Are Needed to Apply for Adjustment of Status?

Every applicant for adjustment of status—including derivative beneficiaries, young children, and the elderly—must submit a complete packet of adjustment application materials. The adjustment of status application packet must contain the following forms and documents:

1. Form I-485: the adjustment of status application form and all supporting documentation.
2. A Form I-130 Visa Petition signed by the petitioner for an immediate relative or an approval notice for a previously-filed, and now valid and current, I-130 petition and copies of supporting documentation.
3. Form G-325A: the biographical data form. Children under the age of 14 are not required to submit the **G-325A**.
4. Passport-style photographs: Include the required number of photographs per application form. For example, Form I-485 requires two photos of the beneficiary. However, Form I-765 (employment authorization document) and the I-131 (advance parole) each also require two passport-style photos.
5. Filing fees: Filing fees increased at the end of 2016. As of December 23, 2016 the new fees are as follows: \$1140 for an adjustment application (\$750 if the applicant is under 14 years of age AND is filing with the I-485 application of at least one parent), \$85 for biometrics (fingerprints and photo processing—not required for an applicant under 14 years of age or 79 years of age or over), and \$535 for the I-130 visa petition if an immediate relative is filing both the visa petition and adjustment packet together. There are no fees for an I-765 and I-131 if included with the adjustment packet. Send check or

¹⁶ Consular process is also the process for people who are outside the United States to obtain an immigrant visa for permanent residence.

- money order only.¹⁷ Always check the USCIS website (www.uscis.gov) for the latest filing fee information *before* you file, as fees often change.
6. Form I-693 containing the results of a medical examination by a USCIS approved civil surgeon.
 7. Proof of vaccinations or proof of exemption for this requirement. (This is part of the Form I-693. Double check that the civil surgeon marked all the correct boxes.)
 8. If the person must apply for a waiver of a ground of inadmissibility, Form I-601 with the \$930 filing fee (as of December 23, 2016).
 9. The applicant's I-94 or I-94 printout if the person entered with a nonimmigrant visa,¹⁸ and (if available) a copy of visa in passport (if a visa was necessary to enter),¹⁹ a copy of entry stamp in passport to prove entry with inspection if filing pursuant to INA § 245(a), and a copy of every page of passport that is not blank.²⁰ If applicant is eligible based on a parole entry, submit a copy of Form I-512L.
 10. Form I-864 Affidavit of Support along with evidence of financial support, according to requirements of INA § 213A signed by the petitioner, or an I-864W if the beneficiary is exempt from the requirement.
 11. Form I-765: Application for Employment Authorization, if the applicant wants a work permit, along with separate supporting documents, such as photos and copies of any prior work permits. No separate filing fee is required.
 12. Copy of applicant's birth certificate or record, with an English translation.
 13. Form I-485 Supplement A, for adjustments under INA § 245(i); and \$1000 penalty fee, if required, plus supporting documents such as proof of physical presence on December 21, 2000.

¹⁷ In *Blanco v. Holder*, the Ninth Circuit held that it was *not* proper to reject "alien's otherwise complete and timely application" for adjustment of status for the sole reason that the accompanying check for the filing fee was inadvertently unsigned. Here, the Court noted that the lack of signature needs to be inadvertent and in good faith (not intentionally done).

¹⁸ If the I-94 is lost, the entry stamp in the passport will suffice as proof of legal entry. If neither the I-94 nor the passport stamp is available, an I-102 should be submitted, to request a replacement I-94. The replacement may then be submitted with the application for adjustment. As of April 26, 2013, CBP is no longer issuing paper I-94s at airports and sea ports of entry, except for those people undergoing secondary inspection, including asylees, refugees and parolees. Instead at those ports of entry, CBP will enter the I-94 into an automated system. These people will still need I-94s to apply for adjustment, but should go to www.cbp.gov/I94 and obtain a printout from the electronic system.

¹⁹ Some people from certain countries enter under the Visa Waiver Program and so will not always have visas in their passports.

²⁰ USCIS wants a copy of every page of the passport with a mark or stamp on it—which will be reviewed in the determination of potential grounds of inadmissibility, such as unlawful presence, material support to terrorists (past travel to certain countries will likely raise questions), visa fraud, etc.

14. Form I-131: Application for Advance Parole with separate supporting documents, if the applicant wishes to depart the United States while the adjustment application is pending, or want to have the possibility of travel just in case. No filing fee is required if filed with the adjustment packet. See *Matter of Arrabally and Yerrabelly*, holding that travel pursuant to advanced parole will not trigger unlawful presence bars.²¹

Be sure your client provides all required signatures, including signing the check! The applicant should never submit originals of official documents, such as birth certificates, marriage certificates, divorce decrees, I-94s, etc., with the adjustment packet unless they are specifically requested. The originals of these documents must be brought to the adjustment interview, but only copies should be mailed with the initial submission.

One-Step Adjustment: If the person is an immediate relative and qualifies for adjustment, an I-130 can be submitted along with the adjustment application, instead of submitting the I-130 first and waiting for approval prior to submitting an adjustment. This one-step process is very useful because it requires the beneficiary only to appear for one interview and speeds up the processing. Additionally, the person is able to obtain work authorization more quickly because the work permit application may also be submitted with the initial packet.

§ 3.8 The Application for Adjustment, Form I-485

The application for adjustment of status is made on Form I-485. A visa petition (Form I-130) may be filed at the same time as the I-485, if the person will be eligible to adjust as soon as the visa petition is approved. This is the case with immediate relatives of U.S. citizens.

The I-485 form is not difficult to complete on its face, but requires careful thought and analysis to ensure that the client is eligible and whether any grounds of inadmissibility are implicated by the information to be submitted. Ask the client to fill it out in draft form first, but review every question with her. In the instructions, “you” refers to the person who is adjusting status.

If the form asks a question that does not apply to the person, she should usually write “not applicable” or “N/A.” Usually it is best not to leave any part of the form blank.

Some guidelines may be helpful:

1. Part 1 asks for information from the I-94. If the person did not enter with a visa of some kind, mark N/A where applicable.
2. Part 2 of the form asks the applicant to state why she qualifies for adjustment of status. Persons who immigrate through a relative’s visa petition will check Box “a” or “b.” Persons who immigrate through a fiancé(e) petition will check Box “c.”
3. Part 3, section A of the form asks for information about the person’s non-immigrant visa. Your client may have obtained a visa from a U.S. consulate abroad in order to enter the

²¹ *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012).

United States. The visa is the large, multicolored stamp or sticker in the person's passport. The visa number is the number that usually appears at the bottom right of the visa stamp or sticker and is often in red. The control number is at the top in black. The name of the location of the U.S. consulate (e.g., Ciudad Juarez) or issuing post is included on the stamp or sticker.

4. Part 3, section C of the form is aimed at identifying people who are inadmissible. If the client might answer yes to any of those questions, be sure that you understand whether the person is indeed inadmissible and if a waiver is necessary and possible. Do NOT check "yes" unless you are certain. On the other hand, do not check "no" if inadmissibility is absolutely certain. Sometimes, even if a client appears inadmissible, advocates will answer "not certain" and leave it up to the examiner at the interview. It is critically important to obtain expert advice in this situation. If you are certain that a waiver is necessary, file a Form I-601, supporting documents and filing fee with the adjustment packet. If your client is not eligible for a waiver, or if it is likely that the waiver application will be denied, you and your client must decide whether or not to apply, due to the risk that adjustment may be denied and that your client may be placed in removal proceedings.

§ 3.9 Form G-325A, Fingerprints, Photos, and Medical Exam

The G-325A Form. Each applicant who is between 14 and 79 years of age must complete a G-325A form. At the question at the bottom of the large box, mark "status as a permanent resident." *Be sure to check the G-325A, the I-485, and the I-130 to make sure that you give the exact same information on all three forms: Consistency is crucial.*

Fingerprints. Each applicant who is between 14 and 79 years of age must be fingerprinted. The process is that an applicant submits a check or money order for the fingerprinting (biometric) fee along with the adjustment application. The USCIS will send a notice to schedule the applicant to have her fingerprints and an additional biometric photograph taken at a USCIS application support center before the person's interview appointment date.

Photos. Each applicant, of any age, must submit two identical color, passport-style photographs of herself. USCIS requires two additional photos for the I-765 and two more for the I-131. It is best to submit 6 photos with each adjustment application, unless no work or advance parole authorizations are needed.

Medical Exam. Each applicant, regardless of age, must submit the results of a medical examination. The medical exam must be submitted on a current form I-693 and it *must be conducted by a civil surgeon who has been designated by USCIS.*²² The examination results will be given to the client in a sealed envelope, which must *remain sealed and unopened* for submission to USCIS. If filing for adjustment of status affirmatively at the Chicago lockbox, the

²² For the most current list of civil surgeons in your client's area, you can check the USCIS *Civil Surgeons Locator* at https://egov.uscis.gov/crisgwi/go?action=offices.type&OfficeLocator.office_type=CIV or by telephone from the USCIS National Customer Service Center at 1-800-375-5283.

completed and sealed Form I-693, should be submitted as part of the I-485 package. If the seal has been broken, or the envelope is open, the medical exam will not be accepted. While the submitted Form I-693 must be sealed by the civil surgeon for submission, the applicant is entitled to her own copy of the results provided by the doctor. In fact, the representative should review a copy to ensure the medical is complete before the interview and to determine whether there are medical issues that could trigger inadmissibility. Note that the conversation between a client and the civil surgeon during the medical exam can include questions about drug or alcohol use and other issues related to inadmissibility grounds. For example, a civil surgeon may make a finding of a “Class A” health issue regarding drug abuse, which will lead to a finding of inadmissibility for one year since last use/abuse.

Review the copy of the medical exam with the client and determine whether a waiver is needed and available or whether the applicant should not proceed with adjustment at that time.

The results of the medical examination are valid only for one year. Additionally, if the civil surgeon uses an old version of the I-693 form, the medical examination will be rejected.

Vaccinations. Each applicant must also submit proof of vaccination in the same sealed envelope as the medical exam. The list of required vaccinations is updated frequently so practitioners should periodically check the website at www.uscis.gov.

§ 3.10 Submitting the Adjustment Application

Applications for adjustment of status and related applications are now filed in one location. This means that, if filed at the same time as the Form I-485 (Adjustment of Status), Form G-325A, Form I-765 (Work Permit), Form I-131 (Advanced Parole), and the I-130 petition (visa petition) should all be filed at the Chicago Lockbox.

All family applications for adjustment of status should be mailed directly to one of the addresses below:

Filings mailed through the U.S. Postal Service should be mailed to:

U.S. Citizenship and Immigration Services
PO Box 805887
Chicago, IL 60680-4120

Filings mailed through private couriers should be addressed to:

U.S. Citizenship and Immigration Services
Attn: FBAS
131 South Dearborn, 3rd Floor
Chicago, IL 60603-5517

The adjustment application packet must be filed with the Chicago Lockbox regardless of which USCIS office has jurisdiction over the applicant’s residence. Filings received at locations other than those above will be returned to the sender.

Within a short time after mailing, the applicant or her representative should receive a receipt notice acknowledging that the application has been filed. After initial processing, the application will be forwarded to the appropriate USCIS District's Adjustment of Status Unit in the Examinations Branch. The applicant will receive a fingerprint appointment notice, which will include a date and location to appear for biometrics data collection. Interview notices will be sent to both the applicant and her representative, unless an interview is not required.²³

Adjustment applications are now generally taking about 4-8 months for processing. If you have a beneficiary who will be turning 21 before the adjustment interview and is not protected from aging out by the Child Status Protection Act (see **Chapter 2**), it is critically important that you alert USCIS and ask that the person be interviewed before turning 21. Follow up and be persistent to try to ensure that your client is interviewed and approved prior to aging out. In many USCIS offices, if the applicant does age out while the adjustment application is pending, USCIS will hold the adjustment application in abeyance and continue to renew the applicant's work authorization until the priority date in the new category becomes current.

§ 3.11 The Effect of Leaving the Country

Once the applicant has filed the adjustment application, she must remain in the United States until there is a decision regarding the application. If the applicant leaves the United States without being granted advance parole, the application will be considered abandoned. 8 CFR § 245.2(a)(4)(ii). If the person has been granted advance parole, she has permission to travel and will not be subject to the three and ten-year bars based on that departure.²⁴

§ 3.12 The Adjustment Interview

Each applicant for adjustment must attend a USCIS interview, if one is scheduled, although children under 14 may request to have the interview waived. 8 CFR § 245.6. A spouse petitioner must attend the interview with the applicant, except in extraordinary circumstances, such as the petitioner's incarceration. The petitioner parent of a minor child should also attend the interview. In other instances, although not required, the best practice is still for the petitioner to attend the interview. However, where the petitioner is not physically able to attend the interview or lives far away, the applicant can explain this at time of interview. If the applicant submitted a one-step adjustment application, USCIS will decide both the family visa petition and the adjustment application based on what happens at the interview and on the documents submitted.

The petitioner and the beneficiary must each bring valid personal identification documents, such as driver's licenses, social security cards, passports and all other immigration documentation with them to the adjustment interview, including the work permit (and advance parole if applicable) received after the adjustment application was filed.

²³ Sometimes no interview is required for a parent petitioning for a child, or a son or daughter petitioning for a parent.

²⁴ *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012).

At the interview, the officer will go over the information contained in the I-485 form to confirm that it is accurate. Applicants should practice answering the questions with a friend or legal worker before the interview. Applicants immigrating through a marriage should be prepared to answer questions about their marriage that demonstrate to the examiner that the marriage is valid and bona-fide. The couple should already have submitted with the I-130 visa petition copies of documents demonstrating that the marriage is bona fide, including: joint tax returns, joint bank accounts, joint credit card accounts, insurance forms naming each other as beneficiaries, rental agreements with both parties names, birth certificates of any children the couple may have, wedding pictures, photos from courtship and after marriage especially with relatives of the U.S. citizen spouse, and any cards from friends or relatives that the couple may have received, etc. They should additionally bring a few more documents to the interview, such as new photos, new tax returns, cards and letters from third parties, and any other documents that a couple typically would acquire since submission of the application. Copies should be made to hand in to the USCIS officer at the interview.

If the family relationship is clear and no grounds of inadmissibility apply, the interview should be quite simple. Problems will arise only if there are questions about marriage fraud, grounds of inadmissibility, or other reasons for discretionary denial. If the person must submit a waiver of inadmissibility application (an I-601 Waiver), she may do so at the adjustment interview or during the 90-day period following the interview pursuant to a written notice USCIS gives at the interview. When filing the I-601, the applicant will have to pay the \$930 filing fee or qualify for a fee waiver.

PRACTICE POINTER: Prepare the Applicant for the Interview. After USCIS sends the notice of interview, meet with the applicant to prepare for the interview. It is also helpful to meet with the petitioner, especially if it is a marriage petition and adjustment case. To prepare you should:

- Review the notice of interview and the documents the notice requests the applicant bring. Note, however, the notice is a template sent to every applicant. Not all the documents listed must be brought to the interview by every applicant;
- Review with the applicant any other documents needed, e.g., new photos and other new proof of bona fides if a marriage case, any new criminal records, or records concerning prior receipt of public benefits. Note: all criminal and public benefit records should be obtained and reviewed *prior* to the submission of the application to ensure that the application will not result in a referral to removal proceedings;
- Review again the applicant's entry. If she entered without inspection, she will probably simply need to answer a question concerning entry by saying something descriptive like, e.g., "I entered through the hills at night near Nogales." If she entered with a non-immigrant visa, review the facts surrounding the applicant's entry and visa interview for possible fraud. Again, this already should have been done prior to the submission of the application, but needs to be revisited in preparation for the interview. In addition, review with the client any "preconceived intent" to remain in the United States, although this is of less concern, as it is not by itself actually "visa fraud."

Tell the applicant that the examiner will probably ask whether she has ever lied to USCIS, a consular official, or any other agency to receive an immigration benefit. If there is a question concerning possible fraud, review the facts carefully to distinguish fraud from events that were in fact not fraud. The examiner may also ask whether the applicant has ever made a false claim to U.S. citizenship for any benefit, which would bar someone from adjusting status through a family member.

- Review receipt of public benefits by the applicant or any family member. If the applicant or someone in the family received public benefits that do not create a public charge problem, explain that the applicant can answer simply and directly a question concerning public benefits—e.g., “I received Medi-Cal for my child for pre-natal care.” Hopefully this has already been addressed on the application. Many practitioners check “no” in this type of circumstance, and write in “Emergency Medi-Cal only during pregnancy” for example, or “my U.S. citizen children received food stamps for 3 months when I was unemployed.” Receipt of non-cash aid and most health care does not trigger public charge. See USCIS’s Fact Sheet on Public Charge for a description of many benefits that do not trigger this ground.²⁵
- Review any arrests or convictions. Explain to the applicant to give a simple, direct answer to any question concerning arrests and convictions—e.g., “I was arrested in 1997 for disorderly conduct. I did not have to go to court.” If there is a document from the court or probation that is not damaging to the client, she can take that and present it as well. Or: “I was convicted in 1998 of driving under the influence. I paid a fine and went to DUI school. Here are the court records.” Be sure to review the record the client will be submitting—do not submit police reports unless there is a really good reason to do so, i.e., they are helpful to your client. Police reports are not credible “evidence” regarding what happened, and sometimes make unfounded allegations that can be detrimental to your client’s case. Submit the court abstract or summary—but be sure to review it first, prior to filing the adjustment case.

These are complicated cases, with potentially devastating consequences, and it makes sense to consult with an attorney who is expert in these matters first, or refer your client to an expert, before submitting any documents relating to criminal offenses to USCIS. You may also want to tell applicants (especially younger applicants) that the examiner might ask them whether they have ever used any drug, including marijuana and including as a one-time experiment. If they say “yes,” such an answer might lead to a finding of inadmissibility. If the drug involved was anything other than marijuana, such a finding of inadmissibility cannot be waived.

- Advise the applicant generally on how to answer the examiner’s questions. Tell her to listen carefully to the questions, to answer directly, briefly and honestly the question asked, and not to volunteer information not specifically requested. Also tell your client not to answer a question she does not understand, but instead ask to have it explained.

²⁵ USCIS Public Charge Fact Sheet, www.uscis.gov/news/fact-sheets/public-charge-fact-sheet.

Tell your clients never to guess, which is often a particular problem in marriage cases. Saying “I don’t know” is a much better solution. For example, if an examiner asks a client, “What did your wife give you for your last birthday” and the client does not remember, it is best to say something along these lines: “I don’t remember what she gave me for my birthday, but I do remember she gave me tools that I wanted for Christmas.”

- If the applicant’s case presents significant issues or complications, she should be accompanied at the interview by an accredited representative or an attorney.

In addition to telling the applicant about all the above-mentioned issues in preparation for the adjustment interview, it is very helpful to do a mock interview with the petitioner and beneficiary so they can experience what might happen during the interview. Some practitioners do this for every adjustment case with great success, as it allows the clients to know what to expect, be less nervous, be able to understand the questions better and why the questions are being asked, and better focus and articulate their answers.

Take a look at the USCIS field office instructions before the interview to see if there is anything particular to the office that your client is going to that would affect how your client prepares or what she brings. See www.uscis.gov/about-us/find-uscis-office/field-offices.

PRACTICE POINTER: If you have teenage clients who meet with you alongside their parents, ask the parents for permission to meet with the teen alone at some point. Advise the teen again about the above issues, particularly drug use and other criminal issues, and explain the process again and potential consequences. The parents may not even be aware of the teen’s past actions and the teen might not feel comfortable talking about these issues in front of her parents.

§ 3.13 The Decision: Approvals and Denials

Approvals. If USCIS approves the adjustment application, the person will receive a “welcome notice” and subsequently a lawful permanent resident card in the mail (I-551). It usually takes only a couple weeks after approval to receive the card, although you may want to advise the applicant that it sometimes takes longer. If no card has been received a month after the approval, an inquiry with USCIS should be made as to the status of the card production.

Because the issuance of permanent resident cards has been streamlined, as a general practice, USCIS no longer stamps passports with proof of residency at the time of interview. Applicants should nonetheless bring their passports to the interview. If an emergency arises that requires temporary proof of residency after approval but prior to issuance of the I-551 card (green card), the immigrant can make an InfoPass appointment and request the stamp.

PRACTICE TIP: If the applicant does not have a current passport and might want to travel after adjustment, advise her ahead of time to apply for a passport from the home country’s consulate, if possible.

RFEs. If the examiner feels that additional evidence is needed, the USCIS may issue a “request for evidence” or RFE, telling the applicant what additional evidence might be needed. USCIS may give the applicant the RFE at the interview or send a request later by mail. The applicant will have a certain number of days to gather and submit the requested evidence. Where there is an issue related to evidence, USCIS will issue an RFE and provide the applicant with an opportunity to supplement the record before denying a case.

Denials. If the application is denied, USCIS may do one of the following: send a denial letter, indicating that the applicant should leave the country immediately; offer voluntary departure to the applicant; or place the applicant in removal proceedings by issuing a denial letter with a Notice to Appear (NTA) in immigration court. In removal proceedings, the applicant can renew the adjustment application before the immigration judge. The judge has jurisdiction to grant permanent resident status based on adjustment along with any needed waivers of inadmissibility as long as USCIS approves the underlying visa petition relating to the relationship between petitioner and beneficiary.²⁶ The immigration judge has no jurisdiction to decide a visa petition, only the adjustment application; but you can request continuances of the removal case to allow additional time for the I-130 to be adjudicated if needed.

If an immigration judge denies an application for adjustment of status, the person may appeal that decision to the Board of Immigration Appeals. The person can maintain work authorization while the appeals are pending. 8 CFR § 274a.12(c)(9).

If the USCIS does not refer the person to ICE for issuance of an NTA to begin proceedings, the applicant cannot appeal the denial to an immigration judge or the Administrative Appeals Unit. 8 CFR § 245.2(a)(5)(ii). The applicant can, however, file a motion to reopen pursuant to 8 CFR § 103.5. The motion to reopen must be filed within 30 days of the denial. The failure to file within 30 days may be excused in the discretion of USCIS by demonstrating that the delay was reasonable and beyond the control of the applicant or petitioner. There is a fee for filing the motion to reopen. If a waiver application is denied, however, the applicant can appeal that denial to the Administrative Appeals Unit.

In some cases, the applicant may decide to accept the USCIS denial and go through consular processing instead of taking the adjustment case to immigration court. For example, if USCIS agrees that the person should be able to immigrate, but has a strong argument that the person is not eligible for adjustment, it may be easier for some people simply to consular process.

Delays. For the most part, intending immigrants have no choice but to wait their turn, unless they wish to file a lawsuit in federal court for “mandamus” to force USCIS to adjudicate their application. Some cases, however, require prompt attention:

Aging-Out. USCIS policy is to expedite cases where a beneficiary (due to reaching 21 years of age) will no longer have a current priority date. USCIS does not routinely check its records to see if applicants are approaching their 21st birthday. It is up to the applicant and her representative to bring the issue to the attention of the USCIS. Also, advocates should not wait until the person is a

²⁶ 8 CFR §§ 245.2(a)(1), 1245.2(a)(1), 1240.11(a)(2), 242.8, 1242.8.

few months from her birthday to approach USCIS. It is best to inform USCIS of the approaching change of category 18 months prior.

The Child Status Protection Act (CSPA), passed on August 6, 2002, protects certain youth from aging out. Under this law, if a U.S. citizen files an I-130 on behalf of a child before the child turns 21, the child's "immigration age" is "frozen" and she will continue to be considered a child for immigration purposes even if the USCIS does not act on the petition before the child turns 21. However, if a *permanent resident* parent files an I-130 on behalf of a child before the child turns 21, the child's age will be determined using the date that the priority date of the I-130 becomes current, minus the number of days that the I-130 is pending. This could result in the child waiting several additional years. In addition, the child must seek to acquire the status of a lawful permanent resident within one year of visa availability. This provision also applies to derivative beneficiaries on family-based petitions.

Death of Petitioner. If a petitioner dies before the adjustment is granted, the principal and derivative beneficiaries of a pending or approved I-130 visa petition (whether in the immediate relative category or one of the preference categories) can be protected under certain conditions.

Naturalized Petitioners. Many lawful permanent residents have become U.S. citizens since submitting the I-130 petitions for their family members and would like their relatives to apply for adjustment of status now as immediate relatives. In 2004 USCIS implemented a new policy under which families no longer have to file a new I-130 if one is already pending at a USCIS Service Center. Instead, USCIS has implemented an internal system for requesting a copy of the I-130 file. Families need only send a letter to the USCIS Service Center notifying them that the petitioner is now a U.S. citizen, with proof, and therefore adjudication of her I-130 petition is a higher priority.

§ 3.14 Conditional Residence

In 1986 Congress passed the **Immigration Marriage Fraud Amendment Act (IMFA)** in response to the former INS' claims that large numbers of people were becoming permanent residents by committing marriage fraud. The IMFA contained many rules that were designed to stop marriage fraud. Most importantly it created a status called **conditional permanent residency**, often referred to as "conditional residence," which applies to people who immigrate based on a marriage to a U.S. citizen or lawful permanent resident within two years of that marriage. Congress thought that the IMFA would guarantee that only people who entered "real" marriages would obtain immigration benefits. This is the purpose of conditional permanent residency.

Conditional permanent residency is a two-year "testing period" before a person who immigrates through a spouse can become a full-fledged lawful permanent resident. INA § 216(a)(1). During the two-year period, conditional residents receive most of the benefits that lawful permanent residents do. They can work, travel in and out of the United States, and count the time they spend as conditional residents toward the residence requirements for U.S. citizenship. 8 CFR § 216.1. Conditional residents also enjoy the right to petition eligible relatives, such as their unmarried sons and daughters. They have a "Resident Alien" card, or permanent resident card, that has an

expiration date **two years** from the date of issuance. Their residency will actually expire at that time if they take no further action—unlike other permanent residents, whose cards may expire, but their residency status is indefinite unless and until rescinded.

Conditional residents must meet additional requirements before the condition on their lawful resident status is lifted:

- **Joint Petition:** File a joint petition on Form I-751 with their spouse within 90-days of the expiration of their two-year conditional residence period; or
- **Waiver of Joint Filing Requirement:** Alternatively, file a waiver of the joint filing requirement if unable to file a joint petition and meet certain criteria.

Both scenarios will be discussed in further detail below as well as when conditional residents can have their status terminated prior to the two-year conditional period.

People who *immigrate through their spouse within two years of the date of their marriage* are conditional residents. Therefore, people are conditional residents if within two years of marrying the person who filed the I-130 for them, they either (1) enter the United States with an immigrant visa after consular processing or (2) have an adjustment of status application approved within the United States. INA § 216(h)(1), 8 CFR § 216.1.

Example: In November 2014, Shao Non, a Chinese citizen, marries Beth, a U.S. citizen. Beth petitions for Shao Non, and in November 2015 he has his visa appointment in China. He immigrates on December 15, 2015 when he enters the United States with his immigrant visa.

Because Shao Non immigrated within two years of marrying Beth he will be a conditional resident for the next two years—until December 14, 2017. Shao Non and Beth need to file the Form I-751 within the 90 days prior to December 14, 2017.

Example: Ellen, a citizen of Canada, marries Maya, a U.S. citizen, in January 2015. Ellen applies for adjustment of status based on her marriage. Her application for adjustment is approved on June 2, 2015

Because Ellen completed adjustment of status within two years of marrying Maya, she will be a conditional resident for the next two years—until June 1, 2017.

PRACTICE TIP: If an applicant for adjustment has been married for almost two years, it might be advisable to re-schedule the adjustment interview until two years have passed since the marriage. If the couple has been married at least two years at the time residency is granted, they will become full residents and have no conditions.

§ 3.15 Removal of the Condition on Residency if the Marriage Still Exists after Two Years: The I-751 “Joint Petition”

As stated earlier, conditional residents must submit an application (Form I-751) to USCIS in order to remove conditional status and become full-fledged lawful permanent residents. They must follow strict deadlines for when to submit the application.

If the couple is still married and cooperative at the end of the two-year period, they will file a joint petition together to remove the conditional basis of the immigrant spouse’s status. They must file a form I-751 during the 90-day period before the second anniversary of the immigrant spouse’s conditional residency grant. If the couple is divorced, legally separated, one spouse refuses to cooperate, the conditional resident was battered or subject to extreme cruelty by the petitioning spouse; or the petitioner has died, the immigrant spouse must instead file a waiver of the joint petition in order to remove the condition on her status. Those who file a waiver request can do so prior to the 90-day window. If they do not file by the expiration date of their conditional residence, their status will be terminated. Their status will later be reinstated, however, when their waiver is on file. There is no actual deadline for filing the waiver, unlike the deadline for the joint petition.

The same requirements that apply to the conditional resident spouse also apply to any conditional resident children who immigrate within two years of the noncitizen parent’s marriage.

§ 3.16 When to File the I-751 Joint Petition

If the couple is still legally married after two years they may file a joint petition with USCIS to remove the condition on the immigrant’s resident status. The petition must be filed in the 90-day period before the expiration of the immigrant’s conditional residency. INA § 216(d)(2)(A); 8 CFR § 216.4. “Filed” means the petition was actually received by USCIS by the deadline date, not simply postmarked by the deadline.

To determine when to file the joint petition, count two years from the date that the conditional resident spouse received conditional residency. (This date is listed as the expiration date of the Conditional Resident Card, I-551.) Then count backwards 90 days. The petition must be filed within this 90-day period before conditional residency expires.

Example: Diego married Frida, a U.S. citizen, on July 10, 2013. He entered the United States with his immigrant visa on August 1, 2014. The two-year anniversary of Diego’s receiving conditional residency is August 1, 2016. Diego and Frida must file (USCIS must actually receive) the joint petition between May 3, 2016 and July 31, 2016.

It is critical to keep track of these deadlines. If the joint petition (or a waiver, see below) is not filed on time, *the conditional resident will lose her legal status automatically* and will be subject to removal. USCIS will attempt to notify the person at the start of the 90-day window. However, lack of notice from USCIS is not a defense against losing lawful status if the person does not file as required. Also, USCIS is not required to send the person notice prior to terminating conditional

residence if the basis for the termination is a failure to file a timely petition (I-751). See INA §§ 216(a)(2)(C), 216(c)(2)(A); 8 CFR § 216.4(a)(6).

Filing Late. Sometimes a joint petition can be filed late. A late joint petition will not be accepted by USCIS unless you show that there was “good cause” for the late filing and that the length of the delay was reasonable.²⁷ Applicants filing untimely joint petitions are required to submit a separate statement explaining the reason for the late filing, and they may also want to submit any available supporting evidence.²⁸ USCIS will evaluate the applicant’s explanation and supporting documentation according to the length of time that has passed since the filing deadline. The regulations do not define “good cause,” but the USCIS often accepts late filed I-751 applications if a reasonable explanation is provided. According to USCIS guidance on this matter, some examples of what constitutes good cause may include:

- | | |
|-------------------------------|--|
| a. Hospitalization | f. Bereavement |
| b. Long term illness | g. Serious family emergency |
| c. Death of a family member | h. Work commitment |
| d. Legal or financial problem | i. Family member on active duty with the U.S. military |
| e. Caring for someone | |

If USCIS is unable to make a determination on whether the failure to file timely was due to good cause, it may issue a request for further evidence (RFE). If the issue is still inconclusive after the applicant responds to the RFE, the USCIS service center where the petition was filed may forward the file to the local USCIS office for an interview.

Extension of Status While Petition Is Pending. Filing of the joint petition or waiver automatically extends conditional residence status for one year. Thus, any conditional resident who has filed a Form I-751 remains a conditional resident until a decision is made on her Form I-751. The receipt notice for the I-751 will indicate that it is proof of an extension of conditional resident status. With the receipt notice and the Conditional Resident Card, the immigrant can continue exercising all rights vested in a lawful permanent resident. In some regions, USCIS takes well over a year to adjudicate the petitions and, therefore, USCIS will extend conditional residence beyond the one-year automatic extension period. USCIS will provide documentation of this extended status for travel or employment purposes in the form of the receipt notice for the I-751.

If the conditional resident continues to live in “marital union” with the U.S. citizen spouse for three years and has maintained conditional resident status for three years, the conditional resident is eligible to apply for naturalization even if the joint petition is still pending. Sometimes the joint petition is approved at the same time as the naturalization application.²⁹

²⁷ 8 CFR § 216.4(a)(6).

²⁸ USCIS Interim Policy Memorandum, “Revised Guidance Concerning Adjudication of Certain I-751 Petitions,” December 23, 2012.

²⁹ INA § 216(e).

§ 3.17 Completing the I-751 Joint Petition

Form I-751 is a straightforward form, but does bring up important legal issues.

1. **Does the Couple Live Together?** Form I-751 asks the couple to provide their home address. If the couple does not live together, USCIS will probably suspect fraud and require an interview. (See below). If the couple lives apart but the marriage is still viable, they should attach an explanation of the reason they live apart with other documentation of their legitimate relationship. If the marriage is no longer viable but the couple is still legally married, a separate statement explaining this should be included with the petition. A joint petition cannot be denied solely because the spouses are separated or have initiated the legal termination of their marriage.³⁰ The legal requirement is still whether the marriage was both valid legally and “bona fide at its inception,” (i.e., not entered into for immigration purposes only), when the couple got married.
2. **Does the Marriage Still Exist?** The conditional resident must still be legally married to the spouse who filed the visa petition for her. If the couple is not married or one spouse refuses to file the application, she must request a waiver when filing the I-751. See below for a discussion of the waiver requirements and process.
3. **Did the Couple Pay to Arrange a Sham Marriage?** Form I-751 asks if a fee was paid to anyone, other than an attorney, in connection to the petition. USCIS is trying to discover those people who paid to have sham marriages arranged. If the client paid your agency to help fill out forms, but there is no attorney on staff, you may want to cross out the word “attorney” and write “community agency” or “paralegal” so that the client may still mark the question “no.”
4. **Did Children Immigrate Based on the Marriage?** Form I-751 refers to children who immigrated based on the marriage. These children are conditional residents and must file to remove conditional status. Some can be included in the petition filed by their parent(s). Others will need to file their own petition. See § 3.27.

§ 3.18 Application Procedure: Filing, Interview, Standard for Approval, Denials

Filing the Petition. Some rules for filing the joint petition are found at 8 CFR § 216.4. To file the joint petition, the couple submits three things: the Form I-751; the supporting documentation to show that the marriage was bona fide at inception (not entered into solely for immigration purposes); and a filing fee of \$680 (\$595 plus an \$85 biometric fingerprint fee). Always check the USCIS website at www.uscis.gov to confirm the correct current filing fee.³¹

³⁰ USCIS Memorandum, Acting Associate Director, Donald Neufeld, *I-751 Filed Prior to Termination of Marriage*, (Apr. 3, 2009).

³¹ The cited fee is applicable from December 23, 2016.

File the joint petition by mail with the USCIS Service Center that has jurisdiction over the area where the conditional resident lives. This address is listed on the Form I-751 instructions. (Because USCIS mailing addresses sometimes change, you should also check the USCIS website at www.uscis.gov to confirm the correct address.)

Be sure to include evidence that the marriage is legitimate. This is the same kind of evidence as you would bring to a marriage interview, but will normally be evidence from the time period in the marriage after the noncitizen adjusted status or entered with her immigrant visa. Including sufficient evidence in the application may help the client avoid having to go to a USCIS interview.

Notice of an Interview. USCIS can choose to interview the couple, but it is not always required. An interview will most likely take place if the I-751 raises concerns, or is not well-documented. Additionally, USCIS may randomly pick some petitions for interview. On the other hand, if the couple files a joint petition with plenty of supporting documentation USCIS will often waive the interview. If USCIS chooses to interview the couple, **the couple must attend the interview**. If the couple is outside of the United States at that time, they must come back to the United States for the interview.

WARNING: *Whenever possible, the couple should not go to the I-751 interview without a legal representative!* If you are not an accredited representative or attorney (and therefore will not be allowed in the interview), help the couple find an experienced lawyer or accredited representative to go with them. The presence of a representative reduces the opportunity for abuse on the part of the USCIS examiner.

If USCIS chooses to interview the couple, it must schedule the interview within 90 days of the filing of the petition. INA § 216(d)(3). The USCIS has 90 days after the interview to issue a decision. INA § 216(c)(3)(A). Despite the mandatory language of the statute, USCIS has stated that it can interview a couple more than 90 days after the application is submitted and deny the joint petition.³²

If a client receives proper notice but fails to appear with her spouse at a required interview without good cause, her status will be terminated at the second anniversary of the client's lawful admission for permanent residence. See INA § 216(c)(2)(A).³³

³² See Acting Associate Comm'r, *Legal Opinion of James A. Puleo*, dated June 21, 1990, reproduced in *Interpreter Releases*, 991 (Aug. 31, 1990).

³³ Note, however, that many conditional residents filing joint petitions with their spouses are not required to attend an interview. USCIS reserves the right to require an interview, but does not always do so.

Standard for Approval and Requests for Evidence. According to the regulations, USCIS must approve a jointly filed petition if it determines that all of the following conditions are met:³⁴

1. The qualifying marriage was legal in the place where it took place;
2. The qualifying marriage has not been legally annulled or terminated;
3. The qualifying marriage was not entered into for the purpose of procuring permanent residence status for the immigrant spouse; and
4. No fee was paid in connection with the filing of the petition (other than legal fees paid to a lawyer).

In cases where the couple is still legally married but the couple is *legally separated or in divorce or annulment proceedings*, USCIS may issue a RFE with an 87-day response period asking the conditional resident to provide a copy of the final divorce decree or annulment. The applicant should also request that USCIS treat the jointly filed I-751 petition as a waiver petition. This is important because it will help the applicant avoid having to file an entirely new I-751 waiver with new fees. In the case where the applicant does not have the final divorce decree or annulment by the 87-day deadline, it is important to respond to the RFE nevertheless, and provide an explanation with evidence, such as documentation showing where the couple is in the process of divorce proceedings. For example, in California, there is a 6-month waiting period in order for a court to finalize a divorce.

If the conditional resident applicant fails to respond to the RFE or to provide the requested information to the satisfaction of the USCIS adjudicating officer, the examiner will determine whether there is sufficient evidence of a good-faith marriage to adjudicate the petition as is. If so, USCIS will then either approve or deny the petition based on that evidence. If the petition is being adjudicated at a USCIS Service Center, it may forward the file to the local USCIS office for an interview (see below). The local office will then conduct an interview to determine whether or not the four facts listed above have been established, and if so, the petition should be approved.

Denials and Appeals. If USCIS denies the joint petition, it will begin removal proceedings against the conditional resident. USCIS may only deny the joint petition on one of three grounds (unless the couple failed to attend the interview): 1) the marriage was fraudulent at its inception; 2) the marriage has been terminated; or 3) the petitioner was paid a fee to enter into the marriage. The conditional resident can ask for a substantive review of the denial by:

- renewing the joint petition in removal proceedings before an immigration judge;
- filing a motion to reopen by showing new facts; or
- filing a motion to reconsider.

If USCIS denies the joint petition because the couple failed to show up for the interview or failed to submit additional evidence in response to a Request for Evidence, and the spouses are still married, the couple should file a new joint petition. If the marriage has terminated or the

³⁴ USCIS Memorandum, Acting Associate Director, Donald Neufeld, *I-751 Filed Prior to Termination of Marriage*, (Apr. 3, 2009); INA § 216(d)(a)(A).

petitioner refuses to cooperate in filing a new petition, the conditional resident should file an I-751 waiver.

However, should such a turn of events occur after the initial filing of the joint petition, the applicant may be able to avoid having to file a new I-751 as a waiver and pay the fees again, simply by notifying USCIS that she has legally separated from her spouse or that divorce or annulment proceedings are pending. In that case, USCIS should issue an RFE and give the applicant 87 days to submit a written request that the previously filed I-751 be treated as a waiver along with a copy of a final divorce decree or annulment (see § 3.15 above for more details). Then USCIS will amend the I-751 and treat it as a waiver request in lieu of a joint petition. Timing of the notification is critical here, as in many states, divorces take more than 87 days to finalize.

CAUTION: Annulments should be carefully reviewed, hopefully before the annulment is agreed to by the immigrant and is final, since one of the main bases for an annulment is fraud. If the fraud was allegedly undertaken by the immigrant, USCIS would have a strong basis for alleging that the immigrant committed marriage fraud.

In removal proceedings, the government has the burden to prove that a substantive denial of a joint petition was proper. If a second or late filed joint petition (or waiver) is pending during removal proceedings, generally judges will continue the proceedings until the waiver is adjudicated. Immigration judges do NOT have jurisdiction to rule on an I-751 application in the first instance (when it is initially filed), but will hear an I-751 after USCIS has denied it. This is considered a “renewal” of the application before the immigration judge. In the instance of a waiver, the applicant has the burden to show that the waiver should be granted.

If the immigration judge rules against the petitioner in removal proceedings, the applicant can appeal to the BIA. If the BIA denies the petition, the applicant can appeal to the federal circuit court of appeals.

§ 3.19 Termination of Conditional Residency by USCIS during the “Testing Period”

Under INA § 216(b)(1), USCIS can revoke conditional residence and begin deportation proceedings in three situations *before* the two-year conditional period ends:

1. The marriage has been judicially annulled or terminated, except through the death of the citizen or permanent resident spouse;
2. USCIS determines that the marriage is a “sham,” that is, that the couple married only for immigration reasons; OR
3. USCIS learns that someone was paid to file the original I-130, other than a legal worker who prepared the document.

USCIS must send the conditional resident written notice that it intends to terminate her conditional residence. The conditional resident must be provided an opportunity to respond to the charges of USCIS.³⁵

Note that such a termination is different than when a conditional resident simply fails to file a joint application or a waiver before the end of the two-year period. When nothing is filed, conditional residency terminates automatically at the end of the two-year period and USCIS is not required to give any notice to the conditional resident.

§ 3.20 Waivers of the I-751 Joint Filing Requirement

As discussed above, couples who are still married and continue to have a relationship together turn conditional residency into permanent residency by filing a joint petition. However, sometimes the joint petition cannot be filed. The marriage may have ended in death, divorce, or annulment. Even if the marriage has not legally ended, the U.S. citizen or permanent resident spouse may be hostile and refuse to help the conditional resident spouse.

A conditional resident spouse in this position may be eligible for a waiver of the requirement that a joint petition be filed. She must still file Form I-751, but can do so alone, without the other spouse's participation. Under INA § 216(c)(4), there are three grounds on which the USCIS will grant a waiver. The conditional resident must show that:

1. the marriage began in **good faith** and has ended (other than through death); OR
2. **extreme hardship** (that arose during the conditional residency period) will result if the conditional resident is deported; OR
3. the conditional resident got married in **good faith** and during the marriage she or her child was **battered or subjected to extreme cruelty** by the lawful permanent resident or U.S. spouse, and she was not at fault in failing to meet conditional residency requirements.

If the conditional resident does not file the I-751, either jointly with the U.S. citizen spouse or individually based on one of the above grounds, she will lose legal status automatically and be subject to removal. For clients who cannot file a joint petition, the legal worker must investigate the possibility of filing the I-751 individually, requesting a waiver of the joint filing requirement.

NOTE: Getting Help. USCIS will carefully scrutinize cases of people who apply for waivers of the joint filing requirement. *If at all possible, the person should have a legal representative at the USCIS interview.* If you are not an attorney or accredited representative and therefore cannot accompany the person to the interview, try to refer the person to an experienced attorney or accredited representative who can represent the person at the interview.

³⁵ 8 CFR § 216.3(a).

§ 3.21 When to File

Neither the INA nor the regulations state when a waiver must be filed. The waiver application may be filed at any time before, during, or after the 90-day period before the second anniversary of receipt of conditional residency. The waiver should be filed *prior* to the 90-day period if the marriage has already ended in divorce or annulment, since the conditional residency will also be automatically revoked at that point, although it is still acceptable to file at a later time. If the marriage has not yet ended, the waiver should be filed during the 90-day window, unless the waiver is based on a good faith marriage and divorce; in that case waiting until the divorce is final will avoid the problem of adjudication and denial because a divorce is not yet final. But if the waiver is not filed before the expiration of conditional residence, an immigrant's residence will be automatically terminated. Nevertheless, USCIS must still accept the waiver whenever it is filed, and the person's residency will be reinstated while the waiver is pending.

PRACTICE TIP: Where the Divorce Will Not Be Final before the Expiration of Conditional Residence. A common situation is one where divorce proceedings have been or will be initiated but the divorce will not be final before the expiration of conditional residence. In that instance, the best practice would be to file a waiver on one of the other two grounds if that is an option—extreme hardship or battered spouse—or to file the I-751 jointly if the spouse is amenable. This prevents the conditional residence from terminating and allows your client to continue as a conditional resident. If a joint petition was initially filed, once the divorce is final USCIS should be notified as explained above. If a waiver on a different ground was filed, a second I-751 petition can still be filed based on the good faith but terminated marriage ground. In a bona fide marriage, this is the strongest waiver petition, which is why most petitioners file it as soon as they are eligible to do so, i.e., when the divorce is final.

§ 3.22 How to File a Waiver

In order to obtain a waiver, the conditional resident must file: Form I-751 (“Petition to Remove Conditions on Residence”); the \$680 filing fee (\$595 application fee plus \$85 biometrics fee) and supporting documentation. Please check the USCIS website for update filing fee information at www.uscis.gov.

The petition must include the declaration of the applicant, explaining the reason for requesting a waiver, and be accompanied by documents that support the argument. Form I-751 requires that a conditional resident choose the basis for the waiver from the categories listed:

- Marriage was entered into a good faith but was terminated;
- Extreme hardship;
- Battery/extreme cruelty by U.S. citizen or LPR;
- Death of petitioning spouse

Note, a conditional resident may choose more than one basis and argue them in the alternative.³⁶

Regardless of the basis of the waiver, you must submit a statement of explanation and supporting evidence. The statement should be a detailed affidavit in the client's words. Explain this to the client and ask her to draft a statement that you and your client can eventually finalize together

If the marriage was bona fide, e.g., not just for immigration purposes, the person should give details and documents that support the legitimacy of the marriage. However, if the marriage was not bona fide, an extreme hardship waiver may still be available. *Matter of Balsille*, 20 I&N Dec. 486 (BIA 1992). The applicant should explain why the marriage ended (if it did) or why the relationship became hostile, and why a waiver should be granted.

What follows is a discussion of each of the four bases for a waiver of the joint petition.

§ 3.23 The “Good Faith” Waiver

This is the broadest waiver. Every applicant whose valid marriage has ended should cite “good faith” as a reason the waiver should be granted. This waiver requires the immigrant spouse to show three things:

1. *She intended to have a bona fide marriage when she got married.* To prove this, you and your client should gather the same kind of evidence that is submitted with the I-130 for a marriage fraud interview or with an I-751 joint petition. USCIS suggests showing evidence of joint finances, the length of time the couple lived together, birth certificates of any children born to the couple, and the reason the marriage ended.
2. *The marriage has ended other than through the death of the spouse.* The conditional resident should submit the decree of divorce, annulment, or other termination proceedings. It does not matter who filed for divorce. The marriage must already be terminated to file for this waiver; the mere commencement of divorce proceedings is not sufficient.³⁷
3. *It was not her fault that she could not file a joint petition.* Under the regulations, it is not clear what “fault” means. 8 CFR § 216.5(a)(1). Certainly the person should emphasize that she was committed to the marriage and describe the things she did to try to make the marriage work. If the applicant's spouse “caused” the demise of the marriage, through an affair, abuse, abandonment, or some other similar action, and there is documentation of this, including statements of third parties, the applicant should submit these documents as well.

³⁶ See Gordon & Mailman § 42.05[3][a]; *Matter of Balsillie*, 20 I&N Dec. 486 (BIA 1992); *Matter of Anderson*, 20 I&N Dec. 888 (BIA 1994).

³⁷ See William Yates, Acting Associate Director, Operations, USCIS Memorandum HQADN 70/23.12, (Apr. 10, 2003), available at www.uscis.gov/files/pressrelease/CRwaiver041003.pdf.

§ 3.24 The Extreme Hardship Waiver

Another basis for a waiver is to show that extreme hardship will result if the conditional resident is deported. INA § 216(c)(4)(A). USCIS will consider only hardship that arose after the conditional resident acquired conditional residence status.³⁸

Who must suffer the hardship? Neither the statute nor the regulations answer this question. USCIS officials have stated, however, that the hardship must be to the conditional resident, to a dependent child, or to a new spouse.³⁹ If you have a case where removal would cause extreme hardship to another close relative or to the community, you should discuss the case with an experienced attorney.

Extreme hardship is a standard that is used in other areas of immigration law, particularly for some waivers of inadmissibility. Extreme hardship means hardship above and beyond that which a person who was forced to leave the United States normally suffers. 8 CFR § 216.5(e)(1). To determine extreme hardship, consider the client's current life and what aspects would change if she had to go back to her country, especially factors such as: age, family ties in the United States and the home country, how long the client has lived in the United States, health and medical needs, economic and political situation in the home country, the client's position in and involvement with her community. Keep in mind that such factors must have arisen after the person became a conditional resident, in order to be considered. USCIS's policy manual explains extreme hardship and provides many examples of possible hardship.⁴⁰ Nonetheless, each case is unique and might have different factors.

§ 3.25 The Battery or Extreme Cruelty Waiver

Conditional residents who have suffered from physical abuse or extreme cruelty by their spouses or parents also can file a waiver of the joint petition requirement. INA § 216(c)(4)(C). The purpose of this waiver is to allow conditional residents the opportunity to leave an abusive relationship without worrying about losing the option to gain lawful permanent resident status. The applicant must prove the following:

1. *She was married in good faith.* 8 CFR § 216.5(e)(3). Proof of this requirement is discussed above under the "good faith" waiver.
2. *Her USC/LPR spouse battered her or her child or treated her or her child with extreme cruelty during the marriage.* USCIS definition of extreme cruelty includes, but is not limited to, any act of violence or threatened act of violence resulting in physical or mental injury, psychological abuse, and sexual abuse or exploitation. 8 CFR § 216.5(e)(3)(i). Note that a conditional resident spouse can file this waiver if her children

³⁸ INA § 216(c)(4).

³⁹ See 67 *Interpreter Releases* 341 (Mar. 19, 1990).

⁴⁰ See USCIS Policy Manual, Volume 9, Part B, available at: www.uscis.gov/policymanual/HTML/PolicyManual-Volume9.html.

were the victims of the physical or mental abuse, and it is not required that the children have U.S. citizenship or permanent resident status. 8 CFR § 216.5(e)(3).

The law does not require that the marriage have ended for the conditional resident to file for a waiver based on battery or extreme cruelty. It also does not require that the applicant prove hardship. The regulations clarify that the battered spouse waiver is available to conditional residents, regardless of their current marital status. 8 CFR § 216.5(e)(3). Many people have been trapped in abusive situations because their lawful permanent resident or U.S. citizen spouse threatened not to file a joint petition if the abused spouse left the marriage. This waiver is designed to allow those people to secure their lawful permanent resident status without the cooperation of the abusive spouse or parent.

PRACTICE TIP: Immigrant survivors of domestic violence have other options to obtain lawful status. They may be eligible to self-petition for an immigrant visa under the Violence Against Women Act (VAWA), or seek special cancellation in removal proceedings. See **Chapter 9, Screening for Relief**. For more information, see the ILRC’s publication, *The VAWA Manual: Immigration Relief for Abused Immigrants*.

§ 3.26 Filing a Waiver if the U.S. Citizen or Permanent Resident Spouse Has Died

USCIS can grant a waiver to a conditional resident whose spouse has died. 8 CFR § 205.1(a)(3). The conditional resident must submit a copy of the death certificate. As with the other waivers, the person does need to submit evidence that the marriage was bona fide. If there is no indication of marriage fraud, the person does not need to prove extreme hardship.⁴¹ When completing the I-751, check the box indicating that the spouse is deceased.

The BIA held “that a conditional permanent resident under INA § 216(a) who is seeking to remove the conditional basis of that status and who has timely filed the petition and appeared for the interview required under INA § 216(c)(1) does not need a separate § 216(c)(4) hardship waiver if the petitioning spouse died during the two-year conditional period.” The I-751 petition, in this instance, will be treated as a joint petition and may only be denied for the reasons a joint petition could be denied (e.g., fraudulent marriage, payment to petitioning spouse or termination other than death). *Matter of Rose*, 25 I&N Dec. 181 (BIA 2010).

§ 3.27 Dependent Sons and Daughters

Dependent children of conditional residents also immigrate as conditional residents. This may include stepchildren, where the U.S. petitioner filed for them directly, as well derivatives that are included as derivative beneficiaries under a petition filed for a spouse. The INA calls these children **alien sons and daughters**. INA § 216(h)(2). Like a conditional resident spouse, a conditional resident son or daughter must apply to remove conditional status.

⁴¹ See Letter from R. Michael Miller, Dep. Ass’t Comm. Adj. to Gerald Linkon, reproduced at 66 *Interpreter Releases* 982 (Aug. 28, 1989).

Example: Marie Paule received conditional residency after adjusting status through her marriage to Steve, who is a U.S. citizen. Steve also petitioned for Marie Paule's unmarried 17-year-old son Jacques as his stepson (this is because Jacques does not qualify as a dependent beneficiary of Marie Paule since she is an immediate relative). Jacques is also a conditional permanent resident, because his mother's marriage to Steve, which created the stepchild/stepparent relationship between him and Steve, took place less than two years before Marie Paule was granted adjustment. Thus, he has the same conditional status as his mother. Two years later, when Jacques is 19, he can remove his conditional residency status.

In some cases, a child may be included in the parent's I-751 application to remove conditions. If the child immigrated more than 90 days after the parent, then the child must file a separate I-751.⁴² The children do not need to show hardship; they need only show that the parent's marriage was bona fide. If the parents' I-751 joint petition has been granted, the child can submit a copy of the approval notice to show that the marriage is bona fide.

§ 3.28 Special Situations Involving Conditional Residency and Waivers⁴³

Failing Marriages. Even if a marriage is failing and no longer viable, the USCIS may approve a jointly filed I-751 petition if it believes that the marriage was entered into in good faith, as long as the petitioner appears at any interview that might be scheduled.⁴⁴ In other words, if the marriage is failing at the end of the two-year period—even if the parties have separated—USCIS must still accept a timely filed joint petition and adjudicate it. The parties' conduct after they enter the marriage should affect the USCIS' decision only if it bears on the parties' state of mind at the time they were married.⁴⁵

1. **Separated, but Attempting to Reconcile.** Should one file a joint petition? Yes, so long as the couple can demonstrate good faith in trying to continue the relationship, the joint petition should be granted. Affidavits should include an explanation of the circumstances of the separation and the couple's attempts to reconcile. The immigrant can always file a waiver if reconciliation fails and the joint petition is withdrawn. Additionally, the immigrant may amend the I-751 filing to include the appropriate waiver basis, if it is still pending.
2. **Separated, but Reconciliation Unclear or Failed.** If the U.S. citizen spouse is willing, she can still file a joint petition because what matters was whether the marriage was bona fide when it was entered into. If the U.S. citizen spouse refuses to file the joint petition (I-751), then a waiver should be filed. It is more advantageous to file the joint petition because there are strict rules about when a joint petition can be denied, whereas waiver

⁴² 8 CFR § 216.4(a)(2).

⁴³ See 8 CFR §§ 216.4, 216.5.

⁴⁴ "INS Answers Marriage Fraud Questions," Questions 38-40, reprinted in 67 *Interpreter Releases* 334, 339 (March 19, 1990).

⁴⁵ *Matter of McKee*, 17 I&N Dec. 332 (BIA 1980).

decisions are discretionary. In addition, interviews are more common for waiver applicants than for joint petitioners.

3. **No Possibility for Reconciliation and No Possibility for Joint Petition.** The only option is to apply for a waiver of the joint filing requirement. A waiver application should be filed, if possible, before the expiration of the conditional residence EVEN IF the marriage has not yet been terminated. The waiver can be filed on the basis of extreme hardship or battered spouse, depending on the facts. A second waiver basis can be filed or added once the marriage has been terminated.
4. **Marriage Terminated and Conditional Resident Not at Fault.** The conditional resident can file for a waiver (I-751) whether or not she initiated the divorce.
5. **Marriage Entered into in Bad Faith or Cannot Be Terminated.** The applicant may file for an extreme hardship waiver based on factors that have arisen since entry. All factors need substantial documentation. The courts are conflicted as to whether an extreme hardship waiver may be granted if the marriage was a sham marriage.⁴⁶
6. **Conditional Resident Must Travel and Will Not Be Present within 90-Day Filing Period.** One can petition or file for a waiver from abroad, but your client may still be required to attend an interview at a local USCIS office although a waiver may be sought.

⁴⁶ See *Waggoner v. Gonzales*, 488 F.3d 632 (5th Cir. 2007) (holding that a noncitizen may seek an extreme hardship waiver even if marriage was not in good faith because the language of the extreme hardship statute is clear and does not require a good faith marriage to qualify); *Singh v. Holder*, 591 F.3d 1190 (9th Cir. 2010) (impliedly agreeing with Fifth Circuit but still denying extreme hardship claim where wife withdrew joint petition and stated marriage was solely to obtain immigration benefit); but see *Velazquez v. INS*, 876 F. Supp. 1071 (D. Minn. 1995) (finding that the extreme hardship provision does not apply if sham marriage).

CHAPTER 4

CONSULAR PROCESSING

This chapter includes:

§ 4.1	The NVC, the U.S. Consulates and the Department of State	4-2
§ 4.2	How DHS and the State Department Divide Responsibility in Visa Cases	4-2
§ 4.3	Initial Consular Processing at the NVC	4-3
§ 4.4	Obtaining Documents According to NVC Instructions and the FAM	4-8
§ 4.5	Getting Ready for the Interview	4-10
§ 4.6	What Will Happen at the Interview?	4-12
§ 4.7	What Happens after the Immigrant Visa Is Granted	4-15
§ 4.8	What to Do if Your Alien Registration Card Fails to Arrive	4-16
§ 4.9	Waivers of Grounds of Inadmissibility	4-16

Immigrating through a visa petition is a two-step process. The first step is the visa petition process that we discussed in **Chapter 2**. Now we will discuss the next step: applying for the immigrant visa and gaining lawful permanent resident status.

There are two ways to apply for permanent resident status. **Adjustment of status** is when a person applies for permanent residency from within the United States. See **Chapter 3**. However, many of our clients must apply for an immigrant visa at a U.S. consulate abroad, usually in their home country. This is called **consular processing** and will be covered in this chapter.

When the beneficiary plans to go through consular processing, the petitioner will first need to file the visa petition on Form I-130. Petitioners who reside in the U.S. need to file the visa petition with USCIS.¹ Petitioners residing in a country other than the U.S. may either send their I-130 petitions to USCIS or they may file at the international USCIS office having jurisdiction over the area where they live.² Those overseas petitioners in countries without a USCIS office must send their I-130 petitions to the Chicago Lockbox, with certain exceptions.

Once USCIS has approved the petition, it sends it to the National Visa Center (NVC). USCIS sends an approval notice (Form I-797) and informs the petitioner that the file has been sent to the

¹ Petitions are filed at either the USCIS Chicago Lockbox or USCIS Phoenix Lockbox, depending on where the petitioner lives in the U.S. The Form I-130 instructions on www.uscis.gov provide further details. It is important to always check the filing address before filing, as USCIS can change filing procedures at any time.

² To find out if the USCIS has an international office assigned to the jurisdiction where the petitioner lives abroad, please visit the USCIS website at www.uscis.gov/international.

NVC, and that all future inquiries should be sent there. After this, the Service Center will not have any updates on the case.

The NVC oversees most of the initial steps in consular processing, including, in many cases, setting the time and date for the visa appointment. Once the visa appointment is made, everything is transferred to the U.S. consulate abroad with jurisdiction over the case, and the interview and medical exam take place abroad.

§ 4.1 The NVC, the U.S. Consulates and the Department of State

As you can see, there are several government actors in visa processing: The U.S. Citizenship and Immigration Services (USCIS) and the Customs and Border Patrol (CBP), which are both agencies within the Department of Homeland Security (DHS); and the National Visa Center (NVC) and U.S. consulates, which are outposts of the Department of State (State Department).

Having more than one governmental entity involved makes the procedure more complicated. For one thing, the State Department writes its own regulations and operating instructions to guide consular officials and other employees. The regulations are found in Title 22 of the Code of Federal Regulations (22 CFR) and the instructions are contained in the **Foreign Affairs Manual**, or **FAM**. Consular officers follow the FAM in deciding visa cases, even where the FAM contradicts DHS regulations, which it sometimes does. You should be familiar with the FAM as well as State Department and DHS regulations.

If any of your cases involve consular processing, you should consult the FAM. The easiest way to find it is to look online at: <https://fam.state.gov/>. The section on immigrant visas is in 9 FAM. The FAM is also included in the large, multi-volume text on immigration law called *Immigration Law and Procedure*. Volumes 17–19. Some, but not all, of the material in the FAM is contained in 22 CFR, available online and also obtainable at the U.S. government bookstore, which is now primarily on-line, at <https://bookstore.gpo.gov/>.

§ 4.2 How DHS and the State Department Divide Responsibility in Visa Cases

The DHS agencies and the State Department each have different roles in visa processing. It is important to know this so that you can identify which agency is in charge of a case at each step.

1. *Only USCIS can approve a visa petition*, unless extraordinary circumstances exist, in such cases, a consulate may be able to approve a petition.³

³ In certain exceptional circumstances, a petitioner residing abroad may file the I-130 with the U.S. Embassy or Consulate in the country of residence. See USCIS Policy Memorandum, “Process for Responding to Requests by the Department of State to Accept a Locally Filed Form I-130, Petition for Alien Relative” May 14, 2012, available at: www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2012/May/DOS-I130May1412.pdf.

2. *Once USCIS approves a visa petition, the petition is transferred to the NVC for initial processing of the immigrant visa.* The NVC notifies the petitioner and beneficiary when it is time for final visa processing, and in most cases collects the forms and documents that are necessary for the consular interview.
3. *Once USCIS approves a visa petition, neither the NVC nor the consular officer has the right to revoke (cancel) it.* A consular officer can, however, *send the petition back to USCIS* for more investigation, and refuse to give the person an immigrant visa in the meantime.

Example: Juan is applying for an immigrant visa based on his marriage to Gina. Gina filed an I-130 visa petition for Juan, which was approved by USCIS. At the consular interview, the officer becomes concerned that the marriage is a fraud. The officer can send the visa petition back to USCIS in the United States with a request for further investigation of the marriage. Although the consular officer cannot cancel the Gina's visa petition approval, the officer does have the authority to deny Juan's application for an immigrant visa.

4. *Only the consular officer can issue the immigrant visa, but DHS personnel review the visa applications to screen for terrorists and other inadmissible applicants.* Both consular officers and DHS officials have the power to determine that an applicant is inadmissible. However, *only USCIS* can grant a waiver of the ground of inadmissibility. See § 4.9 of this chapter and **Chapter 5** for more information on certain grounds of inadmissibility.
5. *Although the consular officer may issue an immigrant visa, it is CBP that grants permanent resident status.* Once an immigrant visa is issued, the applicant will present the visa to CBP at the U.S. border or U.S. airport. The CBP has independent authority to review grounds of inadmissibility. The person will become a permanent resident at the time that CBP admits her at the border and places a stamp in her passport.

§ 4.3 Initial Consular Processing at the NVC

As noted above, the NVC does the initial stage of consular processing. The NVC will complete the following preliminary processing steps: 1) it will collect the required fees; 2) it will collect the affidavit of support, the visa application forms, and all the required supporting documentation; and 3) it will forward all documents collected to the appropriate U.S. consulate for the final interview with the visa applicant. The NVC is located at 31 Rochester Avenue, Portsmouth, New Hampshire 03801-2915. You can contact the NVC at (603) 334-0700 or via automated email service that answers commonly asked questions: nvcinquiry@state.gov.⁴

⁴ Useful information can also be accessed at the NVC website:
<https://travel.state.gov/content/visas/en/immigrate/immigrant-process/approved/contact.html>.

PRACTICE TIP: When inquiring to the NVC about a case, each inquiry must contain the following information, in addition to your inquiry itself:

1. Name of the person submitting the inquiry
2. NVC case number or USCIS receipt number
3. Name of the Petitioner
4. Principal Applicant's name and date of birth
5. Attorney of Record's name (as it appears on Form G-28)

A. The Agent of Choice Form and Paying the Required Fees

There are two fees associated with the Immigrant Visa Application process: the Affidavit of Support (I-864 form) fee and the Immigrant Visa Application fee. When an applicant's priority date is close to becoming *current*, the NVC will send an Affidavit of Support (I-864 form) processing fee bill to the petitioner and the online Choice of Address and Agent, Form DS-261, to the applicant/beneficiary. This form allows the applicant to select an agent to receive NVC correspondence. This could be the attorney of record, the petitioner, or someone at a secure address in the beneficiary's home country. Failure to return this form within a year may lead to cancellation of the petition. Once NVC receives the Form DS-261⁵ from the applicant, NVC will email or mail the Immigrant Visa (IV) fee bill to the agent of choice.⁶

If there is a G-28 on file, these forms will also be sent to the attorney of record directing the attorney to the relevant webpage and instructing her to coordinate payment of the fees. See a sample of this cover letter, as well as the Processing Fee Bill Invoices at **Appendix 4-A**. Online Form DS-261 should be submitted by agents who are not already registered by the NVC as the representative, even if a G-28 was previously on file.

NOTE: The petitioner and/or beneficiary should be proactive in following up with the NVC when the priority date becomes current if no notice or fee bill has been received from the NVC prior to this point. Sometimes, particularly in older visa petition cases, the NVC fails to notify the petitioner or beneficiary when the priority date is current. See **Chapter 2** for detailed information about priority dates.

The fee bills are sent by both regular mail and email. As of December 2016, the visa application processing fee is \$325 and the Affidavit of Support fee is \$120.

The NVC prefers that fees be paid online through a bank account, by clicking on the "**Immigrant Visa Invoice Payment Center**" link within the "Pay Fees" tab listed on the **Immigrant Visa**

⁵ This form can be found at <https://ceac.state.gov/ceac/>.

⁶ This step (choosing an agent) will usually be skipped if a G-28 is already on file from an attorney or accredited representative, as that person will be presumed to be the agent of choice, unless the applicant indicates otherwise.

(IV) Process Page of the NVC.⁷ Payment must come from a checking or savings account at a U.S. bank. If you make an online payment, you will not need to mail the physical fee bill to the NVC. However, in order to make an online payment, you will need the “Invoice Identification Number” listed on each of the two fee bills, in addition to the NVC Case Number.

Though as of this writing, the NVC has removed instructions for alternative methods of payment from the website, the NVC states that if fees cannot be paid online through a bank account, that the NVC may be contacted to make alternative arrangements.⁸ The Public Inquiry Form is the best way to do this, as you can print out and have written documentation of all communications.⁹ Attorneys and BIA accredited representatives, however, should use the “attorney” inquiry email: nvcattorney@state.gov.

NOTE: Proof of Payment for the Provisional Unlawful Presence Waiver. Some applicants will require a waiver for unlawful presence. See **Chapter 5** for an in-depth discussion of unlawful presence and the corresponding waivers. If this is the only applicable ground of inadmissibility in the case, the visa applicant may be eligible to apply for a “Provisional Unlawful Presence Waiver” while in the United States before traveling to the consular appointment. At the time of filing the Provisional Waiver Form I-601A, the applicant is required to provide proof of payment of the Immigrant Visa application fee. A printout of the payment confirmation from the Consular Electronic Application Center (CEAC) may be utilized for this purpose. If the Immigrant Visa fee is not paid online, however, a copy of the receipt must be requested from the NVC. To do so, e-mail the NVC at NVCI601A@state.gov using the subject line “Fee Payment Receipt Request” and the NVC case number.

PRACTICE TIP: As soon as the fee bills are received, the beneficiary should obtain ORIGINALS of all needed documents (birth certificate, police clearance, marriage certificate, etc.)

WARNING: If a period of one year passes without communication to the NVC, all submitted fees and documents expire and must be resubmitted to resume the immigration process.¹⁰ Also if the USCIS forms are revised and the old version is no longer accepted, such as with the Affidavit of Support Form I-864, a new Affidavit of Support using the current version of the form and supporting documents must be submitted. Finally, if a year passes without communication, the case will also likely be terminated, which means the priority date will be lost, which could be devastating to many families.

⁷ You can access the “Online Payment” link through the IV Main Page at https://travel.state.gov/content/visas/en/immigrate/immigrant-process/approved/step_2_pay_fees.html or by going directly to: <https://ceac.state.gov/CTRAC/Invoice/signon.aspx>.

⁸ The NVC contact page is at: <https://travel.state.gov/content/visas/en/immigrate/nvc/nvc-contact-information.htm>.

⁹ The NVC Public Inquiry Form can be found at: <https://secureforms.travel.state.gov/ask-nvc.php>.

¹⁰ See INA § 203(g) regarding the termination of an immigrant visa petition.

B. Collecting the Affidavit of Support and Supporting Documents

Once fee bills are paid, NVC will send a letter by mail or email with instructions to visit the NVC website. Although the specific link for the “Immigrant Visa Applicant and Document Processing” may not be provided on that letter, it is listed on the **IV Process Page**.¹¹ These instructions provide the applicant with detailed information on what forms and documents are necessary for the immigrant visa application and the corresponding interview.

If payment was made online, once NVC has processed the I-864 Affidavit of Support and immigrant visa fees, payment receipts can be downloaded from the Immigrant Visa Invoice Payment Center.¹² You can also download the “Document Cover Sheets” which you must return to NVC along with the completed immigrant visa application and affidavit of support forms. If payment was made by alternative means, once the I-864 processing fee is paid, NVC will contact the petitioner, who is also the primary sponsor on the Affidavit of Support with a fee receipt and instructions to download the I-864 form and instructions, complete the I-864, and return it to NVC with all required supporting documents (such as tax returns, employer letters, etc.) along with a “Document Cover sheet,” which is a bar code sheet that identifies the case. **Appendix 4-B** shows sample Payment Receipt print-outs and “Document Cover Sheets.”

1. Affidavit of support

The NVC reviews the I-864 for completeness, to see if signatures, proof of U.S. citizen or LPR status, proof of current income, and required tax returns are included. However, only the consulate can make a decision as to whether the affidavit is legally sufficient to meet the public charge requirements.

The I-864 is an enormously complex document, and your clients will need your help in completing it. Please see **Chapter 3** for detailed instructions on what is required for completion of the I-864.

2. Submitting the Immigrant Visa Application

The NVC website contains further instructions and identifies additional documents needed to complete processing. *These instructions will not be sent until and unless the fee bill is paid.* However, since the instructions included in the packet are available online, the petitioner and the applicant can begin gathering all the required documentation by going to the **IV Process Page** and following the links therein (also listed throughout this chapter).

¹¹ The “Submit Visa Applicant and Supporting Documents” link can be accessed through the IV Process Page. <https://travel.state.gov/content/visas/en/immigrate/immigrant-process/approved/contact.html>.

¹² See <https://ceac.state.gov/CTRAC/Invoice/signon.aspx>.

The “Submit Visa Applicant and Supporting Documents” link will provide instructions for the following required steps:

1. Notifying the NVC if any derivative children are turning 21 within the next 60 days.
2. Completing and submitting the Online Immigrant Visa Application on Form DS-260 (at this point a copy of the biographic page of the applicant’s passport is required, verifying six months of validity past the date of the future visa interview).
3. Obtaining the necessary supporting documentation, referred to as the “civil documents.” The civil documents include things such as birth and marriage certificates, adoption documentation, court and prison records, military records, police certificates and deportation documentation;
4. Obtaining immigration-style photographs; and
5. Obtaining any consulate-specific additional requirements.

The applicant will need to sign and submit online the Application for Immigrant Visa and Alien Registration, DS-260,¹³ although she may receive help from someone else. The applicant will have a chance at the interview to review and confirm all information entered. After submitting Form DS-260, the applicant should print the confirmation page and a copy of the completed form for her records, and also take a copy to the immigrant visa interview abroad. The confirmation page will be required at the time of fingerprinting abroad, if required by the consulate in question.

The forms are self-explanatory. However, a few questions deserve comment:

- “Country of Nationality” refers to the country of citizenship.
- Answer “Dates & Places of Residence” and “Information about visits/stays in the U.S.” as accurately and with as much specificity as possible. Note that answers to these particular questions may help to determine inadmissibility under the unlawful presence grounds. It is therefore critical that advocates review these questions and answers very carefully with clients for accuracy, and to determine whether the client is inadmissible as a result; and if so, whether she requires and is eligible for a waiver.
- The DS-260 asks questions referring to the grounds of inadmissibility. **Chapter 5** of this manual discusses the grounds of inadmissibility.

PRACTICE TIP: Do not leave any question unanswered. Answer “none” or “N/A” (not applicable) where appropriate. Be sure that your answers on all forms are consistent and that they match the information provided on the I-130 petition.

The Consular Electronic Application Center (CEAC) will not accept an online DS-260 form unless the information is provided exactly as requested, with complete names of educational institutions, addresses, postal codes, dates, etc. Note also that the online DS-260 asks for more detailed information than the prior printed form, for example with regard to the applicant’s history of residential addresses and the information pertaining to prior spouses.

¹³ This form is completed and submitted on-line through the Consular Electronic Application Center (CEAC) at <https://ceac.state.gov/ceac/>.

3. *Electronic processing*

The NVC has an Electronic Processing Program, through which all documents are to be scanned and submitted in Portable Document Format (PDF) via electronic mail. This includes Form I-864 and all the civil documents. Form DS-260 is submitted online through the CEAC system and the rest of the documents are scanned and sent by e-mail to NVC. Therefore, no physical documents are submitted to NVC; and when NVC transfers the case to the designated consulate for final processing, the physical file is sent to the National Records Center for archiving.

The National Visa Center website shows three different processing groups, designated by the first three letters of the applicant's case number, which is usually an abbreviation for the consulate which will process the visa application. This chart can be found under the "Submit Documents to the NVC" link at the IV Process Page listed above. Depending on whether the applicant's consulate is in Method 1, Method 2 or Method 3, electronic filing may be mandatory, optional, or not permitted. It is anticipated that electronic processing will eventually be implemented worldwide and required for all immigrant visa applications.

PRACTICE TIP: After the applicant has a Case Number, at any stage in the process, the status of the immigrant visa application may be checked online at the CEAC website *Visa Status Check* page, which can be located at: <https://ceac.state.gov/CEACStatTracker/Status.aspx>.

§ 4.4 **Obtaining Documents According to NVC Instructions and the FAM**

As you will see on the instructions listed on the "Collect and Submit Forms and Documents to the NVC" link of NVC's IV Process Page, the applicant will need to obtain documents, such as birth/marriage records, military service records, police certificate, etc., and either submit these to the NVC or bring them with him or her to the consular interview. The applicant needs to obtain his or her "civil documents" according to the regulations outlined in the Foreign Affairs Manual or FAM. Furthermore, in addition to the documents listed on NVC's instructions, many consulates have location-specific instructions regarding the required civil documents. Therefore, in order to assist your client in obtaining the required civil documents, you will need to familiarize yourself with different sets of instructions.

PRACTICE TIP: It is a good idea to go online and review these requirements in advance so that you may discuss them with your client. Beneficiary applicants in the home country, especially if they are children, may have difficulty obtaining the required civil documents and may need help from someone in their home country. They may also need to pay a fee or provide a certain document in advance, in order to obtain one of the required civil documents.

Country Requirements in the FAM. The FAM or the State Department's Visa Reciprocity and Country Documents Finder on NVC's website will provide you with instructions on how to obtain the required civil documents from a particular country. On the NVC's website, you can go to the "Reciprocity by Country" page, which provides country-by-country links to all the reciprocity schedules simply need to select the name of the country where the event happened

(i.e., the birth, death, marriage, adoption, etc.) from the drop-down menu, and scroll down to the “Documents” section, where you will find instructions on how to obtain each required civil document. Follow the requirements exactly.

WARNING: Pay attention to detail! Get help if you are not sure about documents. If you do not prepare the documents *exactly* according to instructions, your client may be turned down at the interview and forced to wait for weeks or months until the right documents are secured and a second interview can be scheduled.

Exercise: If you have access to the FAM or the Visa Reciprocity and Country Documents Finder, look at the documentation sections (at <http://travel.state.gov/content/visas/english/fees/reciprocity-by-country.html>) discussed above to complete this exercise. Answers to questions are at **Appendix 4-C**.

1. Yun was born in Taiwan. He wants to immigrate through his mother and needs to provide a birth record. Will he be able to get a birth certificate? If not, is there something else he can submit?
2. Alicia, a Mexican woman, married her partner Grisel, also a woman, in the state of Quintana Roo in Mexico. They were issued a document called “*acta de convivencia*” (cohabitation certificate). Will this document be acceptable as proof of a lawful marriage if Alicia tries to immigrate through Grisel, who is a U.S. citizen?
3. Jules was born in Ghana. He has a birth certificate, on light gray paper, issued two years after his birth. Will the consulate accept this with no other proof?

Location-Specific Instructions. Some consulates have consulate-specific requirements for documents that are not part of the general civil documents requirements. Therefore, in addition to following the instructions listed in the Department of State’s “Reciprocity by Country” page, you will need to check if the specific consulate where the applicant will be interviewed has issued any special instructions. You may check the link for “Review Embassy/Consulate Instructions” on the NVC’s website and select the relevant country from the drop down menu.¹⁴

NOTE: All documents listed in either the FAM or in the instructions from individual consular offices serve as “primary evidence” for the immigrant visa application. However, when primary evidence is unavailable and “secondary evidence” is necessary, the applicant will need to obtain a letter from the appropriate authorities stating that the requested document is not available.¹⁵

NOTE: While original documents are scanned and uploaded electronically for submission to the NVC, applicants should bring all originals to the consular interview, together with duplicate

¹⁴ You may access the “Review Embassy/Consulate Instructions” link at the bottom of the “Collect Supporting Documents” link of NVC’s IV Process Page.

¹⁵ See 8 CFR 204.1(f)(1). (Note the “any credible evidence” standard regarding secondary evidence for self-petitioners under the Violence Against Women Act).

copies, one to keep in her records and one to submit to the consulate at the interview, in order to have all the originals returned. The consular officer will return only original documents (i.e., passport, birth certificate) but keep all other documents submitted with the application.¹⁶ Finally, all documents not in English must be accompanied by certified English translations.¹⁷

§ 4.5 Getting Ready for the Interview

When the case file is complete, the NVC will schedule an appointment for the applicant and send an appointment letter to everyone involved (applicant, petitioner, and agent/attorney of record) approximately one month before the interview date. With online fee collection and electronic processing, once registered, attorneys will receive this notification via email.

At that time, the NVC will forward the I-130 petition and complete immigrant visa application file to the consulate; or, in the case of electronic processing, the NVC will send electronic copies of these documents to the consulate and archive the physical file at the National Records Center (NRC). In either case, NVC will no longer be in charge of the case. *All subsequent inquiries must be directed to the consulate.* The consulate will request background reports from other government agencies and request an immigrant visa number from the State Department.

NOTE: Check for updates in fingerprint requirements regularly. Presently, for immigrant visa applicants, some consulates do require fingerprints, including Ciudad Juarez for those processing in Mexico. For others, the NVC conducts a “name check” with the FBI prior to transferring the file to the consulate. If your client’s name comes up in the FBI database he or she will be required to be fingerprinted. The client will be instructed to make an appointment with a USCIS Application Support Center (ASC) in the country in advance of the interview. This biometrics appointment in some locations may be scheduled as little as one day in advance of the consular interview, but this can vary significantly by country.

WARNING: The Permanent Bar. Clients who have lived in the United States without lawful immigration status for an aggregate total of one year or more, then leave the United States and re-enter or try to re-enter without inspection, will be barred from immigrating for a *minimum* period of 10 years under INA § 212(a)(9)(C). This bar also applies to clients who re-enter or attempt to re-enter without inspection after they have been removed, deported, or excluded. Warn your clients *not* to try to come back to the United States while awaiting the outcome of their consular processing, including fingerprint processing, until they have been granted their immigrant visas.

The interview appointment letter will direct the applicant to the “Interview” instructions on the **IV Process Page** of NVC’s website listed above. The applicant should be prepared to bring all of the following documents to the interview:

¹⁶ See 8 CFR 204.1(f)(2).

¹⁷ See 8 CFR 204.1(f)(3).

1. The original interview appointment letter from the NVC;
2. An original passport valid for six months after the intended date of arrival in the United States;
3. A sealed medical examination performed by an authorized “panel physician” (see below);
4. Two color passport-style photos of the applicant;
5. All the required civil documents, such as records of birth, marriage, military service and a police certificate,¹⁸ including all original documents establishing the relationship between the petitioner and the applicant;
6. Updated supporting documentation for the petitioner’s Affidavit of Support, including evidence of the petitioner’s financial situation and his or her ability to support the applicant/intending immigrant; and
7. Any additional location-specific documents required by the consulate.

PRACTICE TIP: Since the documentation submitted to the NVC may be outdated at the time of the interview at the consulate, beneficiaries should bring updated information (most recent tax returns, W-2s and bank statements) to the interview.

A. The Medical Exam

In advance of the consular interview, the applicant will have to schedule a medical examination by an authorized doctor designated by the State Department, called a “panel physician.”¹⁹ Medical examinations performed by non-authorized doctors are not accepted. Currently, visa applicants are required to bring the following to their medical appointments (but you should always check the NVC website for updated information):

- Copies of prior medical records, immunization records, and prior chest x-rays
- The applicant’s passport, identity card, laissez-passer, or travel document
- Payment for the exam (types of payment that are accepted and fees vary)

The applicant will receive the results of the examination in a sealed envelope to take to the consulate. Applicants with children ages 2-14 should plan to schedule the medical exam at least four days prior to the visa interview, because a TB skin test will be required and results take 72 hours to obtain.

WARNING: At the medical exam, the doctor will likely ask your client about past drug and alcohol use and may, in his or her discretion, order testing for drugs. Admission of drug use, even

¹⁸ Police certificates are neither required nor available from every country. Check the Reciprocity by Country list (see above) to determine from which countries they are currently required—note however, that even the list may not be current. For at least approximately a year, the Reciprocity list has indicated that police certificates are now available in Mexico, though they have long been considered unavailable, and as of this writing are still not being required by the U.S. Consulate in Ciudad Juarez.

¹⁹ For a list of panel physicians and other instructions regarding the medical examination, you can click on the “Medical Examination” link on the “Prepare for the Interview” page on the NVC’s IV Process site, or you can go directly to: <https://travel.state.gov/content/visas/en/immigrate/immigrant-process/interview/prepare/medical-examination.html>.

one time for experimental reasons, or testing positive for a drug may lead to findings of inadmissibility either as a drug abuser or as one who has admitted to the violation of a law relating to controlled substances. A DUI arrest or conviction will generate questions about alcohol use and abuse—and could lead to a finding of inadmissibility under the health related grounds of inadmissibility for being a “risk to self or others.” The same for a domestic violence arrest or conviction. Finally, doctors affiliated with some consulates are asking some visa applicants to remove clothing and are looking for gang related tattoos—which could result in a finding of inadmissibility for national security reasons or based on the same “risk to self or others” health related grounds. You should always explain this medical exam related line of questioning to all your clients before they see the panel physician—especially teenagers and young adults.

B. Scheduling a Biometrics Appointment, a Medical Exam, and Selecting a DHL Location

Many U.S. consulates (including Ciudad Juarez at this writing) now require the scheduling on-line of an appointment for fingerprinting at an Application Support Center prior to the visa interview. Some consulates also require that an immigrant visa applicant register at a courier service designated by the consulate (DHL in Ciudad Juarez) prior to attending the visa interview, in order to receive delivery of the applicant’s passport and approved immigrant visa after the visa is approved. The applicant will not return to the consulate, but rather will pick up these documents at the designated courier office.

Applicants contact the U.S. Visa Information and Appointment services through their website, selecting the appropriate country and creating an account.²⁰ This account will be used to schedule fingerprint appointments, pay fees, and to select a courier location and track courier deliveries of documents. Any follow-up interview at the consulate, if needed, can also be scheduled on this website.

Once an immigrant visa interview has been scheduled, the applicant or their attorney of record will be instructed to go on-line to schedule an appointment at an Application Support Center (ASC) and a medical examination.

§ 4.6 What Will Happen at the Interview?

Applicants cannot be represented at consular appointments; therefore, clients need to understand what the procedure will be. They must also understand all the issues that might come up in the case. If a client can read and write, she should be familiar with all of the documents.

At the interview, the client will present any documents that were not already submitted to the NVC, as indicated in the appointment letter. It is always a wise plan to carry additional copies of all documents already submitted to the consulate through the NVC, as well as all the originals, to the interview, in case anything was lost in transit. The officer will go over all the questions in the

²⁰ Available at <https://usvisa-info.com/>.

DS-260 to confirm the answers. The client should practice answering all of these questions with an advocate, friend or relative before the interview.

Recall from **Chapter 3** that every prospective immigrant must be admissible. This means she must not be found inadmissible under INA § 212(a), or, if she is, she must receive a waiver of the ground of inadmissibility. If the consular officer finds that the applicant must apply for a waiver, the applicant may need to wait outside the United States for several months for approval of the waiver request. The waiver request is submitted to USCIS, and in most cases must be submitted after the initial consular interview in which the officer finds the person inadmissible. The provisional waiver for unlawful presence is an exception. If an I-601A Provisional Unlawful Presence Waiver was submitted, it should already have been filed and adjudicated in the U.S. prior to the scheduling of the applicant for the visa interview. However, if the consular officer determines that an additional ground of inadmissibility applies, the applicant will have to renew his or her request for a waiver of unlawful presence grounds, in addition to requesting the newly identified grounds be waived, through the centralized processing procedure. See below and **Chapter 5**.

Pay Particular Attention to the Following Issues

Public Charge. Consular Officers pay close attention to the public charge issue. Your client should be prepared to explain his or her sponsor's sources of income and to explain how he or she will be able to provide for herself/himself in the United States.

Unlawful Presence. The Consular Officer will want to make certain that the applicant has not unlawfully resided in the United States and triggered an unlawful presence ground of inadmissibility. Applicants who have visited the United States in the past may be required to submit documents to show they are not subject to the unlawful presence bars. Thus, an applicant who has been in the United States should be prepared to present documentation of foreign residence, such as employment records, rent receipts, leases or mortgage statements, bank records, etc. In addition, the consulate may require the applicant to document her *lawful* presence in the United States with such documents as passport pages, copies of I-94s, I-797 notices approving an extension of non-immigrant stay, etc. For applicants residing in the United States whose only inadmissibility issue is unlawful presence, a Provisional Waiver can be filed in advance of the consular interview.

Proof of Valid and Bona Fide Marriage. If the person is immigrating through a spouse, the Consular Officer will ask to see evidence of both a valid and bona fide marriage, even though USCIS has already approved the I-130 visa petition based upon marriage. Immigrant spouses should bring to the interview marriage certificates and divorce judgments, as well as evidence of joint accounts, insurance, bills, photographs, affidavits, and any other documentation relating to the bona fides of their marriage.

DUI and Domestic Violence Arrests and Convictions, and “Gang-Related” Tattoos. Some consulates and their affiliated doctors who do the immigrant medical examinations may decide that past DUI arrests or convictions or charges of domestic violence, even without a conviction, are evidence of a physical or mental disorder posing a threat to others such as alcoholism. See

Chapter 3. The same is true of those who have tattoos that the doctors and/or consulates believe are gang related. If this is a possibility, you and your client need to decide whether it is best to delay the consular interview until more time has passed since the incident(s) in question, or whether to obtain documents which are evidence that no disorder or threat exists, such as obtaining a similar examination in advance by a physician expert in the field and submitting additional corroborating documents. Your client may also want to consider having “questionable” tattoos removed.²¹

If There Is a Problem. Tell the client that if something goes wrong, she should ask the consulate official for something in writing stating what the problem is. The client should call you immediately. You may be able to provide the missing document, or negotiate with the consular officer over the phone to get the immigrant visa issued.

If the problem is not resolved before the first day of the following month, the person’s immigrant visa may be reclaimed and the person may be forced to wait another 60 days to get another visa number to immigrate to the United States. If the problem is resolved within the month, the person may retain her visa number.

Advisory Opinions: While Consular Officers make **factual** conclusions and determinations on particular cases, the ultimate decision as to whether the person is **legally admissible** rests with the State Department’s Visa Office located in Washington, DC. However, when the case involves factual interpretations as well as legal matters, the consular officers have great discretion.

Nevertheless, most consular officers will agree to follow the Visa Office’s recommendation to grant a visa. Consular officers are legally required to follow the legal conclusions made by the Visa Office.

Hence, advisory opinions can correct misapplications of regulations and consular abuses of the law. To request an advisory opinion, a lawyer or accredited representative should send a letter with the following information to the Advisory Opinion Division:

1. Full Name of the visa applicant, date and place of birth and nationality
2. Consular post/name of consular officer, if known and post file number if available
3. Type and date of visa application
4. Summary of the facts, statute/regulation in question, legal basis for arguing that the post made a legal error.

The State Department prefers that requests for advisory opinions be sent via email to: legalnet@state.gov. However, if necessary, a request for an advisory opinion can also be mailed to:

²¹ FBI National Gang Intelligence Center 2010 Tattoo Handbook can be found at: www.cryptocomb.org/2011%20tattoo%20handbook%20for%20police.pdf. An additional 2013 FBI NGIC report on gangs in the U.S. can be found at: www.fbi.gov/stats-services/publications/national-gang-report-2013.

Advisory Opinions Division
Department of State
2401 E Street, NW, Room L603F
Washington, DC 20037

It is fine to ask questions relating to hypothetical situations if the answer will serve to clarify a very specific issue. This often leads to corrections to the FAM. However, the Advisory Opinions Division has discretion whether or not to respond to requests for opinion in hypothetical cases. *Interpreter Releases* publishes some advisory opinions and advocates can use them to better prepare applicants with similar admissibility problems.

§ 4.7 What Happens after the Immigrant Visa Is Granted

Once an immigrant visa applicant is found to be admissible, or her waiver is approved, she is issued an immigrant visa, usually valid for six months. *Your client must enter the United States during the six months before the visa expires in order to become a lawful permanent resident.*

All persons issued immigrant visas outside the United States must pay a USCIS Immigrant Fee after receiving the immigrant visa, but prior to travelling to the United States.²² If this fee is not paid, the person will not receive an alien registration card (green card). The applicant must go online to the USCIS ELIS (Electronic Immigration System) to pay the fee, which at this writing is \$165. USCIS instructions state that only the visa applicant may go online, register, and pay the fee for each member of the family who is immigrating together. The applicant needs the “A” number assigned, the State Department DOS case number which has been used throughout the process, biographic information on each family member who is immigrating, and a valid credit card or U.S. bank account number and routing number. The applicant then goes online at www.uscis.gov/uscis-elis, chooses “Pay the USCIS Immigrant Fee” and pays. All family members may be included in a single transaction. If the client fails to pay the fee prior to entering the United States, she or he will receive a Request for Evidence (RFE) if not paid within 45 days, and a second RFE if not paid within 90 days.

When the consular officer grants the visa, she will give the applicant some papers (including an immigrant visa) to present at the U.S. border. When the applicant comes to the United States, she will apply to CBP for admission at the border. She will present the visa materials from the consulate to CBP. If everything is in order, CBP will stamp her passport and she will be a permanent resident as of the day she enters the United States. The passport stamp authorizes the immigrant to work in the United States and is proof of lawful presence in the United States.

Many people who immigrate through a petition filed by their spouses obtain a two-year **conditional permanent resident status** (also known as conditional residence) when they first immigrate. This applies to spouse who immigrate within two years of getting married to the petitioning spouse. Conditional residents must file a Form I-751 petition with USCIS within two

²² In practice, however, this fee may be paid after arrival in the U.S., but the DHS will not begin processing the permanent resident card until after the fee is paid.

years after immigrating to remove the conditions on residence. If they fail to file this application, their conditional permanent residence will expire after the two years. See **Chapter 2** for further information on conditional residence.

§ 4.8 What to Do if Your Alien Registration Card Fails to Arrive

A person who does not receive his or her alien registration card (green card) in the mail within five months of immigrating, needs to file Form I-90, Application to Replace Permanent Resident Card. If someone has not received a card that was actually issued, there is *no filing fee for Form I-90*. There may have been a problem, such as inadequate photos, unreadable documents, that resulted in the card not being issued. In addition, because the U.S. Postal Service will not deliver green cards addressed to someone who is not a listed resident of a particular address, immigrants should make sure to provide USCIS and the consulate with a secure address, in care of someone who is a listed resident of the given address. Unfortunately, USCIS does not notify a person if there is a problem with the photos or the mailing address. Therefore, a new immigrant who has not received the initial card needs to take action to remedy the situation. A good first step is to schedule an InfoPass appointment at the closest USCIS office. This will allow USCIS to check their system and see if there are any issues with the card. In some cases, USCIS can rectify the situation without the filing of the Form I-90. An InfoPass appointment is made online at <https://infopass.uscis.gov/>.

§ 4.9 Waivers of Grounds of Inadmissibility

Your client attends the consular interview. The documents are in order, the visa petition is valid, and an immigrant visa is available. If there is no other problem with the case, the officer will approve the application, issue the visa, and allow your client to travel to the United States to become a permanent resident. But, what happens if your client is inadmissible?

People may be inadmissible if they have a criminal record, certain health issues, immigration offenses (such as visa fraud, prior removal or deportation, or unlawful presence), public charge (for people who cannot demonstrate that they will not need to receive cash assistance from the government), or security/terrorist concerns. **Chapter 5** covers the grounds of inadmissibility related to unlawful presence.

When a person is inadmissible, they will not be able to immigrate through a family member unless they receive a waiver. USCIS can waive (forgive) certain grounds of inadmissibility in its **discretion**. If USCIS agrees to waive the ground of inadmissibility, the person may immigrate.

To obtain a waiver is to have the ground of inadmissibility forgiven. USCIS is saying, “Even though we could deny you, you have shown that you deserve to be admitted and we have decided to let you immigrate.”

To obtain a waiver, the person must submit an **application for a waiver** to USCIS, most commonly using Form I-601 or Form I-212.²³ Only certain grounds of inadmissibility, under certain circumstances, can be waived.

Example: Muata is inadmissible for visa fraud under INA § 212(a)(6)(C)(i). He wants to immigrate through his U.S. citizen wife.

Look up INA § 212(i). It states that the government has discretion to waive the visa fraud ground of inadmissibility, if the alien meets certain requirements. Muata is eligible to apply for a waiver. In order to be granted the waiver, Muata must show that his U.S. citizen wife will suffer extreme hardship if the waiver is denied. If USCIS grants the waiver, he can immigrate.

Some grounds of inadmissibility cannot be waived. People inadmissible under those grounds cannot immigrate through a family visa petition.

Example: Ira has a U.S. citizen wife and six U.S. citizen children. He is inadmissible because he has a criminal conviction for sale of drugs. There is no waiver for this ground of inadmissibility. Ira cannot immigrate through his family.

People who are processing their cases at a consulate and need a waiver will first attend the interview where they will be found inadmissible and then submit the waiver application. If the consulate finds your client inadmissible, it may require your client to submit a waiver application with the appropriate fee to the USCIS window or office at the consulate, or to the consular officer who will then forward the waiver to USCIS. Different grounds of inadmissibility may all be included together on the same I-601 form, though some different supporting documents may be needed. With the exception of those who qualify for a provisional waiver (see next paragraph), the applicant will have to remain outside the United States during this process, and will often have to appear at a second interview to submit the waiver application. It will be important to prepare the waiver package in advance, if you know a waiver will be required in order to expedite the process. Adjudication of the waiver is a separate process from the immigrant visa application process, and may take between 4-12 months or more. If the waiver is denied, the person must wait even longer outside the United States while appealing or filing a new waiver application.

Applicants who are residing in the United States and whose *sole* ground of inadmissibility is the unlawful presence ground of INA § 212(a)(9)(B), may file a waiver in advance of their consular appointment. This is called the Provisional Unlawful Presence Waiver, which is filed on Form I-601A and allows the person to file a waiver and have it adjudicated before leaving the United States for consular processing. See **Chapter 5** for details about the provisional waiver process.

Once the consular officer approves the visa application and DHS personnel approve any required waiver, the consular officer will issue an immigrant visa to the applicant. The applicant will present the visa to CBP at the border (including an airport port of entry). The CBP has

²³ Other forms are utilized for waivers at the time of asylum adjustment, “U” visa applications and certain other ways of immigrating.

*Immigrant Legal Resource Center
December 2016*

independent authority to review grounds of inadmissibility. The person will become a permanent resident at the time that CBP admits her at the border and places a stamp in her passport.



U.S. Department of State
National Visa Center
31 Rochester Ave., Suite 200
Portsmouth, NH 03801-2915

ANN ELIZABETH BLOCK
LAW OFFICE OF ANN BLOCK
2655 PORTAGE BAY STE 9
DAVIS, CA 95616

 LIVAOS I-130

August 4, 2015
NVC Case Number: LGS2[REDACTED]6

Dear ANN ELIZABETH BLOCK,

You are registered as the attorney of record in the immigrant visa case of [REDACTED]. As such you must review communication and processing requirements and options which may apply to this case. Go to our website <http://nvc.state.gov> for details.

You are also responsible for coordinating payment of the Immigrant Visa (IV) Application processing fee for each applicant, and the Affidavit of Support (AOS) fee for this case, all of which are now due and payable.

Payment must be received before the petition can be processed further. Fee bill invoices for all fees due are included with this message and may be required to be submitted with payments. If you did not receive a fee bill for any applicant who should be named on this case, please contact the NVC; do not send a fee payment for the applicant.

You can pay the fees online at <http://ceac.state.gov>. If you are unable to pay online, you can pay by mail using a cashier's check or money order by following **Step 2: Pay fees** on our website <http://nvc.state.gov>. To make payments you will need the following information, which is on the enclosed fee bill invoice(s):

- Your client's NVC case number
- Your client's invoice ID number

Do not send fee payments to the National Visa Center (NVC) in Portsmouth, New Hampshire.

If the applicant intends to adjust status with U.S. Citizenship and Immigration Services (USCIS), contact the NVC before taking further action or making any payments.

NVC Case Number: LGS2[REDACTED]6



Children who pass 21 years of age after original USCIS approval of the petition lose eligibility to accompany or later join the applicant(s) immigrating to the United States under the original petition. The Child Status and Protection Act (CSPA) allows some children to remain eligible beyond 21 years of age. If you believe that the CSPA applies to this case, please send a detailed explanation to the NVC to be forwarded to the U.S. Embassy/Consulate for a decision.

If the NVC receives no communication from any representatives of a case for a period of one year the case enters the termination process. All submitted fees and documents expire and must be resubmitted to resume the immigration process.

When contacting the NVC or any U.S. Embassy/Consulate about your client's case always include:

- Full Name of Visa Applicant
- Full Name of Petitioner
- NVC Case Number

Sincerely,

Director
National Visa Center

NVC Case Number: LGS2 [REDACTED] 36



Visa Information

If you have specific questions about your client's case, please contact the NVC. The preferred method of communication is e-mail.

- E-Mail** The NVC's e-mail address is: **asknvc@state.gov**
Attorneys of record should use: **nvcattorney@state.gov**
In order to ensure a prompt response:
- Enter your client's case number in the Subject Line of the e-mail.
 - Include the principal applicant's name and date of birth and the petitioner's name and date of birth in the body of the e-mail.
 - Include the name of the law office requesting the information.
 - If the petition is employment-based, include the company/organization name.
 - Ask about only one case per e-mail.
- Legal Questions** The Visa Office of the Bureau of Consular Affairs uses the following e-mail address for attorneys of record: **legalnet@state.gov**
- 24 Hour Information** An automated recorded message system is available 24 hours a day, seven days a week to answer case status inquiries (603 334-0700).
- Customer Service** Customer Service Representatives are available to respond to inquiries Monday through Friday from 7:30 AM to 12:00 AM Eastern Standard Time (EST) (603 334-0700).
- Postal Mail** National Visa Center
Attn: WC
31 Rochester Ave., Suite 200
Portsmouth, NH 03801-2909
USA

When contacting the National Visa Center about an immigrant visa case, always include the following information:


Name of Principal Applicant
Principal Applicant's Date of Birth
Name of Petitioner
Petitioner's Date of Birth
NVC Case Number

Please Note: If a period of one year passes without communication to the NVC, all submitted fees and documents expire and must be resubmitted to resume the immigration process.



U.S. Department of State
National Visa Center

Affidavit of Support Fee Invoice

NVC Case Number: LGS2 [REDACTED] 
AOS Invoice for: [REDACTED]
Invoice Date: August 4, 2015
Amount Due: \$120.00
Invoice I.D. Number: [REDACTED]

Fee Invoice Instructions:

You only need to use this fee invoice if you cannot pay your Affidavit of Support Fee online. If you cannot pay your fee online, go to our website at **<http://nvc.state.gov/fee>** and follow the pay by mail instructions. Include this fee invoice when you mail your payment.


Processing fees are non-refundable.





U.S. Department of State
National Visa Center

Immigrant Visa Fee Invoice

NVC Case Number: LGS2 [REDACTED] 06 
IV Invoice for: [REDACTED]
Beneficiary I.D.: [REDACTED]
Invoice Date: August 4, 2015
Amount Due: \$325.00
Invoice I.D. Number: [REDACTED]

Fee Invoice Instructions:

You only need this fee invoice if you cannot pay your Immigrant Visa Fee online. If you cannot pay your fee online, go to our website at <http://nvc.state.gov/fee> and follow the pay by mail instructions. Include this fee invoice when you mail your payment.

Processing fees are non-refundable.



LGS2 [REDACTED]

DOCUMENT COVER SHEET

The next step in the immigration process is for each applicant to submit an Application for Immigrant Visa and Alien Registration with supporting civil documents.

A link to the instructions has been provided on the Receipt Page. You can also find the instructions through the NVC website at <http://nvc.state.gov>.

You **MUST RETURN THIS COVER SHEET** with the completed forms and required documents for the following individuals:

[REDACTED]

Failure to do so will delay your visa(s).

Please attach this page to the front of the documents for this case and mail to:

**National Visa Center
Attn. CMR
31 Rochester Avenue Suite 100
Portsmouth, NH 03801-2914**

LGS2 [REDACTED] 6



F2A



Payment Receipts for IV Case LGS2[REDACTED]6 AOS Fee Payment Receipt Details

Payment Status IN PROCESS
Principal Applicant [REDACTED]
Petitioner [REDACTED]
Payment Amount \$120.00
Payment of Services Initiated 12-MAY-2016 16:11:47
Payment Processed Date
Payer [REDACTED]
Payer Email aeblock@dcn.org
Transaction ID 25R[REDACTED]

Next Steps

If your payment status shows that it is IN PROCESS, wait two to three business days for the payment to clear. Then sign into the system again to check for a status update.

If your payment status shows a status other than IN PROCESS or PAID, sign in to the Immigrant Visa Invoice Payment Center page <https://ceac.state.gov/CTRAC/Invoice/Signon.aspx> and click on Get Help.

If you receive a notice that your case has entered termination, **do not attempt to pay any fees.** You must contact the National Visa Center (NVC) immediately to resume processing of your petition. You can find NVC contact information at nvc.state.gov/ask.

To review specific U.S. Embassy or Consulate instructions and options that may apply to your case, go to nvc.state.gov/document. You will find the information in a downloadable PDF format at the bottom of the page.

When the AOS fee payment status is PAID:

1. The petitioner must complete and submit an Affidavit of Support (Form I-864). To submit your application, go to nvc.state.gov/aos.
2. Read the introductory paragraph. Then click on > Complete an Affidavit of Support form. From the chart, select the form that fits your situation. You will need to click the GO button to access the form and instructions.
3. To complete your Immigrant Visa Application, you must submit copies of all supporting documents. Go to nvc.state.gov/submit. You will find instructions if you are required to email your documents, as well as the processing and mailing information.
4. If you are required to submit physical copies of your documents, you must include a barcoded cover sheet to identify your documents.
 - If you received an Instruction Packet from the NVC, it contains a cover sheet. You can send that cover sheet or a copy of the cover sheet.
 - If you need a new cover sheet, print one by clicking the Print Document Cover Sheet button on the Receipt page.
 - If you cannot print a cover sheet, click the Email Document Cover Sheet button.

Then send an electronic copy to an email address where you can print it.

You will find steps concerning IV fee payments on the IV fee payment receipt.



Payment Receipts for IV Case LGS2[REDACTED]6 IV Fee Payment Receipt Details

Principal Applicant [REDACTED]
Payment of Services Initiated 12-MAY-2016 16:08:07
Payment Processed Date
Payment Amount \$325.00
Payer [REDACTED] M
Payer Email aeblock@dcn.org
Transaction ID 25R[REDACTED]

Applicant	IV Fee Payment Status	Fee Amount
[REDACTED]	IN PROCESS	\$325.00

Next Steps

If your payment status shows that it is IN PROCESS, wait two to three business days for the payment to clear. Then sign into the system again to check for a status update.

If your payment status shows a status other than IN PROCESS or PAID, sign in to the Immigrant Visa Invoice Payment Center page <https://ceac.state.gov/CTRAC/Invoice/Signon.aspx> and click on Get Help.

If you receive a notice that your case has entered termination, **do not attempt to pay any fees**. You must contact the National Visa Center (NVC) immediately to resume processing of your petition. You can find NVC contact information at nvc.state.gov/ask

When the IV fee payment status is PAID:

1. Each applicant must complete and submit an Online Immigrant Visa and Alien Registration Application (DS-260). To submit your application, go to <http://ceac.state.gov/iv>, and sign in. Read the Summary Information. Click on the IV APPLICATION tab and follow the application instructions.
2. To review specific U.S. Embassy or Consulate instructions and options that may apply to your case, go to nvc.state.gov/document. You will find the information in a downloadable PDF format at the bottom of the page.
3. To complete your Immigrant Visa Application, you must submit copies of all supporting documents. Go to nvc.state.gov/submit. You will find instructions if you are required to email your documents, as well as the processing and mailing information.
4. If you are required to submit physical copies of your documents, you must include a barcoded cover sheet to identify your documents.
 - If you received an Instruction Packet from the NVC, it contains a cover sheet. You can send that cover sheet or a copy of the cover sheet.
 - If you need a new cover sheet, print one by clicking the Print Document Cover Sheet button on the Receipt page.
 - If you cannot print a cover sheet, click the Email Document Cover Sheet button.

Then send an electronic copy to an email address where you can print it.

IMPORTANT NOTES:

- If you decide to file Form I-601A, Application for Provisional Unlawful Presence Waiver with USCIS, you must include a copy of this fee payment receipt or USCIS will reject your Form I-601A.
- Please keep this receipt for your records. If you can't print the receipt now, return to the Receipt Screen and email a copy to an address where you can print it later.
- Do not let more than one-year pass without contacting the NVC about your immigrant visa petition. If a period of one-year passes from the last date of contact, all submitted forms and fees will expire and you must resubmit them to resume processing.
- You will find the next steps about AOS fee payments on the AOS fee payment receipt.

APPENDIX 4-C

ANSWERS TO EXERCISES

Exercise, Chapter 4

1. Yun was born in Taiwan. He wants to immigrate through his mother and needs to provide a birth record. Will he be able to get a birth certificate? If not, is there something else he can submit?

According to the Country Reciprocity Schedule, “[h]ousehold registration records will contain entries regarding birth, death marriage, and divorce. Extracts of the household registration may therefore be accepted as prima facie evidence of this fact.”

2. Alicia, a Mexican woman, married her partner Grisel, also a woman, in the state of Quintana Roo in Mexico. They were issued a document called “*acta de convivencia*” (cohabitation certificate). Will this document be acceptable as proof of a lawful marriage if Alicia tries to immigrate through Grisel, who is a U.S. citizen?

According to the Country Reciprocity Schedule, “[s]ame-sex marriages in Mexico are allowed in the Federal District (DF) since December 29, 2009, and in the state of Quintana Roo since October 30, 2008. After five years of living together, a same-sex couple in a common law relationship is entitled to all benefits as if it were a marriage in the DF since December 29, 2009. These couples are able to receive an ‘acta de convivencia’ from the Civil Registry.”

3. Jules was born in Ghana. He has a birth certificate, on light gray paper, issued two years after his birth. Will the consulate accept this with no other proof?

According to the Country Reciprocity Schedule, “[r]egistrations not made within one year of an individual's birth are not reliable evidence of relationship, since registration, including late registration, may often be accomplished upon demand, with little or no supporting documentation required.” Therefore, in the case of a late registration such as that of Jules, secondary evidence will be required, such as “a midwife's certificates of birth, weight cards or welfare centre cards, and baptismal certificates. Recent affidavits by relatives or friends are not reliable.”

*Immigrant Legal Resource Center
December 2016*

CHAPTER 5

UNLAWFUL PRESENCE WAIVERS

This chapter includes:

§ 5.1	Overview of Unlawful Presence.....	5-1
§ 5.2	Unlawful Presence and Exceptions	5-2
§ 5.3	Triggering the Unlawful Presence Ground of Inadmissibility	5-4
§ 5.4	When an I-601 Waiver Is Required.....	5-7
§ 5.5	Eligibility Requirements for an I-601A Provisional Waiver.....	5-8
§ 5.6	Approved Visa Petition Requirement.....	5-9
§ 5.7	Qualifying Relatives.....	5-12
§ 5.8	Extreme Hardship.....	5-12
§ 5.9	Provisional Waiver and Other Grounds of Inadmissibility	5-13
§ 5.10	Prior Removals and Proceedings.....	5-13
§ 5.11	Approvals and Denials	5-15
§ 5.12	How to Apply for an I-601A Waiver	5-15
§ 5.13	What Is Extreme Hardship	5-15

§ 5.1 Overview of Unlawful Presence

The ground of inadmissibility that covers “unlawful presence” is found in INA § 212(a)(9)(B). That section covers noncitizens who were unlawfully present in the United States for specified periods of time, left the United States, and now seek readmission. It is necessary to start by defining what is and is not considered unlawful presence and explain how it has been interpreted by the United States Citizenship and Immigration Services (USCIS).

No regulation defines or interprets unlawful presence. The statute lists certain categories of individuals who are not subject to accruing unlawful presence,¹ and all other guidance on this topic comes from the Adjudicator’s Field Manual (AFM), § 40.9. Under the statute, an individual accrues unlawful presence when he or she is “present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.”² For someone who enters on a nonimmigrant visa but who subsequently violates the terms of the visa—such as by working without authorization—unlawful presence begins only after a determination by USCIS or an immigration judge that the person violated status.³ This is a rarity. Therefore, unlawful presence for the overwhelming majority of cases starts when the person does one of two things: (1) enters without inspection, or (2) overstays a designated period of admission.

¹ INA § 212(a)(9)(B)(iii).

² INA § 212(a)(9)(B)(ii).

³ AFM § 40.9.2(b)(1)(E)(i).

Most nonimmigrants who enter at a land border are given a printed Form I-94, Admission/Departure Record, or an equivalent stamp in their passport upon admission to the United States. Those who enter the United States at an international airport are technically issued an I-94, but it is in electronic format. The traveler does not receive a paper copy, but can download the record from CBP's website. The stamp and I-94 record will indicate the amount of time the person is authorized to remain in the United States. For example, tourists who enter on B-1/B-2 visas are typically authorized to stay for 90 days. Their unlawful presence would begin to run starting on the day after their I-94 or time of authorized stay, expires. But some nonimmigrants are not issued I-94s, the two most common categories being Canadian tourists and Mexicans entering on border crossing cards (laser visas). Canadian citizens are not issued tourist visas and may enter the United States by presenting a passport; they are currently not issued an I-94 document. Therefore, the USCIS position is that they do not accrue unlawful presence.⁴ Similarly, most Mexicans who enter with border crossing cards do not receive I-94 cards unless they request one. The USCIS position, at least as stated in the AFM, is that these nonimmigrants do not accrue unlawful presence, since they are not issued a document delineating how long they can stay. Nonetheless, there has been some tension around this policy. Customs and Border Protections (CBP) has taken exception to this policy on occasion. Additionally, if an I-94 is received, the person will accrue unlawful presence after the authorized stay ends.

Students who enter the United States on F-1 visas are often issued an I-94 that is stamped "duration of status" or "D/S." Those students do not accrue unlawful presence until the USCIS or an immigration judge makes a formal finding that they have fallen out of status.

§ 5.2 Unlawful Presence and Exceptions

Unlawful presence and unlawful status, or being out of status, are related but distinct concepts.⁵ In many instances, an individual may be present in the United States without lawful status but is nevertheless protected from accruing unlawful presence based on statutory or policy-based exceptions, as summarized below.

Example: On December 1, 2014, Michelle entered the United States on a B-1/B-2 nonimmigrant visa and was issued an I-94 authorizing her to stay in the United States for 90 days. She overstayed and started accruing unlawful presence on March 1, 2015. She filed for adjustment of status on April 15, 2015, which stopped the running of her unlawful presence. Nevertheless, she is not in a lawful immigration status.

⁴ AFM § 40.9.2(b)(1)(E)(iii) ("Nonimmigrants, who are not issued a Form I-94, Arrival/Departure Record, are treated as nonimmigrants admitted for D/S for purposes of determining unlawful presence").

⁵ AFM § 40.9.2(a)(2).

The statute recognizes six categories of individuals who do *not* accrue unlawful presence.⁶ They are:

- Those under 18 years of age
- Applicants for asylum during the pendency of the application, provided the applicant did not work without employment authorization
- Those who have been granted Family Unity during the authorized period
- Battered spouses and children, provided there is a substantial connection between the abuse and the unlawful presence
- Victims of a severe form of trafficking in persons if the trafficking was at least one central reason for the unlawful presence, and
- Nonimmigrants who have made a timely, non-frivolous application for an extension of stay or change of status, during the 120-day period after filing the application.⁷

The most important exception is for children under 18 years of age. For purposes of the three- and ten-year bars, unlawful presence begins accruing the day after the child turns 18.

Example: Laura entered the United States when she was two years old. She turned 18 on November 15, 2014 and started accruing unlawful presence the next day. As of May 15, 2015, she had accrued more than 180 days of unlawful presence. When Laura departs the United States for her consular interview on June 20, 2015, she will trigger the three-year bar and she will need a waiver of inadmissibility to return before that three-year period expires. If Laura had departed the United States before May 15, 2015 to await her consular interview abroad, she would not be inadmissible for unlawful presence.

Section 40.9 of the Adjudicator's Field Manual lists additional classes of noncitizens whom the USCIS regards as being present in the United States pursuant to a period of authorized stay:

- Persons with properly filed applications for adjustment of status under INA §§ 245(a) or 245(i), including persons who in removal proceedings renew adjustment applications that were denied by USCIS, but not including persons who first apply for adjustment when in removal proceedings⁸
- Persons admitted to the United States as refugees under INA § 207 or granted asylum under INA § 208⁹
- Persons granted withholding of removal under INA § 241(b)(3)¹⁰
- Persons granted withholding or deferral of removal under the Convention Against Torture¹¹

⁶ INA §§ 212(a)(9)(B)(iii), (iv).

⁷ This period may extend to include all the time such an application is pending, beyond the 120-day period stated in the statute. See AFM, ch. 30.1(d).

⁸ AFM § 40.9.2(b)(3)(A).

⁹ AFM § 40.9.2(b)(1)(F)(i) and (ii). This group includes derivative asylees and refugees, from the date a bona fide I-730 Asylee/Refugee Relative Petition is filed with USCIS.

¹⁰ AFM § 40.9.2(b)(3)(K).

¹¹ AFM § 40.9.2(b)(3)(L).

- Persons with legalization or special agricultural worker applications for lawful temporary residence pending through an administrative appeal¹²
- Persons granted deferred enforced departure¹³
- Applicants for adjustment of status under the Nicaraguan Adjustment and Central American Relief Act or the Haitian Refugee and Immigrant Fairness Act¹⁴
- Cuban/Haitian entrants, as defined under Pub. L. No. 99-603, § 202(b)¹⁵
- Persons granted voluntary departure, during the period allowed¹⁶
- Persons granted suspension of deportation or cancellation of removal¹⁷
- Persons granted deferred action status¹⁸
- Persons under a current grant of temporary protected status (TPS), including applicants for TPS, provided the application was granted¹⁹
- Conditional residents who timely file a petition to remove the conditions on residence, or whose late filing is accepted by USCIS or an immigration judge²⁰
- Parolees, during the allowed parole period,²¹ and
- Persons granted a stay of removal, during the authorized stay period.²²

Those *not* considered to be in a period of authorized stay under this ground include:

- Persons under an order of supervision (pending removal)²³
- Persons with pending applications for cancellation of removal²⁴
- Persons with pending applications for withholding of removal²⁵
- Asylum applicants who have worked without employment authorization,²⁶ and
- Persons present pursuant to pending federal court litigation.²⁷

§ 5.3 Triggering the Unlawful Presence Ground of Inadmissibility

The term “unlawful presence” was first introduced into the grounds of inadmissibility in 1996 by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.²⁸ This ground of

¹² AFM § 40.9.2(b)(3)(E).

¹³ AFM § 40.9.2(b)(3)(M).

¹⁴ AFM § 40.9.2(b)(3)(A).

¹⁵ *Id.*

¹⁶ AFM § 40.9.2(b)(3)(H).

¹⁷ AFM § 40.9.2(b)(1)(D).

¹⁸ AFM § 40.9.2(b)(3)(J).

¹⁹ AFM § 40.9.2(b)(1)(F)(iii).

²⁰ AFM § 40.9.2(b)(1)(C).

²¹ AFM § 40.9.2(b)(1)(G).

²² AFM § 40.9.2(b)(3)(I).

²³ AFM § 40.9.2(b)(6).

²⁴ See AFM § 40.9.2(b)(1)(D).

²⁵ See AFM § 40.9.2(b)(3)(K) and (L).

²⁶ See AFM § 40.9.2(b)(2).

²⁷ See AFM § 40.9.2(b)(5)(B).

inadmissibility was implemented on April 1, 1997, and is applied prospectively. Therefore, time spent in the United States “unlawfully” prior to April 1, 1997 does not count towards this bar. Those who are unlawfully present in the United States for a period of more than 180 days (but less than one year) on or after April 1, 1997, who then voluntarily depart the United States prior to the commencement of removal proceedings, and who then seek admission to the United States are inadmissible for a period of three years from the time they departed.²⁹ Persons who are unlawfully present in the United States for one year or more after April 1, 1997, and who depart and then seek admission are inadmissible for a period of ten years from the date they departed.³⁰

Example: Pedro entered the United States illegally on October 1, 2013. He returned to Mexico on March 5, 2014. He recently re-entered the United States illegally and has applied for adjustment of status under 245(i) based on a petition his U.S. citizen brother filed for him in August 1996. Pedro has not triggered the three-year bar because he was not unlawfully present for more than 180 days. His unlawful presence began on October 1, 2013 and ended on March 5, 2014, for a total of 157 days.

The three-year bar applies only to noncitizens who voluntarily depart the United States before the commencement of removal proceedings.³¹ If removal proceedings have commenced and the person has been unlawfully present for less than one year before departing, he or she will not be subject to the three-year bar. This means that those who leave the United States under an order of removal or voluntary departure granted by an immigration judge will not be subject to the three-year bar if they leave before accruing one year of unlawful presence. They will still be subject to the ten-year bar if they were placed into removal proceedings and then depart after accumulating a year or more of unlawful presence.³²

Under the three- and ten-year bars, periods of unlawful presence in the United States are not counted in the aggregate, but rather each period is counted separately. Thus, the three-year bar does not apply to a person with multiple periods of “unlawful presence” if no single period exceeded 180 days.³³

Example: Maria entered the United States illegally on multiple occasions. She first entered illegally in 2013 and remained for four months before returning to Mexico. She reentered illegally in 2014 and stayed three months. She reentered illegally this year and has recently married a U.S. citizen. If she departs the United States before accruing more than 180 days of unlawful presence, measured from her most recent illegal reentry, she will not have triggered the three-year bar. She has not triggered the ten-year bar, either, since none of her periods of unlawful presence were one year or longer. (Beware! If Maria stays over 5 months she will trigger the permanent bar if she re-enters illegally

²⁸ Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208 (Sept. 30, 1996).

²⁹ INA § 212(a)(9)(B)(i)(I).

³⁰ INA § 212(a)(9)(B)(i)(II).

³¹ INA § 212(a)(9)(B)(ii).

³² Note that AFM § 40.9.2(a)(4)(C) wrongly states that the 10-year bar is triggered by *more* than one year of unlawful presence rather than a year or more as written in the statute.

³³ AFM § 40.9.2(a)(4)(A).

again. This is because for purposes of INA § 212(a)(9)(C), periods of unlawful presence are considered in the aggregate.)

BEWARE! Unlike the 3- and 10-year bars, the so-called permanent bar found at INA § 212(a)(9)(C) will apply if someone accumulates more than a year of unlawful presence, in aggregate. This means we add up all periods of unlawful presence from each visit to the United States to determine whether the permanent bar might apply. If INA § 212(a)(9)(C) applies, the person will be barred from entering the U.S. permanently, but may apply for a waiver after 10 years outside the United States.

Prior to April 2012, noncitizens who had applied for and been granted advance parole, left the United States after having accrued more than 180 days of unlawful presence, and were paroled back into the United States were found to be inadmissible under INA § 212(a)(9)(B)(i)(I). Those who had accrued one year or more of unlawful presence before leaving and being paroled in were subject to the ten-year bar under INA § 212(a)(9)(B)(i)(II). This is because the agency’s interpretation of “departure” triggering the unlawful presence bars included leaving under advance parole.

This changed on April 17, 2012, when the BIA published a decision holding that leaving the United States temporarily pursuant to a grant of advance parole does not constitute a “departure” for purposes of § 212(a)(9)(B).³⁴ The case dealt with an adjustment of status applicant who obtained advance parole pursuant to his adjustment application. The USCIS has indicated that it will issue guidance clarifying and formally extending this doctrine to other individuals who qualify to travel on advance parole, including those with Temporary Protected Status (TPS) and Deferred Action for Childhood Arrivals (DACA). This means that if they are eligible to adjust status in the United States, they will not be found inadmissible under INA § 212(a)(9)(B).

Before advising any client to depart the United States for consular processing, it is critical that you first determine if your client has accrued any unlawful presence. If your client has accrued unlawful presence, you must accurately calculate how much. If your client has not yet accrued 180 days of unlawful presence, advise him or her of the option of leaving the United States before triggering the three-year bar.

Finally, it is critical that you record all the times and dates that your client has entered the United States and departed. This is important for determining if the three- or ten-year bars have been triggered, but also for determining if the “permanent” bar under INA § 212(a)(9)(C)(i)(I) has been triggered. More than one year of unlawful presence in the aggregate followed by a departure and then either an attempted or successful reentry without admission will make your client subject to the “permanent” bar and will require your client to depart the United States and remain abroad for ten years before being eligible to file a waiver.

³⁴ *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012).

§ 5.4 When an I-601 Waiver Is Required

If a family member does not qualify to apply for permanent residency in the United States through adjustment of status, he or she must be processed for an immigrant visa at a U.S. embassy or consulate abroad. This procedure is known as consular processing. In order to consular process, the person must first have an approved visa petition filed on his or her behalf, with all proper paperwork and fees submitted to the National Visa Center for processing. Once everything is complete, the case is transferred to the consulate for final processing of a visa and interview of the person who intends to immigrate.

Normally, this final step, which includes the taking of biometrics, undergoing a medical examination, and being interviewed at a U.S. consulate abroad, takes only a few days to be completed and the immigrant visa issued. Once the visa for travel is issued, the applicant may enter the United States as an LPR. However, if the consular officer conducting the interview determines that the applicant is inadmissible, the applicant will be refused the visa.

If the ground of inadmissibility is waivable, the applicant must remain abroad until a Form I-601, Application for Waiver of Grounds of Inadmissibility, is filed, adjudicated by the Nebraska Service Center, granted, and the approval forwarded to the consulate. In most cases the waiver is adjudicated within four to six months, but in some cases it could take longer. While the waiver adjudication is pending, the applicant is typically unemployed and separated from family members in the United States. If the waiver is denied, the applicant will be denied entry as an immigrant either permanently or for a designated period of time. For those found inadmissible based on unlawful presence and denied a waiver, that period is either three years or ten years after departure, depending on how much unlawful presence was accrued in the United States.

Waiver of the unlawful presence ground of inadmissibility is authorized by INA § 212(a)(9)(B)(v). Applicants for the waiver must demonstrate extreme hardship to a U.S. citizen or LPR spouse or parent. An LPR spouse or parent in this case is considered a “qualifying relative,” because the relationship is needed to qualify for the waiver.³⁵ U.S. citizen or LPR children are not qualifying relatives, nor is the waiver applicant or any other family relation. This does not mean that you should ignore the hardship these other family members will suffer when applying for the waiver. Instead, you will need to funnel their hardship through the qualifying relative and make it part of his or her hardship. While the hardship of a child does not count directly, for instance, one may show how hardship to the applicant’s child will result in increased hardship to the qualifying relative. For example, the lack of health care in the foreign country to treat a child’s specific medical condition will result in greater stress and suffering to the qualifying relative spouse of the applicant if the family elects to move there. The same could be true for any other non-qualifying family member who will suffer more due to the absence of the waiver applicant. Identify and document that hardship and then explain how it will increase the hardship experienced by the qualifying relative.

In most cases, families with U.S. citizen children petitioning for their parents will be unable to use the provisional waiver process because the U.S. citizen child cannot be considered a

³⁵ INA § 212(a)(9)(B)(v).

qualifying relative. Sometimes one parent might not have an unlawful presence problem, or might be eligible to adjust status without departing and triggering the bar. In these cases, the citizen child might first immigrate the parent who does not have an unlawful presence problem. After immigrating, the other parent may apply for an unlawful presence waiver with the LPR spouse as a qualifying relative.

WARNING! To qualify for a waiver of unlawful presence, the applicant must be able to show hardship to a USC or LPR spouse or parent. Having a USC child will not qualify an immigrant for a waiver.

§ 5.5 Eligibility Requirements for an I-601A Provisional Waiver

The purpose of the Form I-601A provisional waiver process is to reduce the period of time that U.S. citizens are separated from family members who must travel overseas for consular appointments and apply for a waiver of the unlawful ground of inadmissibility. It is intended to limit the uncertainty of the waiver process by allowing the applicant to apply for a waiver for unlawful presence before leaving the United States. In this way, the person is applying provisionally, before she has departed and triggered the inadmissibility ground. The process provides either a provisional approval or a denial before the applicant leaves the United States for the consular interview. This process encourages those who qualify for permanent residency, and who otherwise would be reluctant to leave their family due to the long wait abroad or uncertainty, will now proceed with family-based immigration. The provisional waiver process began in 2013. In August 2016, the provisional waiver process was expanded, to allow more immigrant families to benefit from applying for a waiver of unlawful presence prior to leaving the United States to consular process.

The provisional waiver adjudication procedure is available to all immigrant visa applicants who will be found inadmissible based on unlawful presence—and no other ground—and who can establish extreme hardship to a U.S. citizen or LPR spouse or parent. To be eligible, the provisional waiver applicant must also meet the following eligibility requirements:

- Have an approved immigrant visa petition (Form I-130, Petition for Alien Relative; Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant; or Form I-140, Immigrant Petition for Alien Worker) or be selected to participate in the Diversity Visa Program under INA § 203(c);
- Have a pending case with DOS and have paid the immigrant visa fee bill with the National Visa Center (NVC);
- Not be an applicant for adjustment of status;
- Not be inadmissible under any other ground of inadmissibility;
- Not be in removal proceedings (where no final order entered) unless those proceedings have been administratively closed and not been re-calendared at the time of filing the provisional waiver application;

- Not be subject to a final order of removal, deportation, or exclusion unless the USCIS has already granted the applicant's Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal;³⁶
- Not be subject to a prior order of removal that has been reinstated by Customs and Border Protection (CBP) or Immigration and Customs Enforcement (ICE);
- Be at least 17 years old; and
- Be present in the United States at the time of filing the waiver application and biometrics collection.³⁷

§ 5.6 Approved Visa Petition Requirement

A. Family-Based Applicants: Immediate Relatives

Family-based immigration allows certain family members of U.S. citizens and LPRs to become lawful permanent residents. These family members immigrate either as immediate relatives or in one of the preference categories. See **Chapter 2** for more information on this process.

Family members included in the immediate relative category are: (1) spouses of U.S. citizens; (2) unmarried minor (under 21) children of U.S. citizens; and (3) parents of U.S. citizens age 21 or older.³⁸ Of these immediate relatives, the most common relationship for purposes of the provisional waiver will be the spouses of U.S. citizens.

Other immediate relatives might also benefit from the expanded provisional waiver. For example, the unmarried children under 21 could also be eligible to apply. Unlawful presence does not begin until the child turns 18 and does not become a ground of inadmissibility until the applicant departs after accruing more than 180 days. Therefore, the child would have to be 18½ or older at the time of departure for the provisional waiver to be necessary, and also be under 21 when the parent files the petition. The Child Status Protection Act allows unmarried children of U.S. citizens who were under 21 when the U.S. citizen parent filed the petition to remain immediate relatives even if they subsequently turn 21.³⁹

The immediate relative classification also includes certain qualified widows and widowers of U.S. citizens and their minor children. Death of the petitioner automatically revokes the I-130 petition, but there is relief for widows and widowers of U.S. citizens who have not remarried or who were not legally separated from the U.S. citizen on the date of his or her death.⁴⁰ The pending or approved I-130 petition automatically converts to a pending or approved Form I-360.⁴¹ The widow/widower who is ineligible to adjust status may use consular processing and

³⁶ Available at: www.uscis.gov/i-212.

³⁷ 8 Code of Federal Regulations (CFR) § 212.7(e)(3) and (e)(4); USCIS, Instructions for Application for Provisional Unlawful Presence Waiver, p. 5 (July 29, 2016), available at: www.uscis.gov/i-601a.

³⁸ Immigration and Nationality Act (INA) § 201(b)(2)(A)(i).

³⁹ INA § 201(f).

⁴⁰ INA § 204.2(b)(2)(A)(i), as amended by FY2010 Department of Homeland Security Appropriations Act, Pub. L. No. 111-83, 123 Stat. 2142, § 568(c)(1), Oct. 28, 2009.

⁴¹ 8 CFR § 204.2(i)(1)(iv).

immigrate as an immediate relative; any unmarried children under 21 are classified as derivatives and may immigrate as immediate relatives, too. Widows and widowers who were the beneficiaries of an I-130 petition that was pending on October 28, 2009 will not be deemed to have accrued any unlawful presence.⁴² But if the widow or widower has accrued unlawful presence, then departing the country may trigger the three- or ten-year bar. Because the qualifying relative spouse has died, this would seem to create a legal roadblock. But USCIS has provided a remedy through an instructional memorandum.⁴³

Those widows or widowers who were residing in the United States on the date that the U.S. citizen spouse died, have continued to reside here, and whose spouse had filed an I-130 petition before his or her death, qualify to file a provisional waiver, assuming they satisfy the other eligibility requirements. The agency will consider the deceased U.S. citizen spouse to be the qualifying relative. It will also presume extreme hardship, so no evidence of hardship need be alleged or included in the provisional waiver application.⁴⁴ The only supporting documentation that should be included would address the relationship to the decedent, residence in the United States on the date of death, and continued residence here since that date.

This special rule applies only to cases where the citizen spouse died while the I-130 petition was pending or after it was approved. If the citizen spouse died before filing an I-130, and the widow or widower has an approved I-360 self-petition, he or she may still qualify to file a provisional waiver. But the widow or widower would need to establish extreme hardship to a U.S. citizen or LPR parent.

In other situations, where the petitioning parent or spouse died after filing an I-130 petition—whether in the immediate relative or one of the preference categories—the surviving beneficiary may also qualify for relief under INA § 204(l). This section of the law allows the agency to reinstate the petition, either pending or approved, which was automatically denied or revoked upon the death of the petitioner. These beneficiaries would need to establish that they were residing in the United States at the time the petitioner died, continue to reside here, and have an LPR or U.S. citizen substitute sponsor. Another regulation allows for those who do not meet the residency requirements to request that the agency reinstate a revoked petition based on humanitarian factors.⁴⁵ In both of these cases, if the USCIS reinstates the petition, the beneficiary may apply for the provisional waiver. The USCIS will consider the deceased U.S. citizen or LPR spouse or parent to be the qualifying relative and his or her death to be the functional equivalent of extreme hardship.⁴⁶ The applicant would still need to evidence why he or she merits a favorable exercise of discretion.

⁴² U.S. Citizenship and Immigration Services (USCIS) Interoffice Memorandum, D. Neufeld, L. Scialabba, & P. Chang, “Additional Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children (REVISED),” (Dec. 2, 2009.)

⁴³ USCIS Memorandum, “Approval of Petitions and Applications after the Death of the Qualifying Relative under New Section 204(l) of the Immigration and Nationality Act” (Dec. 16, 2010).

⁴⁴ *Id.*

⁴⁵ 8 CFR § 205.1(a)(3)(i)(C).

⁴⁶ USCIS, Instructions for Application for Provisional Unlawful Presence Waiver, p. 7 (July 29, 2016), available at: www.uscis.gov/i-601a.

B. Family-Based Applicants: Preference Categories

Family members in the four family-based preference categories include the following:

- Unmarried adult children of U.S. citizens [first preference or F-1]
- Spouses and unmarried minor (under 21) children of LPRs [second preference F-2A]
- Unmarried adult children of LPRs [second preference F-2B]
- Married children of U.S. citizens [third preference or F-3], and
- Brothers and sisters of U.S. citizens who are age 21 or older [fourth preference or F-4].⁴⁷

The original provisional waiver program—which only benefited immediate relatives—was expanded on August 29, 2016 to include all family-based immigrant visa applicants. The major group that is now eligible are the spouses of LPRs.

The married or unmarried sons and daughters of U.S. citizens and the unmarried sons and daughters of LPRs may also benefit from this expansion of the provisional waiver. By definition, those beneficiaries have qualifying relatives: a USC or LPR spouse or parent.

The siblings of U.S. citizens are also eligible to apply for the provisional waiver, assuming they have a qualifying relative. Their petitioner is not a qualifying relative. For practical purposes, this would usually require them to have an LPR parent. If they had an LPR spouse, they would be immigrating based on that relationship, since the F-4 category is backlogged much farther than the F-2A category. Similarly, if they had a U.S. citizen parent, they would be immigrating based on that relationship, since the F-4 category is backlogged farther than the F-1 or F-3 category.

The spouses and unmarried children of the principal beneficiary in the preference categories—called derivatives—also are eligible to apply for the provisional waiver. This will typically require their applying for the waiver after the principal beneficiary has immigrated and established LPR status, which allows them to be a qualifying relative.

Derivative children in the F-2A category may be eligible to immigrate and apply for the provisional waiver together with the principal beneficiary, since the LPR petitioner can be a qualifying relative for both the principal (the spouse) and the derivative (the child).

C. Other Immigrant Visa Applicants

The immediate relative classification also includes certain battered spouses and children of U.S. citizens who can gain relief pursuant to the Violence Against Women Act (VAWA). And the F-2A category includes those spouses and children who have been abused by an LPR spouse/parent. They qualify to self-petition by filing an I-360. If that is approved, the vast majority will qualify to adjust status, regardless of how they entered the United States.⁴⁸ Therefore, they will not need to file a provisional waiver. However, battered spouses who entered as fiancé(e)s in the K-1 category, as well as their children who entered as derivatives in the K-2 category, are prohibited from adjusting status unless it is based on “the marriage of the nonimmigrant (or in the case of a

⁴⁷ INA § 203(a).

⁴⁸ INA § 245(a).

minor child, the parent) to the citizen who filed the petition to accord that alien's nonimmigrant status under section 101(a)(15)(K)."⁴⁹ That means that they will be required to consular process, and probably trigger the unlawful presence bar. They would be eligible to file a provisional waiver, assuming they have a U.S. citizen or LPR spouse or parent to act as the qualifying relative.

Both principal beneficiaries and derivatives in the employment-based categories are eligible for the provisional waiver, assuming they have an LPR or U.S. citizen parent or spouse. The employer is the petitioner on the I-140. Most beneficiaries in the employment-based categories qualify to adjust status, since they have typically entered the United States legally and have been working here with employment authorization. But those who entered EWI or who overstayed their lawful nonimmigrant status by more than 180 days are required to consular process.

In addition, those who qualify to adjust on an approved employment-based petition may have a derivative spouse or child who has failed to maintain lawful immigration status and will have to consular process. Therefore, only those derivatives who have a qualifying relative are likely to pursue this immigration benefit, which may entail waiting for the principal beneficiary to obtain LPR status.

Persons who have been selected for the Diversity Visa (DV) program, as well as their derivative spouse and children, are also eligible to file for the provisional waiver, assuming they have a qualifying relative. They must be in the process of obtaining an immigrant visa, which means that the DOS Kentucky Consular Center has assigned them a DV case number and they are awaiting an immigrant visa interview while in the United States.⁵⁰ Most DV lottery winners who are in the United States and who must consular process will not have an LPR or U.S. citizen spouse or parent. But those who do will be able to file for the provisional waiver. Note that they must have the waiver approved *and consular process within the strict fiscal year limitations*.

§ 5.7 Qualifying Relatives

Applicants for the provisional waiver for unlawful presence must demonstrate extreme hardship to a U.S. citizen or LPR spouse or parent. Bear in mind that a U.S. citizen or LPR child is never considered a qualifying relative. For this reason, it will be rare for the parents of U.S. citizens to be eligible for the provisional waiver, since the parent would need to have a U.S. citizen or LPR spouse or parent as his or her qualifying relative. As you can see, the qualifying relative is not always the same person as the petitioner. A person can pursue LPR status through a petition filed by one relative, and show hardship to a different qualifying relative.

§ 5.8 Extreme Hardship

Like the I-601 waiver, the applicant for a provisional waiver must establish extreme hardship to a qualifying relative. The provisional waiver program does not change the existing standard

⁴⁹ INA § 245(d).

⁵⁰ USCIS, Instructions for Application for Provisional Unlawful Presence Waiver, p. 1 (July 29, 2016), available at: www.uscis.gov/i-601a.

governing an extreme hardship determination. However, the Attorney General has issued guidance clarifying how extreme hardship should be interpreted and the “particularly significant” factors that would support a waiver application. This guidance has been incorporated in the USCIS Policy Manual Volume 9, Part B, and is explained below.

§ 5.9 Provisional Waiver and Other Grounds of Inadmissibility

Additionally, once the person leaves the United States, the consulate might also find new grounds of inadmissibility. In this instance, the I-601A waiver is revoked, and the person will be required to file the traditional I-601 for all grounds of inadmissibility, should a waiver be available for the new inadmissibility findings.

For this reason, it is imperative to screen your client well for any possible other issues with admissibility. The permanent bar is of particular importance. If your client has entered the United States more than once, it is important to ascertain whether they have accumulated more than a year of unlawful presence in total.

§ 5.10 Prior Removals and Proceedings

Eligibility for the provisional waiver for those in proceedings, and the procedures one must follow, depend on whether the person has received a final order of removal, deportation, or exclusion and, if so, whether the order was issued *in absentia*.

The final regulations broadened eligibility for the provisional waiver to include some persons who have received a final order. When the person departs the United States while a final order is outstanding, he or she affects or executes that order.⁵¹ And execution of the order would then make the person inadmissible for a period of five or ten years (20 years in some situations).⁵² Persons who execute the order (e.g., self-deport) may apply for a “waiver” of this ground of inadmissibility on Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal. They would apply for that waiver while outside the United States. The standard is simply a balancing of the equities, which is much lower than the extreme hardship standard.

If the person has not executed the order by departing the country, he or she could move to reopen the case, vacate the order, and have it administratively closed. In addition, persons in proceedings who have not yet been ordered deported or removed could also move to administratively close the case. The basis for this motion would be that the person is eligible for an immigrant visa and wishes to apply for the provisional waiver. The Executive Office for Immigration Review (EOIR) must not have re-calendared the proceeding at the time of the filing of the waiver application.⁵³ Persons in removal proceedings in which no final order has been entered are ineligible to file the provisional waiver unless the proceedings are administratively closed.⁵⁴ Should the waiver be

⁵¹ INA § 101(g); 8 CFR § 241.7.

⁵² INA § 212(a)(9)(A).

⁵³ 8 CFR § 212.7(e)(4)(iii).

⁵⁴ *Id.*

granted, the person is then advised to move to terminate the proceedings before departing the country. Individuals who have been granted voluntary departure by an immigration judge are still considered to be in removal proceedings.⁵⁵

The final regulation also allows persons who have been ordered removed and who have not executed the order to apply for a waiver of this ground of inadmissibility before they leave. This is done by filing the Form I-212 with the USCIS in the jurisdiction where the person was ordered removed.⁵⁶ If the I-212 is approved, the individual's order of removal, deportation, or exclusion would no longer bar him or her from obtaining an immigrant visa abroad. After obtaining such consent, the person would then be eligible to apply for the provisional waiver. Otherwise, persons subject to a final order of deportation or removal who have not been granted a Form I-212 would be ineligible to file for the provisional waiver.⁵⁷

Persons who without "reasonable cause" fail or refuse to attend or remain in attendance at an immigration hearing commenced on or after April 1, 1997 will be issued a final order of removal *in absentia*. When that order is executed by departing the United States, the person will trigger a separate ground of inadmissibility that renders him or her inadmissible for a mandatory five-year period.⁵⁸ There is no waiver available for this ground of inadmissibility. The five-year period begins upon departure from the United States, though the five years does not have to be spent outside the United States. The granting of a Form I-212 would waive the five- or ten-year bar under INA § 212(a)(9), but would not cure the separate ground of inadmissibility under INA § 212(a)(6)(B). For that reason, persons subject to an *in absentia* removal order would not be eligible for the provisional waiver. They would need to reopen their case and have the order vacated.

Persons who have executed the deportation or removal order by departing the United States and then reentering without inspection on or after April 1, 1997 have triggered a separate ground of inadmissibility called the "permanent bar."⁵⁹ This ground may not be cured through the provisional waiver process. Instead, the person must reside abroad for ten years and then obtain a waiver (consent to reapply) by filing a Form I-212.

Finally, illegal reentry to the United States after a deportation, removal, or exclusion order renders the person subject to reinstatement of removal.⁶⁰ But in the final regulation, the DHS clarified that ICE or CBP must have formally reinstated such an order for the person to be ineligible for a provisional waiver.⁶¹ Evidence of the agency's formal reinstatement is service of a Form I-871, Notice of Intent/Decision to Reinstate Prior Order.

⁵⁵ USCIS, "Questions and Answers, USCIS: American Immigration Lawyers Association (AILA) Meeting" (Apr. 11, 2013).

⁵⁶ 8 CFR § 212.2(j).

⁵⁷ 8 CFR § 212.7(e)(4)(iv).

⁵⁸ INA § 212(a)(6)(B).

⁵⁹ INA § 212(a)(9)(C).

⁶⁰ INA § 241(a)(5).

⁶¹ 8 CFR § 212.7(e)(4)(v).

§ 5.11 Approvals and Denials

There is no appeal or motion to reopen by the applicant from the denial of a provisional waiver application.⁶² However, the USCIS may reopen and reconsider its decision at any time.⁶³ An applicant may choose to reapply for a provisional waiver following a denial with additional evidence, if the immigrant visa application is still pending with the DOS.⁶⁴

The approval of a provisional waiver does not provide permission to remain in the United States or grant legal status; prevent the accrual of unlawful presence; or provide eligibility for employment authorization, advance parole, a driver's license, or a social security card. It simply allows a person to proceed to the consulate for processing, with a waiver for unlawful presence granted. Should any other ground of inadmissibility come to light at the consulate, the I-601A provisional waiver will be revoked.

§ 5.12 How to Apply for an I-601A Waiver

File the Form I-601A along with a fee of \$630, plus an additional \$85 for biometrics, and supporting documentation with the USCIS Chicago Lockbox at the following address: USCIS, PO Box 4599, Chicago, IL 60680.⁶⁵ The waiver application packet must contain a copy of the I-130, I-360, I-140 approval notice or proof of selection to participate in the Diversity Visa Program, and a copy of the fee receipt showing payment of the Department of State immigrant visa processing fee.⁶⁶ In addition, if hardship is based on a qualifying relative who is not the I-130 petitioner, the applicant must submit evidence showing the qualifying relationship.⁶⁷ Finally, the applicant must demonstrate hardship to the qualifying relative.

§ 5.13 What Is Extreme Hardship

Establishing extreme hardship has long been a requirement for many different immigration benefits and forms of relief. In addition to being a necessary element for various waivers of inadmissibility, including for fraud⁶⁸ and criminal conduct,⁶⁹ it is or was a requirement for suspension of deportation,⁷⁰ Nicaraguan Adjustment and Central American Relief Act (NACARA),⁷¹ relief for self-petitioners under the Violence Against Women Act (VAWA),⁷² and

⁶² 8 CFR § 212.7(e)(11).

⁶³ 8 CFR § 212.7(e)(13).

⁶⁴ 8 CFR § 212.7(e)(9).

⁶⁵ 8 CFR § 103.7(b)(1)(i)(AA). The stated fee is effective as of December 23, 2016. Prior to that date, the fee was \$585.

⁶⁶ USCIS, *Instructions for Application for Provisional Unlawful Presence Waiver*, Pg 9 (March 3, 2013).

⁶⁷ *Id.*

⁶⁸ INA § 212(i).

⁶⁹ INA § 212(h).

⁷⁰ Former INA § 244(a)(1996).

⁷¹ Pub. L. No. 105-100, tit. II, 111 Stat. 2160, 2193–201 (1997), as amended.

⁷² INA § 204(a)(1)(A), (B).

a waiver of the joint petition requirement for conditional residents.⁷³ Despite that prevalence in the immigration laws, the term “extreme hardship” is not defined in the statute or the regulations. Instead, the term remains purposefully fluid and vague. In the words of the BIA, it “is not a definable term of fixed and inflexible content or meaning.”⁷⁴ But over the course of more than four decades, the Immigration Service, the BIA, the Administrative Appeals Office (AAO), and the federal courts have identified the elements of what this term means and have provided a framework for establishing a successful hardship claim.⁷⁵

Because different sections of the immigration statute impose the same extreme hardship requirement, case law from other contexts—suspension of deportation decisions and other sections of the immigration statute—inform what the term means in a waiver of inadmissibility hardship claim.⁷⁶ The BIA in *Matter of Cervantes-Gonzalez*, when comparing the term’s definition for a fraud waiver with the interpretation used in suspension cases, noted that “we find the factors articulated in cases involving suspension of deportation and other waivers of inadmissibility to be helpful, given that both forms of relief require extreme hardship and the exercise of discretion.”⁷⁷ *Matter of Anderson*,⁷⁸ the seminal extreme hardship case, dealt with eligibility for suspension of deportation and set forth the range of possible factors that the BIA examined to see if the applicant had satisfied the requirement. Suspension of deportation is no longer a defense to deportation under current immigration laws, but it required the applicant to prove extreme hardship to himself or herself or to his or her U.S. citizen or LPR spouse, parent, or child. So the qualifying relatives are not the same as those for the unlawful presence waiver, but the factors the BIA enumerated are nevertheless instructive. The *Matter of Anderson* factors include the following:

- Applicant’s age both at the time of entry and at the time of relief
- Length of residence in the United States
- Family ties in the United States and abroad
- Health-related issues
- Financial situation, including business or occupation
- Possibility of other means of immigrating
- Applicant’s immigration history
- Applicant’s position in the community, and
- Economic and political conditions in the applicant’s home country.

⁷³ INA § 216(c)(4)(C).

⁷⁴ *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999); *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964).

⁷⁵ See, e.g., *Matter of O-J-O-*, 21 I&N Dec. 381 (BIA 1996); *Matter of L-O-G-*, 21 I&N Dec. 413 (BIA 1996); *Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978).

⁷⁶ *Matter of Kao & Lin*, 23 I&N Dec. 45, 49 (BIA 2001).

⁷⁷ *Matter of Cervantes-Gonzalez*, *supra*.

⁷⁸ *Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978).

Case law following *Matter of Anderson* further developed and expanded these nine extreme hardship factors as they relate to other forms of relief. Additional relevant hardship factors include:

- Ability to raise children if family members are not available to help⁷⁹
- Quality of life factors in the home country⁸⁰
- Educational opportunities for children who do not speak, read, write language⁸¹
- Separation from family members, especially in single parent situations⁸²
- Separation from family members when qualifying relative was ill or elderly⁸³
- Significant health conditions when medical care was unavailable⁸⁴
- Violence, damage from civil war and disasters in home country⁸⁵
- Psychological impact including depression, trauma,⁸⁶ and
- Political persecution⁸⁷

⁷⁹ *Matter of Recinas*, 23 I&N Dec. 467, 470 (BIA 2002) (BIA considered that the non-citizen depended on her legal resident mother to assist her in the care of her U.S. citizen children).

⁸⁰ *Matter of Cervantes-Gonzalez*, *supra* at 566. (BIA noted that quality of life factors were relevant to the extreme hardship inquiry).

⁸¹ *Matter of Recinas*, 23 I&N Dec. 467, 470 (BIA 2002) (BIA considered whether the U.S. citizen children were able to read, write and speak in the language of the country of deportation).

⁸² *Id.* (BIA considered the fact that the U.S. citizen children were entirely dependent upon the non-citizen because the parents were divorced and the father was not involved in their care).

⁸³ *Mendez v. Holder*, 566 F.3d 316, 322 (2d Cir. 2009) (“Petitioner’s daughter suffers from severe asthma. Petitioner testified that she has about 25 asthma attacks a year and that her condition requires the use of a home nebulizer as well as an inhaler. She also requires regular visits to the emergency room for serious attacks.... Petitioner’s son was diagnosed with Grade II Vesicoureteral Reflux. This disease causes urine to reflux from the bladder back [**5] to the kidneys and liver, causing staph infections, scarring, and tissue damage. Ultimately, the condition can lead to kidney or liver failure”).

⁸⁴ *Matter of Cervantes*, 22 I&N Dec. 560, 566 (BIA 1999) (BIA reviewed expanded hardship factors following *Matter of Anderson* in 212(i) waiver application).

⁸⁵ *Matter of L-O-G*, 21 I&N Dec. 413, 420 (BIA 1996) (“Nicaragua is an extremely poor country, still in political turmoil, with a shattered economy, very high unemployment and minimal government”).

⁸⁶ *Lam v. Holder*, 698 F.3d 529, 534 (7th Cir. 2012) (“Lam submitted a letter from his wife’s psychologist, who stated that Ms. Lin suffered from ‘severe’ postpartum depression and that she was ‘truly psychologically unable to care fully’ for their children. Her psychologist also stated that Lam’s removal would place Ms. Lin ‘in extreme psychological distress’”); *Ravancho v. INS*, 658 F.2d 69 (3rd Cir. 1981) (“[p]sychological trauma may be a relevant factor in determining whether a United States citizen child will suffer ‘extreme hardship’ within the statute”).

⁸⁷ *Gutierrez-Centeno v. INS*, 99 F.3d 1529, 1534 (9th Cir. 1996) (“Gutierrez and her family have had a history of conflict with the Sandinistas. In light of the political instability in Nicaragua and the power which the Sandinistas continued to wield after the election of the Chamorro government, the political situation in Nicaragua is also a factor that should have been considered. See *In re O-J-O*, 1996 WL 393504, at 5 (‘In light of the respondent’s family’s history of conflict with the Sandinistas, the current political situation in Nicaragua should be factored into the hardship assessment’”); *Blanco v. INS*, 68 F.3d 642, 646 (2d Cir. 1995) (“incidents of violence that have been and would be directed at her in El Salvador. Her affidavit in support recounted the killing of her common-law husband, her father, and her uncle; the murder of a neighbor; threats against her by guerrillas; injury to her child from a bomb blast outside her home; and child kidnapping from a school attended by one of her children. This evidence was relevant to a claim of

- Contributions to the community⁸⁸
- Acculturation and integration into U.S. society⁸⁹
- Severe personal consequences and non-economic hardship flowing from economic ones⁹⁰

Case law requires that each of these factors be analyzed in the context of the facts and circumstances specific to each case.⁹¹

Example: Carlos, a Mexican citizen, is married to Rosie, a U.S. citizen. The couple has two U.S. citizen children. Carlos provides great emotional, financial, and parental support to Rosie. Carlos is an attentive father, and the children would greatly miss him if he were required to leave and reside in Mexico for ten years. In the past when Carlos's work took him away for long periods, their eldest son didn't eat well, became rebellious, and performed poorly at school. Rosie became depressed, experienced difficulty sleeping, and was unable to properly care for her children; a psychological report found that Rosie suffers from separation anxiety and is susceptible to depression. Rosie has no family in Mexico, but has strong family and community ties in the United States. She speaks very little Spanish. She has worked as a filing clerk at the same job for the past 16 years and worries about the poor employment opportunities she would experience in Mexico. Rosie is also worried about other things that would happen were she and the children to relocate to Mexico with Carlos: the reported violence in northern Mexico, where Carlos is from; the loss of health insurance for her children, which is currently paid for by her employer; the lower quality of educational and health-care options; and the expected difficulty adjusting to life in Mexico.

This fact pattern is very similar to a waiver case that was originally denied by the USCIS in Mexico but later approved by the AAO.⁹² It demonstrates the range of inter-related

hardship more personally directed and more severe than the claim that might be made by any deportee to such a strife-torn nation").

⁸⁸ *Urbina-Osejo v. INS*, 124 F.3d 1314, 1318-19 (9th Cir. 1997) ("Urbina worked as a volunteer telephone counselor for the San Francisco Aids Foundation, teaching AIDS prevention to Spanish-speaking callers"); *Matter of O-J-O*, 21 I&N Dec. 381 (BIA 1996) ("He is deeply involved in church activities, attending services regularly and serving as a voluntary deacon in his congregation.... The hardship related to community involvement, however, derives from the loss of the personal and social bonds established during the course of such activities").

⁸⁹ *Ramos v. INS*, 695 F.2d 181, 184 (5th Cir. 1983) ("[his] speech, choice of toys, knowledge, and interest were typical of American boys.... [His] choice of toys and drawings were typical of American children. ... He would be particularly vulnerable to a move at this age because he is just now developing relationships outside the home.... Once a child has adopted the culture of a country he is subject to rejection by peers if he is forced to readjust to the new culture. The child at age six and onward is particularly vulnerable to this.")

⁹⁰ *Tukhowinich v. INS*, 64 F.3d 460, 464 (9th Cir. 1995) ("Because the loss of financially comparable employment would create not only an economic hardship for Ms. Tukhowinich but would severely frustrate what she regards as the overriding mission in her life—to provide for her parents and siblings—we think the BIA should have considered the implications of her economic loss").

⁹¹ *Jara-Navarrete v. INS*, 813 F.2d 1340 (9th Cir. 1987); *Zavala-Bonilla v. INS*, 730 F.2d 562 (9th Cir. 1984); *Ramos v. INS*, 695 F.2d 181 (5th Cir. 1983); *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964).

factors that typically comprise a waiver case. While none of these factors standing alone would probably be sufficient to establish extreme hardship to Rosie, in combination they rose to the level of extreme hardship.

The USCIS issued guidance that defines extreme hardship and this guidance will be followed by USCIS officers adjudicating waivers for fraud, crimes, and unlawful presence. The guidance points out that any factor that the applicant presents should be considered. It then sets forth the five most common factors and their impact: family ties, social and cultural issues, economic issues, health conditions and care, and country conditions. It spells out examples of what hardships might fall within each of the five categories. For example, social and cultural impact could be evidenced by loss of access to U.S. courts, our criminal justice system, and the protection of family law proceedings (protection orders, child support, or visitation). It could also be demonstrated by fear of persecution or social ostracism and lack of access to social institutions and support networks. Other examples include the more obvious: lack of language skills, quality of educational opportunities, assimilation into U.S. culture, and community ties here versus in the foreign country. The country conditions category could include the designation of TPS, civil unrest or generalized level of crime and violence, and State Department Travel Warnings or Alerts.

The guidance also identifies five factors that “often weigh heavily in support of a finding of extreme hardship.” While the existence at the time of adjudication of one or more of these “particularly significant factors” would not create a presumption of extreme hardship, they are “often likely to support findings” of it. The five particularly significant factors are:

- Qualifying relative was granted Iraqi or Afghan Special Immigrant Status, T nonimmigrant status, or asylee or refugee status from the waiver’s applicant’s country of relocation
- The qualifying relative is on active duty with any branch of the U.S. Armed Forces
- Either the qualifying relative or a member of the household who is dependent on the qualifying relative’s care is disabled or suffers from a medical/physical condition that makes travel to or residence in the foreign country detrimental to his or her health or safety
- The Department of State has issued either a country-wide travel warning or one for a region of the country where the applicant or the qualifying relative would likely relocate
- Separation would result in the qualifying relative becoming the primary caretaker—and possibly income-earner—for the couple’s children or otherwise taking on significant parental or other caregiving responsibilities.

The guidance points out that the applicant should decide whether the qualifying relative would either relocate or remain in the United States. The applicant would then have to establish extreme hardship in one of those scenarios rather than both. The guidance also allows the qualifying relative to show that extreme hardship would result from both separation and relocation.

⁹² AAO Decision, Mexico City, Mexico, March 26, 2012. The AAO found that the applicant established extreme hardship.

Case law tells us repeatedly that extreme hardship means something more than the “ordinary hardship” one would suffer in being separated from family members or from a country and lifestyle to which one has become accustomed.⁹³ These common hardships include the difference in standards of living between the United States and Mexico or between the United States and other Latin American countries. They also include economic hardship,⁹⁴ difficulty in finding employment, and inability to find employment in a chosen trade or profession.⁹⁵ Difficulty in readjusting to life in one’s home country after residing in the United States will not, in and of itself, be found to constitute extreme hardship.⁹⁶ Nor will reduced educational opportunities and medical facilities in the home country.⁹⁷

A careful perusal of AAO decisions reveals, however, that what often tips the scales from “ordinary” to “extreme” hardship is a thorough and specific examination of a particular family’s circumstances, coupled with careful documentation of all the hardship factors asserted in each case. Each family’s circumstances are unique, and the more advocates can paint a picture of a specific family and what prolonged separation will mean for this individual family, supporting that portrait with documentation, the stronger the hardship argument will be.

The BIA has consistently stressed that hardship factors must be considered cumulatively: “Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.”⁹⁸ Although one particular hardship factor may not be extreme on its own, the hardship faced by the qualifying relative may become extreme in combination with other factors. An INS General Counsel memo on extreme hardship in the battered spouse context notes that “[f]actors which may not alone be determinative should be considered, and may become a significant or even critical factor when weighed with all the other circumstances presented.”⁹⁹ An applicant’s inability to reside in the United States may have a ripple effect that causes hardship in many aspects of the qualifying relatives’ lives. The range of consequences, both small and large, must be evaluated in their totality in an extreme hardship evaluation.¹⁰⁰ In the cover letter accompanying the waiver application and supporting documents, advocates should therefore craft a strong argument explaining how the various factors fit together and amplify each other.

Do not forget to address discretionary factors in your client’s case; these are often unrelated to the extreme hardship factors. Every AAO decision discusses whether the applicant has met this

⁹³ *Matter of Pilch*, 21 I&N Dec. 627, 631 (BIA 1996).

⁹⁴ *Palmer v. INS*, 4 F.3d 482, 488 (7th Cir. 1993).

⁹⁵ *Hernandez-Patino v. INS*, 831 F.2d 750, 754 (7th Cir. 1987) (Petitioner “claims he would not be able to secure steady employment other than subsistence-level seasonal sharecropping”).

⁹⁶ *Matter of Ige*, *supra* at 883.

⁹⁷ *Matter of Kim*, 15 I&N Dec. 88, 90 (BIA 1974) (Diminished educational opportunities and medical facilities without other strong hardship factors did not tip the scales toward a finding of extreme hardship).

⁹⁸ *Matter of Ige*, 20 I&N Dec. 880 (BIA 1994).

⁹⁹ INS General Counsel’s Office, Memo from Paul W. Virtue, “‘Extreme Hardship’ and Documentary Requirements Involving Battered Spouse and Children” (August 16, 1998).

¹⁰⁰ *Matter of O-J-O*, *supra* at 383, quoting *Matter of Ige*, 20 I&N Dec. at 882, (“The adjudicator ‘must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.’”)

burden, assuming he or she has established extreme hardship. They can often tip the balance in either direction: strong cases can lose if negative discretionary factors are not addressed, and borderline cases can turn into approvable ones by stressing the positive factors.

CHAPTER 6

PAROLE-IN-PLACE

This chapter includes:

§ 6.1	What Is Parole?	6-1
§ 6.2	Overview of Parole-in-Place	6-2
§ 6.3	Eligibility Requirements for Parole-in-Place	6-4
§ 6.4	The Benefits of Parole-in-Place	6-5
§ 6.5	Impact on DACA-Eligible Persons	6-7
§ 6.6	How to Apply for Parole-in-Place.....	6-8

§ 6.1 What Is Parole?

Congress specifically delegated to the Executive Branch the broad authority to “parole” any person into the United States based on “urgent humanitarian reasons or significant public benefit.”¹ This parole power has been interpreted broadly to authorize parole in several different situations, including humanitarian parole, advance parole, and parole-in-place. Humanitarian parole generally refers to the act of allowing someone into the United States who would not otherwise be allowed to enter. This type of parole helps those with medical emergencies and other compelling humanitarian needs. Humanitarian parole can be granted in advance or at the U.S. border. Advance parole is where persons inside the United States are granted permission to leave and then return in the same status they had when they left. Persons eligible for advance parole include those granted Deferred Action for Childhood Arrivals (DACA), Temporary Protected Status (TPS), or those who have applied for adjustment of status. See **Chapter 8** for a comprehensive overview of advance parole for DACA recipients. The parole power also includes the authority to grant parole-in-place, which allows certain persons the right to remain in the United States and to qualify for benefits associated with being paroled into the country. Parole in this sense is not to be confused with “parole” out of detention, which is based on a separate statutory ground.²

All three main branches of the Department of Homeland Security may exercise parole power. USCIS generally adjudicates advance parole and parole-in-place requests. For those in removal proceedings, ICE should make the decision. However, in all cases where the person enters at a checkpoint, the ultimate decision to allow the person to be “paroled” in lies with Customs and Border Protection (CBP). The decision to parole a person into the United States can be made by CBP agents at port of entry; this is commonly referred to as “port parole.” Additionally, CBP makes the ultimate decision to allow someone entry if USCIS grants parole permission in advance.

¹ INA § 212(d)(5)(A).

² INA § 236(a)(2)(B).

The first parole programs included humanitarian parole programs for those seeking entry to the United States. Most persons paroled into the United States apply in advance through a special office of USCIS located at its headquarters in Washington, DC.³ The most common reasons for someone to be paroled into the United States include family emergencies, urgent health conditions requiring treatment in the United States, and adoptions that have encountered bureaucratic problems. Parole is not intended to circumvent or avoid normal visa processing; the government only paroles persons who are not eligible for an immigrant or nonimmigrant visa. Parole is typically granted for a one-year period (although it can be granted for longer periods of time), which can then be renewed. Parole also includes eligibility to apply for employment authorization. A 2008 memo provides guidance and division of responsibility between ICE, CPB and USCIS in the administration of parole authority.⁴

This chapter is intended to provide an overview of parole-in-place, particularly the changes implemented as a result of the 2014 Executive Action. For a comprehensive discussion of parole, see the ILRC's manual, *Parole in Immigration Law*.

§ 6.2 Overview of Parole-in-Place

The parole power authorized by the Immigration and Nationality Act has been interpreted to grant the Executive Branch the ability not only to parole people outside of the country into the United States, but also to “parole” people who are already inside the United States but who have not been lawfully admitted. Parole-in-place is the term used by DHS when granting parole to people who are already physically present in the United States after an entry without inspection.

Parole-in-place can confer important benefits, such as work authorization, an authorized stay, and the ability to adjust status if otherwise eligible. By way of official policy of USCIS, parole-in-place is only available to certain family members of the U.S. military, as detailed below. Nonetheless, practitioners report limited success at certain field offices with non-military cases with compelling humanitarian factors.

Parole-in-place has a well-established though guarded history within immigration law. It has been used most widely, for example, to grant status to Cubans residing unlawfully in the United States in order for them to qualify for the benefits of the Cuban Adjustment Act. It was also granted to battered spouses prior to a specific amendment in the Violence Against Women Act that allowed them to adjust status if their self-petition was approved. Additionally, it was commonly used by ICE officials as a benefit for immigrants participating in the investigation of a criminal matter in lieu of granting them an S nonimmigrant visa.

The first case relating to members of the military occurred in 2008. As a result of that case, Congress sent a bi-partisan letter to the Executive Administration asking it to establish a formal

³ See USCIS, *Humanitarian Parole*, available at www.uscis.gov/humanitarian/humanitarian-parole.

⁴ USCIS, ICE, CBP, *Memorandum of Agreement Between USCIS, ICE, and CBP on Coordinating the Concurrent Exercise by USCIS, ICE, and CBP of the Secretary's Parole Authority Under INA § 212(d)(5)(A) With Respect to Certain Aliens Located Outside of the United States*, (Sep. 29, 2008), available at www.ice.gov/doclib/foia/reports/parole-authority-moa-9-08.pdf, and attached as Exhibit 6-A.

procedure where the spouses and parents of military personnel could request deferred action or parole status in certain circumstances. In response, DHS director Janet Napolitano sent a letter to Congress on August 30, 2010. In it she stated: “On a case-by-case basis, DHS utilizes parole and deferred action to minimize periods of family separation, and to facilitate adjustment of status within the United States, by immigrants who are the spouses, parents, and children of military members.”⁵ This is the first time such a practice and procedure came to light.

Parole-in-place was more recently formalized by a November 15, 2013, memo that described eligibility and filing procedures.⁶ That memo sets forth a procedure to grant parole-in-place to undocumented family members of those who are in the U.S. Armed Forces, the reserves, or who are veterans. Parole-in-place gives them the formal right to reside in the United States temporarily and qualify for certain benefits.

On November 20, 2014, DHS issued a subsequent memo directing USCIS to explore granting parole-in-place for certain spouses, children, and parents of those *seeking to enlist* in the U.S. Armed Forces. The memo also asks USCIS to look into granting deferred action for undocumented family members of U.S. military service members and veterans who would otherwise be eligible for parole-in-place, but who were inspected and admitted into the United States.⁷ On November 23, 2016, USCIS issued a policy memorandum implementing the directives of 2014. The latest memo provides additional guidance on treatment of family members of deceased veterans; allowance of parole for qualifying family members with sons or daughters in the military; and creates deferred action options for certain MAVNI (Military Accessions Vital to the National Interest program) and enlistees participating in the DEP (Delayed Entry Program), and their family members. See Attachment 6-D.

As is clear from the history of how parole-in-place has been used in the past, there is nothing inherent in the parole power granted to the Executive Branch that limits parole-in-place to family members of the military. Nevertheless, under current government policy, it is used only to benefit family members of the military. Because there is nothing in the statutory language limiting its use in this way, advocates should push for an expanded interpretation and application.

⁵ J. Napolitano, Letter to the Honorable Zoe Lofgren (Aug. 30, 2010).

⁶ USCIS, *Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces, the Selected Reserve of the Ready Reserve, and Former Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve and the Effect of Parole on Inadmissibility under Immigration and Nationality Act § 212(a)(6)(A)(i)*, (Nov. 15, 2013), available at www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/2013-1115_Parole_in_Place_Memo_.pdf, and attached as Appendix 6-B.

⁷ DHS, *Families of U.S. Armed Forces Members and Enlistees*, (Nov. 20, 2014), available at www.dhs.gov/sites/default/files/publications/14_1120_memo_parole_in_place.pdf, and attached as Appendix 6-C.

§ 6.3 Eligibility Requirements for Parole-in-Place

The eligibility requirements for parole-in-place are set out by policy. There are no regulations establishing the below requirements. In order to apply for parole-in-place, the person must:

1. Have a spouse, parent, or son or daughter who is a current or former member of the U.S. military;
2. Have not previously been admitted or paroled; and
3. Not have any adverse factors that would cause the application to be denied as a matter of discretion.

Spouse, Parent, or Son or Daughter Who Is a Current or Former Member of the U.S.

Military. The program is currently limited to the spouses, parents, and sons or daughters of current or former members of the U.S. military. The military member has to be:

- Serving in active duty of the U.S. Armed Forces;
- A current member of the Selected Reserve of the Ready Reserve; or
- A veteran who previously served in the U.S. Armed Forces or Selected Reserve of the Ready Reserve.

In order to serve in the military one must be either a U.S. citizen or a lawful permanent resident (LPR). Therefore, it is unlikely that the military member will not be in one of those two categories.

It is not necessary that the military member have served overseas or have been in combat. Veterans certainly include those who served in World War II, the Vietnam War, and the Iraqi War. The term Selected Reserve of the Ready Reserve includes service in the National Guard that is part of the Selected and Ready Reserve. Under the new policy, veterans must have not been dishonorably discharged. Family members of deceased veterans may also apply.

No Previous Admission or Parole. The applicant for parole-in-place must not previously have been admitted or paroled into the United States. The new November 23, 2016, policy establishes a process for deferred action for those that do not qualify for parole-in-place due to a prior admission.

Example: Mari's son is in the military. Mari entered with a B-2 tourist visa and thus does not qualify for parole-in-place because she was admitted. Under the new policy, Mari can apply for deferred action because her son is in the military.

If the family member is in removal proceedings, the best practice is to terminate proceedings and proceed with a parole request made to USCIS. There is currently no equivalent memo authorizing ICE officials to grant parole-in-place. (One can ask ICE for parole-in-place, but practitioners report that ICE is reluctant to adjudicate these requests. Nonetheless, ICE jurisdiction to consider parole requests.) Once the proceedings are terminated, the family member should apply for parole-in-place through the USCIS district office.

Discretionary Decision. The grounds of inadmissibility do not apply to a parole-in-place applicant; this means that an applicant for parole-in-place does not have to show that she or he is admissible. However, while the grounds of inadmissibility do not apply, the grant of parole-in-place is discretionary. The 2013 USCIS memo notes that, “absent a criminal conviction or other serious adverse factors, parole in place would generally be an appropriate exercise of discretion.” Therefore, criminal conduct, prior immigration violations, or other adverse factors that are revealed through the application process could affect the decision. In practice, parole-in-place is rarely granted if the applicant has a serious criminal conviction. Practitioners report successful applications for those with more minor criminal issues. Applicants have been granted parole-in-place with DUIs, for instance.

Although the grant of parole-in-place is discretionary, the 2013 USCIS memo notes that being the spouse, parent, or child of an individual who is on active duty in the military or is a veteran “ordinarily weighs heavily in favor of parole-in-place.” Under this guidance, a person in this situation should qualify for parole-in-place absent adverse factors.

§ 6.4 The Benefits of Parole-in-Place

After being granted parole-in-place, the applicant can request employment authorization under 8 CFR § 274a.12(c)(11). Individuals who qualify to adjust status and are ready to apply upon approval of parole can request employment authorization in conjunction with the application for adjustment. If granted, the parole status and employment authorization will each be valid for one year. The applicant will be allowed to re-apply for parole status at the end of that period.

One of the main benefits of parole-in-place is that it may enable a person to adjust status. There are two ways to adjust status through a family-based petition: under INA § 245(a) or INA § 245(i). INA § 245(a) limits adjustment eligibility to those who were “inspected, admitted, or paroled” into the United States. This means that a person who entered the country without inspection cannot adjust status under INA § 245(a). But those who entered the country without inspection would satisfy that requirement if they are subsequently granted parole-in-place. The parole-in-place constitutes having been “paroled” in for purposes of INA § 245(a). Without the status of parole-in-place, many would have to depart the country and consular process, thus triggering the unlawful presence ground of inadmissibility.⁸

Note that parole-in-place only cures the requirement that the person have been inspected, admitted, or paroled. It does not address the other eligibility criteria for adjustment, such as the requirement (not applicable to immediate relatives and certain others) to have maintained continuous lawful immigration status.⁹ If a person is in one of the family-based preference categories—adult or married sons/daughters of U.S. citizens, siblings of U.S. citizens, or spouses or children of lawful permanent residents (LPRs)—he or she would likely not qualify for adjustment of status under INA § 245(a), even after receiving parole-in-place. This is because the

⁸ The three- and ten-year unlawful presence bars are triggered upon a departure from the United States after having accrued a certain amount of unlawful presence. See INA § 212(a)(9)(B). See Chapter 5 for more about the unlawful presence bars.

⁹ INA § 245(c).

person would also need to have always maintained lawful immigration status. This restriction does not apply to immediate relatives. If a person is an immediate relative—the spouse, unmarried child, or parent of a U.S. citizen—he or she may be eligible to file for adjustment of status under INA § 245(a) after receiving parole-in-place.

Example: Jose, a 21-year-old U.S. citizen, is serving in the U.S. Marines. His mother Ana entered the United States without inspection in 1990 and has resided here since then. Jose has not petitioned for his mother because she will trigger the unlawful presence bar if she departs the United States to consular process, and she does not qualify for a waiver.

Ana can qualify for parole-in-place based on her son's serving in the U.S. military. If Ana receives parole-in-place, she will no longer be barred by INA § 245(a) because she has been "paroled." Her son could file a petition for her as his immediate relative, and she could adjust status.

Example: What if Jose in the example above is only 19 years old?

He cannot petition for his mother until he turns 21. But his mother can still apply for parole-in-place in the meantime.

Example: What if Jose wants to enlist in the U.S. Marines but has not yet done so?

Under current policy, his mother will not qualify for parole-in-place unless Jose is a current or former member of the U.S. Armed Forces. But under the memo issued by DHS on November 23, 2016, USCIS will grant deferred action to Ana.

Example: Miguel is an LPR in the U.S. Navy. His wife Magdalena entered the United States without inspection several years before they met and has been living here since then without status.

Magdalena can qualify for parole-in-place because her husband is serving in the U.S. military. However, she will not be able to adjust status even if she receives parole-in-place because she has not maintained lawful status. She will still need to consular process. If Miguel naturalizes, his wife would no longer be subject to the requirement that she have maintained lawful status, and parole-in-place would allow her to adjust status. This is because once Miguel is a U.S. citizen, Magdalena will qualify as an immediate relative and will no longer be a relative in an immigration preference category. See **Chapter 2** for more information on family-based immigration.

The grant of parole-in-place does not cure any inadmissibility grounds. Family members who are potentially inadmissible, for example, due to criminal convictions, smuggling, or health-related grounds, will still have to show either that they are admissible or that they qualify for a waiver at the adjustment of status stage. Many of the same grounds that cause potential inadmissibility, such as criminal convictions, may also cause the parole-in-place application to be denied in the agency's discretion.

The USCIS memos on parole-in-place do not address the issue of when a person might be placed in removal proceedings where an application for parole-in-place is denied. However, according to current USCIS policy guidance on referrals in general,¹⁰ USCIS will refer an applicant to ICE in cases involving certain criminal offenses, a statement of findings substantiating fraud, or a threat to public safety or national security. In the absence of specific guidance to the contrary, parole-in-place applicants should assume that this memo applies them as well.

Deferred Action for Those Ineligible for Parole-in-Place. As mentioned above, USCIS expanded and clarified the parole-in-place program on November 23, 2016, and set out new provisions to offer deferred action to encompass enlistees and MAVNI participants, as well as their family members.¹¹ The memo also instructs USCIS to consider deferred action for family members of U.S. military service members and veterans who do not qualify for parole-in-place because they were inspected and admitted to the United States, although are now out of status. This would include, for example, family members who overstayed or violated a nonimmigrant visa status. This expansion was necessary due to President Obama's Administration's ban on enlisting persons in the U.S. military who had undocumented family members. If the family member is granted parole-in-place, then the enlistment can proceed.

Example: Marcus, an LPR in the U.S. Army, is worried about his 23-year-old daughter Maria who entered as a visitor last year after her divorce. She has since overstayed her visa and decided that she does not want to go back to her home country, Italy. Marcus has never filed an immigrant visa petition for her.

Maria does not qualify for parole-in-place because she entered as a visitor, so she has already been admitted. But under the memo issued by DHS on November 23, 2016, USCIS will consider a request for deferred action to family members who were inspected and admitted to the United States but are now out of status. Although Maria's father can file an immigrant visa petition for her, the waitlist for adult children of LPRs is very long. Deferred action would be a good option for Maria in the meantime until she can obtain a green card through her father (or through other means).

§ 6.5 Impact on DACA-Eligible Persons

Parole-in-place provides very similar benefits to DACA. Both parole and DACA allow the person to reside in the United States without fear of removal and to work legally. DACA provides for two years of lawful presence and employment authorization, while parole-in-place must be renewed every year. But if the main purpose of applying for one of these programs is to qualify to adjust status, then the person should simply apply for parole-in-place. If that is granted, the person will have been paroled in for purposes of adjusting under INA § 245(a). However, if the person does not have relatives who are or were in the U.S. Armed Forces, or may not otherwise

¹⁰ USCIS, *Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens*, PM-602-0050, (Nov. 7, 2011), available at www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20%28Approved%20as%20final%2011-7-11%29.pdf.

¹¹ See Attachment 6-D.

qualify for parole-in-place due to criminal convictions, the person could achieve the same goal by applying for DACA and then seeking advance parole. Obtaining advance parole is another way for immediate relatives to establish eligibility for adjustment of status if their last entry to the United States was without inspection. See **Chapter 8**. Even so, if a DACA recipient may qualify for parole-in-place, this provides the protection and benefits of a “parole” entry without the risk of traveling outside the United States.

§ 6.6 How to Apply for Parole-in-Place

Applicants for parole-in-place need to file the following:

- A completed Form I-131, Application for Travel Document;
- Evidence of family relationship to the member of the military (e.g., birth certificates, marriage certificate, adoption decree);
- Evidence of the military member’s active duty membership or past membership in the U.S. Armed Forces or the Selected Reserve of the Ready Reserve (e.g., military member’s identification card or DD Form 1173, military deployment orders, Defense Eligibility Enrollment Reporting System enrollment documents);
- Two identical, color, passport-style photographs; and
- Evidence of favorable discretionary factors (e.g., statement of hardship to the military service member, applicant’s participation in the community, bona fide marriage).

Form I-131 is available on the USCIS website. Form I-131 is not specifically for applicants for parole-in-place and therefore some of the questions must be adapted slightly. It is a form used to apply for several different kinds of immigration benefits, including a re-entry document, a refugee travel document, as well as parole. Thus, it is recommended that in Part 2, Application Type, applicants mark option 1.d. (“I am applying for an Advance Parole Document to allow me to return to the United States after temporary foreign travel.”) Applicants should then write in the words “parole-in-place” to clarify what they are seeking. In Part 4, Information About Your Proposed Travel, applicants should also write in “parole-in-place” in response to question 1.a. (Purpose of trip) and “not applicable” in response to question 1.b. (List the countries you intend to visit). Leave Parts 5, 6, and 7 blank.

The application form and supporting documents should be sent to the USCIS district office having jurisdiction over the applicant’s address. The USCIS website (www.uscis.gov) contains a map of the district offices nationwide. There is no filing fee. The applicant will then receive an interview appointment for biometrics.

Practitioners report that it is not necessary to present extensive evidence to support the favorable exercise of discretion absent a significant adverse factor to overcome. If the applicant does have minor convictions, such as minor theft convictions or DUIs, he or she should explain the criminal conduct, show remorse and rehabilitation, and demonstrate how the positive discretionary factors in the case outweigh the convictions.

The USCIS district offices have not reported the processing times for parole-in-place applications. Expect that it will take approximately three months to receive a decision, but the processing times will vary depending on the district office.

Once the parole-in-place has been approved, the recipient can then proceed to apply for employment authorization. The Form I-765 for employment authorization should not be filed together with the parole-in-place application.

Once parole-in-place has been granted, the parole recipient can then proceed with adjustment of status if he or she is otherwise eligible. The adjustment of status application process includes filing the Form I-485 and supporting documents. The adjustment packet should not be filed together with the parole-in-place application. For more information on the adjustment of status process, please see **Chapter 3** and the ILRC's manual, *Families and Immigration: A Practical Guide*.

Memorandum of Agreement

Between

United States Citizenship and Immigration Services (USCIS)
United States Department of Homeland Security,

United States Immigration and Customs Enforcement (ICE)
United States Department of Homeland Security,

And

United States Customs and Border Protection (CBP)
United States Department of Homeland Security

For the purpose of

COORDINATING THE CONCURRENT EXERCISE BY USCIS, ICE, AND CBP, OF THE SECRETARY'S PAROLE AUTHORITY UNDER INA § 212(d)(5)(A) WITH RESPECT TO CERTAIN ALIENS LOCATED OUTSIDE OF THE UNITED STATES

1. PARTIES

The parties to this Memorandum of Agreement (MOA or Agreement, inclusive of addenda thereto) are U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), and United States Customs and Border Protection (CBP), three bureaus within the U.S. Department of Homeland Security (DHS).

2. AUTHORITY

This Agreement is authorized under § 872 of the Homeland Security Act (HSA) of 2002 (Pub. L. No. 107-296) and is in accordance with the following DHS Delegation Orders: *Delegation of Authority to the Commissioner of U.S. Customs and Border Protection* (Delegation No. 7010.3, Sec. 2(B)(15)); *Delegation of Authority to the Assistant Secretary for U.S. Immigration and Customs Enforcement* (Delegation No. 7030.2, Sec. 2(M)); and *Delegation of Authority to the Bureau of Citizenship and Immigration Services* (Delegation No. 0150.1, Sec. 2(O)).

3. PURPOSE AND SCOPE

This Agreement articulates a decisional framework to coordinate the bureaus' concurrent exercise of parole authority with respect to aliens who are outside of the United States or who present themselves at a U.S. port of entry upon initial approach to the United States. Next, the MOA applies the framework to a non-exhaustive, sample list of parole requests and designates the appropriate bureau(s) that would exercise jurisdiction over each request. Third, the MOA establishes two case management rules: (1) consolidation of principal and derivative parole applications for adjudication by one bureau; and (2) except as provided herein, requests for re-parole will be adjudicated by the bureau that adjudicated the initial parole request. Finally, the MOA establishes a dispute resolution mechanism.

This MOA does not cover conditional parole and release from detention pursuant to section 236 of the Act,¹ nor other forms of parole issued to aliens who are already within the United States (e.g., parole to trafficking victims; parole in place; advance parole), nor other immigration benefits often associated with certain categories of parole (e.g., work authorization, adjustment of status). An Addendum to this MOA will address jurisdiction over parole issued to aliens who are in removal proceedings, who have a final order, or who have been granted deferred action by ICE at any time after commencement of removal proceedings, regardless of whether the alien is within or outside of the United States. See Addendum 1.

4. BACKGROUND

A. Parole under INA § 212(d)(5)(A)

¹ See memorandum dated August 21, 1998, by U.S. Immigration and Naturalization Service General Counsel Paul W. Virtue entitled, *Authority to Parole Applicants for Admission Who Are Not Also Arriving Aliens, superseded in part by* Memorandum of the DHS General Counsel, dated September 28, 2007, by DHS General Counsel Gus P. Coldebella entitled, *Clarification of the Relation Between Release Under Section 236 and Parole Under Section 212(d)(5) of the Immigration and Nationality Act.*

Section 212(d)(5)(A) of the Immigration and Nationality Act (INA, or the Act) authorizes the Secretary of the Department of Homeland Security (DHS)² "in his discretion [to] parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission into the United States, . . ." Parole is an extraordinary measure, sparingly used only in urgent or emergency circumstances, by which the Secretary may permit an inadmissible alien temporarily to enter or remain in the United States. Parole is not to be used to circumvent normal visa processes and timelines.

The Secretary has delegated his parole authority USCIS, ICE, and CBP.

B. Current Parole Practice by Bureaus

As practice has evolved, DHS bureaus have generally construed "humanitarian" paroles (HPs) as relating to urgent medical, family, and related needs and "significant public benefit paroles (SPBPs) as limited to persons of law enforcement interest such as witnesses to judicial proceedings. Categorizing parole types helps prospective parole beneficiaries direct their applications to the appropriate bureau and facilitates DHS tracking. In the vast majority of cases, parole queries and applications are directed to the appropriate bureau and adjudicated without re-routing the parole request to another bureau.

In a January 18, 2007, letter to the Senate Committee on Health, Education, Labor, and Pensions, DHS Secretary Chertoff explained that the Cuban and Haitian Entrant Program (CHEP), Humanitarian Parole Program, and the Moscow Refugee Parole Program would transfer from ICE to USCIS, stating, "DHS will consolidate CHEP and the non-law enforcement functions of related parole programs from [ICE] to [CIS]."

Below is a non-exhaustive list of outside the United States and port of entry parole programs and categories and how those requests are staffed:

1. Urgent medical, family, and related needs: USCIS
2. Moscow Refugee Parole Program (MRPP): USCIS
3. Specific Cuban parole programs:³
 - a. Special Cuban Migration Parole issued at U.S. Interest Section (USINT) Havana (Lottery; CP-2/5): USCIS
 - b. Cuban Family Reunification Program issued at USINT Havana (CFRP; CP-1): USCIS
 - c. Cuban family of immigrant-visa bearers, issued at USINT Havana (CP-3): USCIS
 - d. Cuban Medical Professional Parole (CMPP): USCIS
 - e. Cubans paroles from the U.S. Naval Station at Guantánamo, Cuba: USCIS
4. As further clarified with the examples and exception below, aliens who will participate in administrative, judicial, or legislative proceedings, and/or investigations, whether at the federal, state, local, or tribal level of government: ICE
 - a. Individual necessary for prosecution or investigation in the U.S.: ICE
 - b. Confidential Informant from overseas with a specific credible threat: ICE
 - c. Extradition of an individual to the U.S.: ICE
 - d. Aliens who will participate in civil proceedings where all parties are private litigants: USCIS
5. Section 7 parole [50 USC 403h]: ICE
6. Trainees: ICE
7. Intelligence:
 - a. If the individual is a registered source of a member of the US Intelligence Community and the parole furthers the national Intelligence mission: ICE

² Homeland Security Act, 6 U.S.C. §§ 251-98 (transferring authorities exercised exclusively by the former Immigration and Naturalization Service to DHS).

³ This MOA addresses parole adjudications relating to aliens who are either outside of the United States (OCONUS) or at a U.S. port of entry. Each bureau may and does issue paroles to Cuban nationals who are present without inspection in the United States, and this MOA does not assign such cases to one or more bureaus.

- b. Promote National Security—If the parole application is submitted or recommended by the Department of State Cooperative Threat Reduction Program or by the Intelligence Community: ICE
- 8. In Transit Aliens (paroled to travel through the U.S. en route to legal proceedings in a 3rd country): ICE
- 9. Aliens who will participate in events hosted by an international organization located within the United States (e.g., UN, OAS): ICE

C. Notes on Construction

- 1. The bureaus have attempted to draft the above categories in a manner that captures and assigns as many parole scenarios as could be foreseen. Nonetheless, if a parole request does not readily fall within an above category, the bureaus will weigh the totality of the circumstances, including but not limited to the motive(s) for the parole application and its nexus to one of the above categories, to determine which bureau should adjudicate the parole request.
- 2. To the extent that this MOA largely assists ICE and USCIS apportion its parole caseloads, omission of specific reference to CBP should not be construed to detract from CBP's inherent authority to issue paroles. CBP does and will continue to exercise parole authority for both urgent humanitarian reasons and significant public benefit.

5. CASES THAT WARRANT MONITORING

- A. USCIS will adjudicate all other parole applications that are not otherwise apportioned pursuant to Sections 4 and that relate to aliens with respect to whom, as necessary, ICE concludes do not warrant monitoring by DHS or DHS organizations.
- B. Notwithstanding Section 4, ICE will adjudicate any parole request in which ICE determines that, if granted, the parolee would warrant monitoring by DHS or DHS organizations.
- C. If USCIS receives a parole request for which USCIS determines that parole is otherwise appropriate but questions whether monitoring is appropriate to the situation, it will request that ICE evaluate whether monitoring is warranted. ICE will respond within one (1) working day in writing or by email.
 - 1. If ICE concludes that monitoring by DHS or DHS organizations is required, per Section 5.B., ICE will adjudicate the parole request.
 - 2. If ICE concludes that monitoring by a non-DHS agency is warranted, ICE will stipulate the conditions of monitoring by the non-DHS entity. USCIS will retain jurisdiction and secure the non-DHS agency's agreement to comply with the ICE stipulated conditions before USCIS approves the parole. During the period of initial parole or upon any request for re-parole, USCIS and/or ICE may require that the agency demonstrate compliance with set conditions.

6. CONSOLIDATION OF PRINCIPAL AND DERIVATIVE PAROLE APPLICATIONS

The bureau that adjudicates a parole (and re-parole) request related to a principal applicant will adjudicate all related parole (and re-parole) applications on behalf of derivative family members, whether accompanying the principal or following to join at a later date. Consolidating principal and derivative parole adjudication affords comprehensive analysis of derivatives' merits, as well as efficiencies in adjudication and post-adjudication case management. This case management rule may not be circumvented by advancing or construing a derivative's parole application under a different parole category than that of the principal parole applicant.

7. ADJUDICATION OF REQUESTS FOR RE-PAROLE

Except as provided in the paragraph below, if a bureau has previously adjudicated and granted parole to an individual, the issuing bureau should, in the interest of efficiency, adjudicate requests for re-parole, unless (1) the circumstances or intent of the parole have changed such that additional factors render the bureau inappropriate to adjudicate the new application, or (2) another bureau agrees to assume a particular caseload in the interest of expediency or settled local practice.

*Immigrant Legal Resource Center
December 2016*

If an original parole was granted by the ICE Parole and Humanitarian Assistance Branch (PHAB) prior to the transfer of the HP, MRPP, and CHEP parole programs to USCIS under the Memorandum of Understanding dated July 26, 2007, a subsequent request for re-parole will be apportioned among the bureaus pursuant to Sections 4 and 5 above.

8. FORUM-SHOPPING PREVENTION

To discourage forum-shopping by parole-requesters, engender inter-bureau comity, promote consistency of case adjudication, and preserve resources, the bureaus adopt the following case management rule: If a bureau identifies a request that was previously denied on the merits by another bureau, the second receiving bureau will refer such a request back to the bureau that originally adjudicated and denied parole.

There may, however, be situations where it is inappropriate for one bureau to grant a parole, whereas the same applicant may and possibly should be granted parole by another bureau at a different time, location, and/or under different factual or procedural circumstances. In such a case, the second bureau to receive the parole request may elect to adjudicate the new request after consultation with the original bureau.

9. POINTS OF CONTACT

To enhance coordination among the bureaus in the exercise of the Secretary's parole authority under INA § 212(d)(5)(A), the following positions within the respective bureaus designates, or their assigned delegates, will serve as points of contact for parole-related matters that fall within the scope of this Agreement.

- | | | |
|----|--------|--|
| A. | ICE: | Branch Chief, Law Enforcement Parole Branch
ICE Office of International Affairs
800 N. Capitol, NW
Washington DC, 20002
Telephone: 202-7326 (b)(7)(C) |
| B. | CBP: | Executive Director
CBP Admissibility and Passenger Programs
1300 Pennsylvania Avenue, NW, Suite 2.5A
Washington, DC 20004
Telephone: 202-3446 (b)(7)(C) |
| C. | USCIS: | Chief, Humanitarian Assistance Branch
USCIS Refugee, Asylum, & International Operations Directorate (RAIO)
20 Massachusetts Avenue, NW, 3 rd Floor
Washington, DC 20529
Telephone: 202-2726 (b)(7)(C) |

10. EXTERNAL GUIDANCE TO PAROLE REQUESTING ENTITIES

While most parole applications are directed by the requesting entity, in the first instance, to the appropriate bureau, and while this MOA will guide the bureaus in case assignment, the bureaus will make available to appropriate U.S. government entities external guidance contained in Addendum 2 to this MOA, so that the requesting entities better understand to which bureau a request for parole should be directed. Addendum 2 is to be read consistent with the terms of this MOA and Addendum 1 thereto. Addendum 2 is incorporated into the MOA and subject to all governing paragraphs, including but not limited to, paragraphs 14 through 16. The parties will also update public outreach materials consistent with the terms of this MOA and Addendum 1.

11. DISPUTE RESOLUTION MECHANISM

It is contemplated that the decisional framework set out above will produce a consensus as to case assignment among the bureaus. In the event that the parole unit staff of the bureaus are unable, within one work day, to agree upon proper case assignment, the receiving bureau(s) will refer the case to their respective bureau deputies -- USCIS Deputy Director, ICE Deputy Assistant Secretary, and CBP Deputy Commissioner -- or their designees to confer on case assignment. If the deputies (or designees) cannot concur upon case assignment within one additional work-day, the case will be referred to the Deputy Secretary of DHS, or designee, for assignment.

Practical Strategies for Immigration Relief: Family-Based Immigration and Executive Actions
December 2016

12. OTHER PROVISIONS

Nothing in this MOA or addenda thereto is intended to conflict with current law or regulation or the directives of DHS or existing agreements. If a term of this agreement is inconsistent with such authority, then that term shall be invalid, but the remaining terms and conditions of this agreement shall remain in full force and effect. This MOA and addenda thereto supersede bureau-issued guidance or directives that are inconsistent.

This Agreement does not disturb the July 26, 2007, Memorandum of Agreement between USCIS and ICE for the purpose of Defining the Roles and Responsibilities of Both ICE and USCIS on the Transfer of the Cuban and Haitian Entrant Program, the Moscow Refugee Parole Program, and the Humanitarian Parole Program to USCIS, or its August 3, 2007 implementing Interagency Agreement. To the extent that there is a disagreement between the documents, USCIS and ICE agree to make every effort to resolve the inconsistency.

13. NO PRIVATE RIGHT STATEMENT

This MOA and addenda thereto provide internal administrative guidance to DHS components and are not intended to, nor do they, create any rights, privileges, or benefits, substantive or procedural, enforceable by any party against: the United States; its departments, agencies or other entities; nor its officers, employees, or any other person.

14. MODIFICATIONS

This Agreement may be modified upon the mutual written consent of the parties.

15. TERMINATION

The terms of this Agreement, and any subsequent modifications consented to by the parties, will remain in effect unless terminated as provided herein. Any party, upon 30 days written notice to the other two parties, may terminate this Agreement, which thereafter would not be in force as between the remaining parties.

16. EFFECTIVE DATE

The terms of this Agreement will become effective immediately upon signature of both this MOA and Addendum 1.

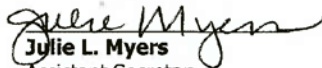
APPROVED BY:


Jonathan Scharfen

Acting Director

U.S. Citizenship & Immigration Services, U.S. Department of Homeland Security

9/10/08
Date


Julie L. Myers

Assistant Secretary

U.S. Immigration & Customs Enforcement, U.S. Department of Homeland Security

9/9/08
Date


W. Ralph Basham

Commissioner

U.S. Customs & Border Protection, U.S. Department of Homeland Security

9/29/08
Date

*Immigrant Legal Resource Center
December 2016*

Addendum 1 to Tri-Bureau Parole MOA of [DATE of signature]

1. Further to Section 4 of the MOA, ICE will adjudicate parole requests relating to aliens in removal proceedings or who have final orders, as well as aliens granted deferred action by ICE at any point after the commencement of removal proceedings, regardless of whether the alien is within or outside of the United States. Given the context of removal proceedings, it is anticipated that parole of such aliens would occur only in very rare circumstances. Addendum 1 is incorporated into the MOA and subject to all governing paragraphs, including but not limited to, paragraphs 6 through 8.

APPROVED BY:


Jonathan Scharfen
Acting Director

U.S. Citizenship & Immigration Services, U.S. Department of Homeland Security

9/10/08
Date


Julie L. Myers
Assistant Secretary

U.S. Immigration & Customs Enforcement, U.S. Department of Homeland Security

9/10/08
Date


W. Ralph Basham
Commissioner

U.S. Customs & Border Protection, U.S. Department of Homeland Security

9/29/08
Date

Addendum 2

Guidance for U.S. Government entities requesting that DHS parole an alien into the US under INA § 212(d)(5)(A)¹

Section 212(d)(5)(A) of the Immigration & Nationality Act (INA) authorizes the Secretary of the Department of Homeland Security (DHS) to parole persons into the US "for urgent humanitarian reasons or significant public benefit." Parole is an extraordinary measure, sparingly used only in urgent circumstances, and not to circumvent normal visa processes and timelines. DHS will not generally adjudicate a parole request absent evidence that the prospective parolee has exhausted visa processes, including any available waivers to applicable grounds of inadmissibility.

The Secretary delegated his parole authority concurrently to Customs & Border Protection (CBP), Immigration & Customs Enforcement (ICE), and U.S. Citizenship & Immigration Services (USCIS). Below is a list of parole categories, followed by which DHS bureau will receive and adjudicate parole requests for each category.

1. Urgent medical, family, and related needs: USCIS
2. Aliens who will participate in civil proceedings where all parties are private litigants: USCIS
3. Except as provided in (2) above, aliens who will participate in administrative, judicial, or legislative proceedings, and/or investigations, whether at the federal, state, local, or tribal level of government: ICE
4. Aliens in removal proceedings or who have final orders, as well as aliens granted deferred action by ICE at any point after the commencement of removal proceedings, regardless of whether the alien is within or outside of the US: ICE
5. Aliens who will participate in events hosted by an international organization located within the U.S. (e.g., UN, OAS): ICE
6. Section 7 parole [50 U.S.C. 403(h)]: ICE
7. Intelligence. Aliens who are registered sources of a member of the US Intelligence agency Community and whose parole would further the national Intelligence mission, or aliens whose parole is sought by the Department of State Cooperative Threat Reduction Program or by the Intelligence Community: ICE

The following case management rules apply:

1. Consolidation of family members: A single bureau will adjudicate parole applications of both principal and derivative family members, whether accompanying the principal or later following to join.
2. Requests for re-parole: The issuing bureau will adjudicate subsequent requests for re-parole.

U.S. Government entities may contact the appropriate DHS immigration bureau as follows:

- | | | | |
|----|--------|---|--|
| A. | ICE: | Branch Chief, Law Enforcement Parole Branch
ICE Office of International Affairs
800 N. Capitol, NW
Washington DC, 20002 | Telephone: 202-732- (b)(7)(C) |
| B. | CBP: | Executive Director
CBP Admissibility and Passenger Programs
1300 Pennsylvania Avenue, NW, Suite 2.5A
Washington, DC 20004 | Telephone: 202-344- (b)(7)(C) |
| C. | USCIS: | Chief, Humanitarian Assistance Branch
USCIS Refugee, Asylum, & International Operations Directorate (RAIO)
20 Massachusetts Avenue, NW, 3 rd Floor
Washington, DC 20529 | Telephone: 202-272- (b)(7)(C) |

With this guidance, DHS seeks to better assist other U.S. entities with its missions, while performing our essential mission of protecting homeland security.

¹ Revised 8-27-08. *No private right.* This guidance addresses internal administration and is not intended to, nor does it, create any rights, privileges, or benefits, substantive or procedural, enforceable by any party against: the US; its departments, agencies or other entities; nor its officers, employees, or any other person.

~~FOR OFFICIAL USE ONLY~~

IMPORTANT: This policy memo has been partially or fully superseded by the USCIS Policy Manual. Please visit www.uscis.gov/policymanual for effective policy.

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000



**U.S. Citizenship
and Immigration
Services**

November 15, 2013

PM-602-0091

Policy Memorandum

SUBJECT: Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces, the Selected Reserve of the Ready Reserve, and Former Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve and the Effect of Parole on Inadmissibility under Immigration and Nationality Act § 212(a)(6)(A)(i)

Purpose

This policy memorandum (PM) amends Chapter 21.1 of the Adjudicator's Field Manual (AFM) to ensure consistent adjudication of parole requests made on behalf of aliens who are present without admission or parole and who are spouses, children and parents of those serving on active duty in the U.S. Armed Forces, in the Selected Reserve of the Ready Reserve or who previously served in the U.S. Armed Forces or Selected Reserve of the Ready Reserve.

This PM also amends AFM Chapter 40.6 concerning the effects of parole on an alien's inadmissibility under Immigration and Nationality Act (INA) § 212(a)(6)(A)(i). This amendment to AFM chapter 40.6 applies to any paroled alien, not only to the family members of Armed Forces personnel.

Scope

This PM applies to and is binding on all U.S. Citizenship and Immigration Services (USCIS) employees.

Authority

INA §§ 212(a)(6)(A)(i), 212(d)(5)(A), 235(a), and 245(a), (c); 8 U.S.C. §§ 1182(a)(6)(A)(i), 1182(d)(5)(A), 1225(a), and 1255(a), (c)

Background

Parole of Spouses, children and parents of Armed Forces personnel

- In partnership with the Department of Defense (DoD), USCIS has launched a number of initiatives to assist military members, veterans, and their families to navigate our complex immigration system and apply for naturalization and other immigration services and benefits.
- This PM builds on these important initiatives as there is concern within DoD that some active members of the U.S. Armed Services, individuals serving in the Selected Reserve of the Ready Reserve and individuals who have previously served in the U.S. Armed Forces or Selected Reserve

IMPORTANT: This policy memo has been partially or fully superseded by the USCIS Policy Manual. Please visit www.uscis.gov/policymanual for effective policy.

PM-602-0091: Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces, the Selected Reserve of the Ready Reserve, and Former Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve and the Effect of Parole on Inadmissibility under Immigration and Nationality Act § 212(a)(6)(A)(i)

Page 2

of the Ready Reserve face stress and anxiety because of the immigration status of their family members in the United States.

- Military preparedness can potentially be adversely affected if active members of the U.S. Armed Forces and individuals serving in the Selected Reserve of the Ready Reserve, who can be quickly called into active duty, worry about the immigration status of their spouses, parents and children.
- Similarly, our veterans, who have served and sacrificed for our nation, can face stress and anxiety because of the immigration status of their family members in the United States. We as a nation have made a commitment to our veterans, to support and care for them. It is a commitment that begins at enlistment, and continues as they become veterans.
- Responding to these and similar concerns by several Members of Congress about soldiers and veterans, the Secretary of Homeland Security on August 30, 2010 emphasized the Department's commitment to assisting military families. The Secretary identified several of the discretionary tools that the Department utilizes "to help military dependents secure permanent immigration status in the United States as soon as possible." Among the tools listed was "parole ... to minimize periods of family separation, and to facilitate adjustment of status within the United States by immigrants who are the spouses, parents and children of military members."¹
- INA § 212(d)(5)(A) gives the Secretary the discretion, on a case-by-case basis, to "parole" for "urgent humanitarian reasons or significant public benefit" an alien applying for admission to the United States. Although it is most frequently used to permit an alien who is outside the United States to come into U.S. territory, parole may also be granted to aliens who are already physically present in the U.S. without inspection or admission. This latter use of parole is sometimes called "parole in place." The legal authority for granting parole in place was formally recognized by the then-Immigration and Naturalization Service (INS) General Counsel in a 1998 opinion.² That opinion was endorsed the following year in a memorandum by the then-INS Commissioner.³ In 2007, the then-DHS General Counsel concurred with the 1998 INS General Counsel's opinion in relevant part.⁴ The basic authority for parole in place is INA § 212(d)(5)(A), which expressly grants discretion to parole "any alien applying for admission to the United States." INA § 235(a)(1), in turn, expressly defines an applicant for admission to include "an alien present in the United States who has not been admitted."

¹ See Letter from Hon. Janet Napolitano, Sec. of Homeland Security, to Hon. Zoe Lofgren, U.S. House of Representatives (Aug. 30, 2010).

² Memorandum from Paul W. Virtue, INS General Counsel, to INS officials, "Authority to Parole Applicants for Admission Who Are Not Also Arriving Aliens," Legal Op. 98-10 (Aug. 21, 1998), 1998 WL 1806685.

³ Memorandum from Doris Meissner, INS Commissioner, to INS officials, "Eligibility for Permanent Residence Under the Cuban Adjustment Act Despite Having Arrived at a Place Other than a designated Port-of-Entry" (Apr. 19, 1999), reprinted in 76 Interpreter Releases 676, 684, App. 1 (May 3, 1999).

⁴ Memorandum from Gus P. Coldebella, DHS General Counsel, to DHS officials, "Clarification of the Relation Between Release under Section 236 and Parole under Section 212(d)(5) of the Immigration and Nationality Act" (Sept. 28, 2007). The same DHS General Counsel's opinion rejected a conclusion that Mr. Virtue had reached on a separate issue related to release from detention under INA § 236(a)(2)(B) (so-called "conditional parole"), see *Matter of Castillo-Padilla*, 25 I&N Dec. 257 (BIA 2010) (agreeing with DHS that "conditional parole" under INA § 236(a)(2)(B) does not constitute parole under INA § 212(d)(5)(A)).

IMPORTANT: This policy memo has been partially or fully superseded by the USCIS Policy Manual. Please visit www.uscis.gov/policymanual for effective policy.

PM-602-0091: Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces, the Selected Reserve of the Ready Reserve, and Former Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve and the Effect of Parole on Inadmissibility under Immigration and Nationality Act § 212(a)(6)(A)(i)

Page 3

- This PM addresses two related issues. The first is a policy question: Should parole in place be granted to certain family members of active duty members of the U.S. Armed Forces, individuals in the Selected Reserve of the Ready Reserve, or individuals who previously served in the U.S. Armed Forces or the Selected Reserve of the Ready Reserve? The second is a legal question: Does parole in place (for military family members or anyone else) affect whether an alien is inadmissible under INA § 212(a)(6)(A)(i)? That provision is discussed below and is critical to determining the alien's eligibility for adjustment of status under INA § 245.

A. Parole in Place for Spouses, Children and Parents of Active Members of the U.S. Armed Forces, Individuals in the Selected Reserve of the Ready Reserve or Individuals Who Previously Served in the U.S. Armed Forces or the Selected Reserve of the Ready Reserve

As noted above, the decision whether to grant parole under INA § 212(d)(5)(A) is discretionary. Generally, parole in place is to be granted only sparingly. The fact that the individual is a spouse, child or parent of an Active Duty member of the U.S. Armed Forces, an individual in the Selected Reserve of the Ready Reserve or an individual who previously served in the U.S. Armed Forces or the Selected Reserve of the Ready Reserve, however, ordinarily weighs heavily in favor of parole in place. Absent a criminal conviction or other serious adverse factors, parole in place would generally be an appropriate exercise of discretion for such an individual. If USCIS⁵ decides to grant parole in that situation, the parole should be authorized in one-year increments, with re-parole as appropriate.

B. Effect of Parole on Inadmissibility under INA § 212(a)(6)(A)(i) and Adjustment of Status under INA § 245

INA § 212(a)(6)(A)(i) contains two closely related inadmissibility grounds. The first ground relates to the alien who is "present in the United States without being admitted or paroled." This inadmissibility ground generally covers those who entered the United States without inspection (and are still in the United States). Aliens who have entered the United States without inspection, while not "arriving aliens" as defined in 8 C.F.R. § 1001.1(q), are eligible for parole because they remain applicants for admission.⁶

The second inadmissibility ground in section 212(a)(6)(A)(i) relates to the alien "who arrives in the United States at any time or place other than as designated by the [Secretary of Homeland Security]." Where the first inadmissibility ground leaves off, this one picks up. Using the present tense ("arrives"), it covers the alien who is in the process of entering U.S. territory without inspection. As is true throughout section 212(a), the choice of tense ("arrives") is clearly deliberate. In enacting the various inadmissibility grounds in section 212(a), Congress was very specific as to whether the

⁵ ICE and CBP also have parole authority. "Memorandum of Agreement between USCIS, ICE, and CBP for the purpose of coordinating the concurrent exercise by USCIS, ICE, and CBP of the Secretary's Parole Authority Under INA § 212(d)(5)(A) with respect to certain aliens located outside of the United States," Addendum I (September 2008). Their decisions whether to grant parole are outside the scope of the present PM.

⁶ INA § 235(a)(1).

IMPORTANT: This policy memo has been partially or fully superseded by the USCIS Policy Manual. Please visit www.uscis.gov/policymanual for effective policy.

PM-602-0091: Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces, the Selected Reserve of the Ready Reserve, and Former Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve and the Effect of Parole on Inadmissibility under Immigration and Nationality Act § 212(a)(6)(A)(i)
Page 4

individual grounds cover past, present, or future events, or some combination thereof.⁷ In particular, when Congress intended that a ground cover both past and present events, it said so explicitly.⁸ In contrast, in the second prong of section 212(a)(6)(A)(i), Congress used only the present tense. Moreover, if “arrives” were read as if it said “arrives or previously arrived,” so as to cover any alien who had ever entered at an undesignated time or place, then the first prong of section 212(a)(6)(A)(i) would be practically superfluous. Ordinarily, the only way for an alien to be present in the United States without admission or parole, as the first prong requires, is to have entered without inspection at some point in the past.⁹ Those individuals would already be covered by the second prong if “arrives” were read to mean “arrives or previously arrived.”

The two inadmissibility grounds contained within section 212(a)(6)(A)(i) are thus complementary. Together, they capture aliens who have already achieved entry without inspection and those who are in the process of attempting such entry.

Reading “arrives” as if it said “arrives or has previously arrived”¹⁰ would also produce at least two anomalies. First, as noted, it would render the first prong of section 212(a)(6)(A)(i) practically superfluous. Second, in combination with another inadmissibility ground, section 212(a)(9)(B)(i), reading “arrives” as “arrives or has previously arrived” would lead to results that Congress could not possibly have intended. The latter ground renders inadmissible any alien who has ever been unlawfully present in the United States for more than 180 days and then departs, but it limits the inadmissibility to either 3 years or 10 years, depending on the duration of the unlawful presence. If the second inadmissibility ground in section 212(a)(6)(A)(i) were interpreted to mean that any prior entry

⁷ Some inadmissibility grounds, like the second prong of 212(a)(6)(A)(i), cover only present conduct. *See, e.g.*, sections 212(a)(1)(A)(i) (determined “to *have* a communicable disease of public health significance”)(emphasis added); 212(a)(1)(A)(iv) (“determined ... to *be* a drug addict”)(emphasis added); 212(a)(6)(D) (“*is* a stowaway”)(emphasis added). Other grounds cover only events that have occurred in the past (up to and including the present time). *See, e.g.*, sections 212(a)(3)(B)(i) (“*has engaged* in a terrorist activity”)(emphasis added); 212(a)(3)(E)(ii) (“ordered, incited, assisted, or otherwise participated in genocide”); 212(a)(6)(E) (“*knowingly has encouraged, induced, assisted, abetted, or aided* any other alien to enter or to try to enter the United States in violation of law”)(emphasis added). Still others cover only predictions of future activity. *See, e.g.*, sections 212(a)(4)(A) (“*is likely* at any time to become a public charge”); 212(a)(10)(A) (“coming to the United States to practice polygamy”).

⁸ *See, e.g.*, sections 212(a)(2)(D)(ii) (“procures or attempts to procure, or [less than ten years earlier] procured or attempted to procure ... prostitutes”); 212(a)(3)(D)(i) (“*is* or has been a member of or affiliated with the Communist ... party”); 212(a)(6)(C)(i) (fraudulently “*seeks to procure* (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit ... ”); 212(a)(6)(C)(ii) (“*falsely represents, or has falsely represented, himself or herself*” to be a U.S. citizen).

⁹ There is one scenario in which the first prong of section 212(a)(6)(A)(i) would capture an alien who does not fall within even the more expansive interpretation of the second prong. If the alien seeks admission at a designated port of entry, is denied admission, is detained, escapes from detention, and then makes his or her way into the interior, he or she would be inadmissible under the first ground but not the second one. It would be far-fetched, however, to assume that this was the only intended use of the first ground in 212(a)(6)(A)(i) (present without admission or parole).

¹⁰ Former AFM section 40.6.2(a)(3)(ii) had stated that “[i]n admissibility does not continue after the alien has departed the United States.” But if this language were interpreted to imply the converse – i.e., that inadmissibility *does* continue even after the alien has long since arrived in the United States (and terminates *only* upon departure) – the assumption would have to be that “arrives” means “arrives or, if the person has not departed, has arrived.” There is no apparent legal basis or policy reason to interpret “arrives” in that way.

IMPORTANT: This policy memo has been partially or fully superseded by the USCIS Policy Manual. Please visit www.uscis.gov/policymanual for effective policy.

PM-602-0091: Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces, the Selected Reserve of the Ready Reserve, and Former Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve and the Effect of Parole on Inadmissibility under Immigration and Nationality Act § 212(a)(6)(A)(i)
Page 5

without inspection renders the alien inadmissible, then both the 180-day threshold and the 3-year and 10-year limitations on inadmissibility under section 212(a)(9)(B)(i) would be meaningless. One who enters without inspection and remains for less than 180 days – even one day, for that matter – and then leaves, is not inadmissible at all under section 212(a)(9)(B)(i), but it would not matter, because that person would be inadmissible for life under the more expansive reading of section 212(a)(6)(A)(i). Further, the alien who enters without inspection, remains for 8 months, and then leaves, is inadmissible under section 212(a)(9)(B)(i), but only for 3 years. That 3-year limitation would be meaningless, however, if section 212(a)(6)(A)(i) were interpreted to bar the person for life for the very same prior entry.¹¹

The above considerations all come into play when an alien who entered without inspection subsequently receives parole. Such an alien will no longer be inadmissible under the first ground in section 212(a)(6)(A)(i) (present without having been admitted or paroled), because the alien has been paroled. And since that alien arrived in the United States only in the past, the second inadmissibility ground in section 212(a)(6)(A)(i) is already inapplicable (even without the parole), because the alien is not one who “arrives” (present tense) at an undesignated time or place. It is not a question of *parole* curing or erasing the second inadmissibility ground. Rather, the alien who arrived in the past is already outside the ambit of that second ground; past arrivals are the subject of the first ground.

Interpreting the explicit statutory language exactly as it is written therefore avoids all these anomalies. An alien who entered the United States without inspection, but subsequently receives parole, is not inadmissible under either of the two inadmissibility grounds contained in section 212(a)(6)(A)(i).¹²

For an alien who entered without inspection, a grant of parole under INA § 212(d)(5)(A) affects at least two of the eligibility requirements for adjustment of status. First, adjustment of status requires that the person be “admissible.” INA § 245(a)(2). As discussed above, parole eliminates one ground of inadmissibility, section 212(a)(6)(A)(i). Second, adjustment of status requires that the alien have been “inspected and admitted or paroled.” INA § 245(a). The grant of parole under INA § 212(d)(5)(A) overcomes that obstacle as well. The alien must still, however, satisfy all the other requirements for adjustment of status. One of those requirements is that, except for immediate

¹¹ The only apparent counter-point is that, even if the language of the second prong (“arrives”) were read to mean “arrives or has ever arrived,” the limitations built into section 212(a)(9)(B)(i) would still be meaningful with respect to overstays (as opposed to those who entered without inspection). Nothing in the legislative history of section 212(a)(9)(B)(i), however, suggests a specific congressional focus on overstays, or a desire to distinguish between the two groups of undocumented aliens, or an intent to subject an alien to lifelong inadmissibility for having once before entered without inspection. Moreover, if a prior entry without inspection were enough to bar a person for life, then INA § 212(a)(9)(C), which prescribes that result only when the entry without inspection follows either one year of unlawful presence or a removal order, would be superfluous.

¹² This analysis pertains exclusively to INA § 212(a)(6)(A)(i). It does not and is not intended to disturb the long-standing principles that an alien granted parole remains an applicant for admission who is considered to be constructively standing at the border, *see* INA § 101(a)(13)(B); *Leng May Ma v. Barber*, 357 U.S. 185, 189 (1958); *Ibragimov v. Gonzales*, 476 F.3d 125, 134 (2d Cir. 2008); and that “an application for admission [is] a continuing one,” *Matter of Valenzuela-Felix*, 26 I&N Dec. 53, 56 (BIA 2012) (parole for criminal prosecution).

IMPORTANT: This policy memo has been partially or fully superseded by the USCIS Policy Manual. Please visit www.uscis.gov/policymanual for effective policy.

PM-602-0091: Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces, the Selected Reserve of the Ready Reserve, and Former Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve and the Effect of Parole on Inadmissibility under Immigration and Nationality Act § 212(a)(6)(A)(i)

Page 6

relatives of United States citizens and certain other individuals,¹³ the person has to have “maintain[ed] continuously a lawful status since entry into the United States.” INA § 245(c)(2). Parole does not erase any periods of prior unlawful status. Thus, an alien who entered without inspection will remain ineligible for adjustment, even after a grant of parole, unless he or she is an immediate relative or falls within one of the other designated exemptions. Moreover, even an alien who satisfies all the statutory prerequisites for adjustment of status additionally requires the favorable exercise of discretion.

This PM supersedes any previous USCIS guidance on these issues, including the Memorandum to Field Leadership (AD07-18) at 5-6 (March 3, 2009).

Implementation

AFM Chapters 21.1 and 40.6 (AFM Update AD 12-30) are updated as follows.

1. A new section 21.1(c) is added to read:

21.1 General Information About Relative Petitions

(c) Special Parole Consideration for Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces, individuals in the Selected Reserve of the Ready Reserve or Individuals Who Previously Served in the U.S. Armed Forces or the Selected Reserve of the Ready Reserve. The decision whether to grant parole under INA § 212(d)(5)(A) is discretionary. Generally, USCIS grants parole in place only sparingly. The fact that the individual is a spouse, child or parent of an Active Duty member of the U.S. Armed Forces, an individual in the Selected Reserve of the Ready Reserve or an individual who previously served in the U.S. Armed Forces or the Selected Reserve of the Ready Reserve, however, ordinarily weighs heavily in favor of parole in place. Absent a criminal conviction or other serious adverse factors, parole in place would generally be an appropriate exercise of discretion for such an individual. If USCIS decides to grant parole in that situation, the parole should be authorized in one-year increments, with extensions of parole as appropriate.

To request parole, the alien must submit to the director of the USCIS office with jurisdiction over the alien's place of residence:

- o Completed Form I-131, Application for Travel Document (The USCIS Director has determined that in this situation the Form I-131 may be filed without fee, per 8 CFR 103.7(d));
- o Evidence of the family relationship;

¹³ INA § 245(c)(2) also exempts certain employment-based immigrants whose unlawful presence was for 180 days or less, in accordance with INA § 245(k)(2); aliens who were unlawfully present only in the past, without “fault” or for “technical reasons;” and certain subcategories of “special immigrant” described in INA § 101(a)(27)(H), (I), (J), or (K).

IMPORTANT: This policy memo has been partially or fully superseded by the USCIS Policy Manual. Please visit www.uscis.gov/policymanual for effective policy.

PM-602-0091: Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces, the Selected Reserve of the Ready Reserve, and Former Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve and the Effect of Parole on Inadmissibility under Immigration and Nationality Act § 212(a)(6)(A)(i)

Page 7

- Evidence that the alien's family member is an Active Duty member of the U.S. Armed Forces, individual in the Selected Reserve of the Ready Reserve or an individual who previously served in the U.S. Armed Forces or the Selected Reserve or the Ready Reserve such as a photocopy of both the front and back of the service member's military identification card (DD Form 1173);
- Two identical, color, passport style photographs; and
- Evidence of any additional favorable discretionary factors that the requestor wishes considered.

☞ 2. Chapter 40.6.2(a) of the AFM is revised:

- a. By amending Chapter 40.6.2(a)(1);
- b. By deleting Chapter 40.6.2(a)(3)(ii);
- c. By deleting Chapter 40.6.2(a)(4)(ii) and redesignating Chapter 40.6.2(a)(4)(iii) as Chapter 40.6.2(a)(4)(ii); and
- d. By amending the redesignated Chapter 40.6.2(a)(4)(ii).

The revisions read as follows:

40.6.2 Individual Grounds of Inadmissibility Under INA Section 212(a)(6)

(a) INA Section 212(a)(6)(A): Alien Present Without Admission or Parole or Who Arrives at Undesignated Time or Place

(1) General. INA section 212(a)(6)(A)(i) contains two closely related inadmissibility grounds. The first ground relates to the alien who is "present in the United States without being admitted or paroled." This inadmissibility ground generally covers those who entered the United States without inspection (and are still in the United States).

The second inadmissibility ground in section 212(a)(6)(A)(i) relates to the alien "who arrives in the United States at any time or place other than as designated by the [Secretary of Homeland Security]." Where the first inadmissibility ground leaves off, this one picks up. Using the present tense ("arrives"), it covers the alien who is in the process of entering U.S. territory without inspection.

The two inadmissibility grounds contained within section 212(a)(6)(A)(i) are thus complementary. Together, they capture aliens who have already achieved entry without inspection and those who are in the process of attempting such entry.

Parole. An alien who is paroled under INA section 212(d)(5)(A) will no longer be inadmissible under the first ground in section 212(a)(6)(A)(i) (present without being admitted or paroled), because the person has been paroled. And since that alien arrived in the United States only in the past, the second inadmissibility ground in section 212(a)(6)(A)(i) is already inapplicable

IMPORTANT: This policy memo has been partially or fully superseded by the USCIS Policy Manual. Please visit www.uscis.gov/policymanual for effective policy.

PM-602-0091: Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces, the Selected Reserve of the Ready Reserve, and Former Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve and the Effect of Parole on Inadmissibility under Immigration and Nationality Act § 212(a)(6)(A)(i)

Page 8

(even without the parole), because the alien is not one who “arrives” (present tense) at an undesignated time or place. It is not a question of *parole* curing or erasing the second inadmissibility ground. Rather, the alien who arrived in the past is already outside the ambit of that second ground; past arrivals are the subject of the first ground. Thus, an alien who entered the United States without inspection, but subsequently receives parole, is not inadmissible under either of the two inadmissibility grounds contained in section 212(a)(6)(A)(i).

For an alien who entered without inspection, a grant of parole under INA § 212(d)(5)(A) affects at least two of the eligibility requirements for adjustment of status. First, adjustment of status requires that the person be “admissible.” INA § 245(a)(2). As discussed above, parole eliminates one ground of inadmissibility, section 212(a)(6)(A)(i). Second, adjustment of status requires that the alien have been “inspected and admitted or paroled.” INA § 245(a). The grant of parole overcomes that obstacle as well. The alien must still, however, satisfy all the other requirements for adjustment of status. One of those requirements is that, except for immediate relatives of United States citizens and certain other exempt categories listed in INA section 245(c)(2), the person has to have “maintain[ed] continuously a lawful status since entry into the United States.” Parole does not erase any periods of prior unlawful status or any other applicable grounds of inadmissibility. An alien who entered without inspection will therefore remain ineligible for adjustment, even after a grant of parole, unless he or she is an immediate relative or falls within one of the other designated exemptions. Moreover, even an alien who satisfies all the statutory prerequisites for adjustment of status additionally requires the favorable exercise of discretion.

(4) Exemptions and Waivers

(ii) Waivers. There are no waivers available to applicants inadmissible under INA section 212(a)(6)(A)(i) other than the waivers (or inapplicabilities) described in AFM Chapter 40.6.1(b) or (c). As stated in AFM Chapter 40.6.2(a)(1), however, an alien paroled under INA section 212(d)(5)(A) is not inadmissible under INA section 212(a)(6)(A)(i).

IMPORTANT: This policy memo has been partially or fully superseded by the USCIS Policy Manual. Please visit www.uscis.gov/policymanual for effective policy.

PM-602-0091: Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces, the Selected Reserve of the Ready Reserve, and Former Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve and the Effect of Parole on Inadmissibility under Immigration and Nationality Act § 212(a)(6)(A)(i)

Page 9

- ☞ 3. The AFM Transmittal Memorandum button is revised by adding a new entry, in numerical order, to read:

AFM Update AD12-30 11/15/2013	Chapter 21.1(c) Chapter 40.6.2(a)	This PM adds new Chapter 21.1(c) and amends Chapter 40.6.2(a) of the AFM.
----------------------------------	--	---

Use

This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information

Questions or suggestions regarding this PM should be addressed through appropriate channels to the Field Operations Directorate.


Secretary
U.S. Department of Homeland Security
Washington, DC 20528



**Homeland
Security**

November 20, 2014

MEMORANDUM FOR: León Rodríguez
Director
U.S. Citizenship and Immigration Services

FROM: Jeh Charles Johnson 
Secretary

SUBJECT: **Families of U.S. Armed Forces Members and
Enlistees**

By this memorandum, I hereby direct U.S. Citizenship and Immigration Services (USCIS) to issue new policies on the use of parole-in-place or deferred action for certain spouses, children, and parents of individuals seeking to enlist in the U.S. Armed Forces.

The authority of the Secretary of Homeland Security to parole an immigrant into the United States is expressly authorized by statute. Section 212(d)(5)(A) of the *Immigration and Nationality Act* (INA) authorizes the Secretary “in his discretion [to] parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission into the United States.”¹

Although parole determinations must be made on an individualized basis, the authority has long been interpreted to allow for designation of specific classes of aliens for whom parole should be favorably considered, so long as the parole of each alien within the class is considered on a discretionary, case-by-case basis. Further, it is generally accepted that this parole authority can lawfully be extended to persons outside the United States as well as persons inside the United States who have not been lawfully admitted.² The latter use of parole is referred to as “parole-in-place.”

¹ INA § 212(d)(5)(A); 8 U.S.C. § 1182(d)(5)(A).

² U.S. Citizenship and Immigration Services Policy Memorandum PM-602-0091 (Nov. 15, 2013).

*Immigrant Legal Resource Center
December 2016*

Under current policy, family members of U.S. military service members and veterans are eligible for parole-in-place.³ The Department of Defense has requested that the Department of Homeland Security expand the scope of its parole-in-place memorandum of November 2013 to encompass family members of U.S. citizens and lawful permanent residents who seek to enlist in the U.S. Armed Forces. To support the military and its recruitment efforts, I hereby direct USCIS to work with the Department of Defense to address the availability of parole-in-place and deferred action for the spouse, parent, and child of a U.S. citizen or lawful permanent resident who seeks to enlist in the U.S. Armed Forces.

Further, I am also directing USCIS to consider the availability of deferred action, on a case-by-case basis, to those now undocumented family members of U.S. military service members and veterans who would be otherwise eligible for parole-in-place, but who were inspected and lawfully admitted to the United States.

³ U.S. Citizenship and Immigration Services, *Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces, the Selected Reserve of the Ready Reserve, and Former Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve and the Effect of Parole on Inadmissibility under Immigration and Nationality Act § 212(a)(6)(A)(i)*, November 15, 2013.

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000



U.S. Citizenship
and Immigration
Services

November 23, 2016

PM-602-0114

Policy Memorandum

SUBJECT: Discretionary Options for Designated Spouses, Parents, and Sons and Daughters of Certain Military Personnel, Veterans, and Enlistees

Purpose

This policy memorandum (PM) clarifies and supplements guidance issued by U.S. Citizenship and Immigration Services (USCIS) in 2013 (“the 2013 PM”)¹ with respect to designated family members of certain military personnel and veterans. Specifically, this PM provides additional guidance on discretionary options for: (a) certain alien family members of individuals serving on active duty in the U.S. Armed Forces or in the Selected Reserve of the Ready Reserve; (b) certain alien family members of those who previously served on active duty or in the Selected Reserve of the Ready Reserve (whether living or deceased) and were not dishonorably discharged; and (c) enlistees in the Department of Defense (DoD) Delayed Entry Program (DEP). This PM amends Chapter 21.1(c) of the Adjudicator’s Field Manual (AFM) to:

- Clarify that individuals who previously served in the military include those who are now deceased but do not include those who were dishonorably discharged;
- Change all references to “children” to “sons and daughters”;
- Provide guidance on deferred action for certain nonimmigrant and other alien recruits (including enlistees in the Military Accessions Vital to the National Interest (MAVNI) program) whose authorized periods of stay expire during the enlistment process, including the time they are in the DEP;
- Provide guidance on deferred action for certain MAVNI and other DEP enlistees’ family members who are present in the United States without authorized periods of stay; and
- Provide guidance on deferred action for certain military family members who would be eligible for parole under the guidelines in the 2013 PM but for the fact that they have already been admitted.

¹ See USCIS Memorandum, *Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces, the Selected Reserve of the Ready Reserve, and Former Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve and the Effect of Parole on Inadmissibility under Immigration and Nationality Act 212(a)(6)(A)(i)* (Nov. 15, 2013), http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/2013-1115_Parole_in_Place_Memo_.pdf.

PM-602-0114: Discretionary Options for Designated Spouses, Parents, and Sons and Daughters of Certain Military Personnel, Veterans, and Enlistees
Page 2

Scope

This PM applies to all U.S. Citizenship and Immigration Services (USCIS) employees.

Authority

Immigration and Nationality Act (INA) §§ 103(a)(1), 103(a)(3), 212(d)(5)(A), 235(a), and 245(a), (c); 8 U.S.C. §§ 1103(a)(1), 1103(a)(3), 1182(d)(5)(A), 1225(a), and 1255(a), (c); 6 U.S.C. § 202(5).

Background

On November 15, 2013, pursuant to the authority conferred upon the Secretary of Homeland Security by INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A), USCIS issued a PM guiding the exercise of discretion with respect to applications for parole by designated family members of certain U.S. military personnel and veterans. On November 20, 2014, the Secretary directed USCIS to expand on these policies, including by issuing new policies on the use of both parole and deferred action for certain family members of military personnel, veterans, and DEP enlistees.² These new policies are intended to support the DoD in several ways, including by:

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

DoD Delayed Entry Program (DEP)

The DoD receives approximately 250,000 individuals into the all-volunteer force each year. To effectively sustain this large volunteer force, DoD uses the DEP to manage and predictably meet the accession requirements of the military services. Individuals who have no previous military experience and are seeking to enlist in the U.S. military must sign a contract by which they enter into the DEP for a period of up to 365 days while awaiting Basic Training. This waiting period allows DoD to better anticipate and meet the needs of the various service components. The DEP is a cornerstone of the U.S. military enlistment process.

Individuals who enlist in the military through the MAVNI program may also enter the DEP. The MAVNI program allows certain nonimmigrants and other aliens to enlist in the military to fill

² Secretary of Homeland Security Memorandum, *Families of U.S. Armed Forces Members and Enlistees* (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_parole_in_place.pdf.

PM-602-0114: Discretionary Options for Designated Spouses, Parents, and Sons and Daughters of Certain Military Personnel, Veterans, and Enlistees
Page 3

positions requiring skills for which there are critical shortages of enlistees.³ The program is currently open to individuals with certain health care skills and individuals fluent in certain foreign languages.

Policy

I. Parole in Place for Families of Certain Military Personnel and Veterans

USCIS has authority to grant parole to noncitizen applicants for admission, including those residing in the United States (through “parole in place”),⁴ on a case-by-case basis for urgent humanitarian reasons or significant public benefit. INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A). The 2013 PM provides guidance on granting parole, on a discretionary case-by-case basis, for certain spouses, children, and parents of, among others, individuals who “previously” served on active duty or in the Selected Reserve of the Ready Reserve. This PM clarifies that such language in the 2013 PM is meant to include former designated military personnel (who were not dishonorably discharged) whether they are living or deceased. The close family members of such individuals, who served and sacrificed for our Nation, are deserving of consideration for a favorable exercise of discretion on a case-by-case basis in accordance with the 2013 PM. This is true regardless of whether the former military service members are living or deceased.

In addition, the 2013 PM contains multiple references to the “children” of current or former military personnel. Under the INA, the term “child” is limited to individuals who are unmarried and under the age of 21. *See* INA § 101(b)(1), 8 U.S.C. § 1101(b)(1). This PM seeks to expand on the provisions in the 2013 PM by replacing all references to “children” in the 2013 PM (and the corresponding provisions in the AFM) with the term “sons and daughters.” This change would further expand the provisions in the 2013 PM to the adult and married sons and daughters of covered military personnel and veterans. Because covered military personnel and veterans generally will be U.S. citizens or lawful permanent residents (or, in the case of MAVNI, soon-to-be U.S. citizens or lawful permanent residents), their sons and daughters will often be on paths to lawful permanent resident status and eventual citizenship. *See* INA § 203(a), 8 U.S.C. § 1153(a). Parole in place or deferred action would therefore serve as a temporary bridge for such sons and daughters while they apply for and await adjudication of their applications for lawful permanent resident status. Moreover, important family relationships continue to exist even after children turn 21 or marry. The same morale, deservedness, and preparedness rationales articulated in the 2013 PM with respect to military personnel and their children continue to apply when such children turn 21 or marry.

II. Deferred Action Requests by DEP Enlistees and the Families of Military Personnel, Veterans, and DEP Enlistees

As in all deferred action determinations, USCIS will make case-by-case, discretionary judgments based on the totality of the evidence. In doing so, USCIS will weigh and balance all relevant considerations, both positive and negative. Certain factors are of particular relevance to the exercise of that discretion when deferred action requests are submitted by DEP enlistees or by the family

³ The MAVNI program is authorized by 10 U.S.C. § 504(b)(2). For further details, see DoD Instruction 1304.26. “Qualifications for Enlistment, Appointment and Induction.” For information about the DoD MAVNI program, see the DoD MAVNI fact sheet, <http://www.defense.gov/news/mavni-fact-sheet.pdf>.

⁴ The parole authority is most frequently used to permit aliens who are outside the United States to come into U.S. territory, but aliens who are already physically present in the United States without having been admitted are also eligible for parole. *See* INA §§ 212(d)(5)(A), 235(a)(1). This latter use of parole is called “parole in place.”

PM-602-0114: Discretionary Options for Designated Spouses, Parents, and Sons and Daughters of Certain Military Personnel, Veterans, and Enlistees
Page 4

members of military personnel, veterans, or DEP enlistees. Particularly strong positive factors specific to such requests include, but are not limited to:

- Being a DEP enlistee, including through the MAVNI program (even if the enlistee’s authorized period of stay expires or terminates while in the DEP);
- Being the spouse, parent, son, or daughter of a MAVNI or other DEP enlistee (even if present in the United States without an authorized status); and
- Being an individual who would be eligible for parole under the 2013 PM, as clarified and amended by the present PM, but for the fact that such individual has already been admitted.

The presence of one or more of the preceding factors does not guarantee a grant of deferred action, which constitutes only a favorable exercise of immigration enforcement discretion, but may be considered a strong positive factor weighing in favor of granting deferred action as a matter of discretion. The ultimate decision rests on whether, based on the totality of the facts of the individual case, USCIS finds that the positive factors outweigh any negative factors that may be present and that a favorable exercise of enforcement discretion is warranted.

If an individual described in any of the three bullets above is approved for deferred action in the exercise of discretion, the period of deferred action should be authorized in two-year increments; USCIS may consider requests for renewal of deferred action as appropriate.

III. Petition for Alien Relative and Work Authorization

USCIS encourages applicants to continue on a path toward lawful permanent resident status whenever applicable. In cases where it is applicable, USCIS encourages the filing of a Form I-130, Petition for Alien Relative, or Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant. In some cases where subsequent parole in place or a renewal of deferred action is requested, such filing may be required (see AFM 21.1(c)(3)(A) below). In addition, individuals who have obtained parole in place or deferred action are eligible to apply for work authorization for the period of parole or deferred action if they can demonstrate economic necessity.⁵

Implementation

The Adjudicator’s Field Manual (AFM) Chapter 21.1, General Information About Relative Visa Petitions, is amended as follows.

1. Section 21.1(c) is revised by:

- Redesignating current section “(c)” as subsection “(1)”;
- Inserting new section “(c)” heading “Special Parole and Deferred Action Considerations.”;
- Inserting, at the beginning of section (c):

On November 15, 2013, USCIS, pursuant to the authority conferred upon the Secretary of Homeland Security by INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A), issued a Policy Memorandum guiding the exercise of discretion with respect to applications for parole by

⁵ See 8 CFR 274a.12(c)(11), (14). See [Form I-765, Application for Employment Authorization](#).

PM-602-0114: Discretionary Options for Designated Spouses, Parents, and Sons and Daughters of Certain Military Personnel, Veterans, and Enlistees
Page 5

designated family members of U.S. military personnel and veterans. On November 20, 2014, the Secretary directed USCIS to issue new policies on the use of both parole in place and deferred action for certain family members of certain military personnel, veterans, and individuals who are seeking to enlist in the U.S. military. See Secretary of Homeland Security Memorandum, "Families of U.S. Armed Forces Members and Enlistees" (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_parole_in_place.pdf

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

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

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

- Revising new subsection 21.1(c)(1) by:
 - Striking "Spouses, Children and Parents" and inserting "Spouses, Parents, Sons, and Daughters" in the heading;
 - Striking "spouse, child or parent" and inserting "spouse, parent, son, or daughter" in the sentence that begins with "The fact that the individual";
 - Inserting "(whether still living or deceased)" in the following places: in the heading, after the word "who"; and in the bullet point that begins with "Evidence that the alien's family member", after the word "who";
 - Inserting "on active duty" in the following places: in the heading, after the word "served"; in the sentence that begins with "The fact that the individual", after the

PM-602-0114: Discretionary Options for Designated Spouses, Parents, and Sons and Daughters of Certain Military Personnel, Veterans, and Enlistees
Page 6

- word “served”; and in the bullet point that begins with “Evidence that the alien’s family member”, after the word “served”;
- Inserting “and Were Not Dishonorably Discharged” at the end of the heading;
 - Inserting “(if the former service member was not dishonorably discharged and either is living or died while the family member was residing in the United States)” in the sentence that begins with “The fact that the individual”, after the second instance of the word “Ready Reserve”;
 - Inserting “(this may include proof of filing a petition in certain cases – see AFM 21.1(c)(3) below);” at the end of the bullet point that begins with “Evidence of the family relationship”;
 - Inserting “(in the case of family members of veterans (whether still living or deceased), the service member must not have received a dishonorable discharge upon separation from the military)” after “(DD Form 1173)” in the bullet point that begins with “Evidence that the alien’s family member”;
 - Inserting “In the case of surviving family members, proof of residence in the United States at the time of the service member’s death;” in a new bullet point after the bullet point that begins with “Evidence that the alien’s family member”; and
 - Inserting the following new paragraphs after the bullet points: “Individuals who have obtained parole in place are eligible to apply for work authorization for the period of parole if they can demonstrate economic necessity. See 8 CFR 274a.12(c)(11), (14). See Form I-765, Application for Employment Authorization.

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

2. A new subsection (2) is added to Chapter 21.1(c) to read as follows:

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

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

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

PM-602-0114: Discretionary Options for Designated Spouses, Parents, and Sons and Daughters of Certain Military Personnel, Veterans, and Enlistees
Page 7

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

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

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

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

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

If an individual described in either of the two bullets above is granted deferred action in the exercise of discretion, the period of deferred action should be authorized in two-year increments; USCIS may consider requests for renewal of deferred action as appropriate. If the individual withdraws from the DEP or becomes disqualified from joining the military, any period of deferred action for the family member may be terminated.

See AFM Chapter 21.1(c)(2)(C) for guidance on filing requests for deferred action. See AFM Chapter 21.1(c)(1) for guidance on parole in place.

(B) Deferred Action for Certain Family Members of Active Duty Members of the U.S. Military, Individuals in the Selected Reserve of the Ready Reserve, or Individuals Who

PM-602-0114: Discretionary Options for Designated Spouses, Parents, and Sons and Daughters of Certain Military Personnel, Veterans, and Enlistees
Page 8

(Whether Still Living or Deceased) Previously Served on Active Duty in the U.S. Military or in the Selected Reserve of the Ready Reserve and Were Not Dishonorably Discharged.

As in all deferred action determinations, USCIS will make case-by-case, discretionary judgments based on the totality of the evidence. In doing so, USCIS will weigh and balance all relevant considerations, both positive and negative. Certain factors, however, are of particular relevance to the exercise of that discretion when deferred action requests are submitted by the family members of military personnel and veterans. One particularly strong positive factor specific to such requests is that the person has been admitted and is the spouse, parent, son, or daughter of an individual who is serving, or has previously served on active duty in the U.S. military or in the Selected Reserve of the Ready Reserve (if the former service member was not dishonorably discharged and either is living or died while the family member was residing in the United States). Such an individual ordinarily fits the guidelines for parole under section 21.1(c)(1) above, except for being statutorily ineligible solely because of his or her prior admission. See INA §§ 212(d)(5)(A), 235(a)(1), 8 U.S.C. §§ 1182(d)(5)(A), 1225(a)(1).

The presence of the preceding factor does not guarantee a grant of deferred action but may be considered a strong positive factor weighing in favor of granting deferred action. The ultimate decision rests on whether, based on the totality of the facts of the individual case, USCIS finds that the positive factors outweigh any negative factors that may be present. If USCIS grants deferred action in the exercise of discretion, the period of deferred action should be authorized in two-year increments; USCIS may consider requests for renewal of deferred action as appropriate.

(C) Filing Request for Deferred Action.

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

- Letter stating basis for the deferred action request [See AFM 21.1(c)(2)(A) and (c)(2)(B)];
- Evidence supporting a favorable exercise of discretion in the form of deferred action as elaborated in AFM 21.1(c)(2)(A) and (c)(2)(B) – (e.g., evidence of family member's current or previous military service, or alien's or family member's enlistment in the DEP; note that in the case of family members of veterans, whether still living or deceased, the service member must not have received a dishonorable discharge upon separation from the military);
- Proof of family relationship, if applying based on family relationship to military member, veteran, or enlistee (this may include proof of filing a petition in certain cases - see section below);
- In the case of surviving family members, proof of residence in the United States at the time of the service member's death;

PM-602-0114: Discretionary Options for Designated Spouses, Parents, and Sons and Daughters of Certain Military Personnel, Veterans, and Enlistees
Page 9

- Proof of identity and nationality (including a birth certificate, a passport and/or identification card, driver's license, notarized affidavit(s), etc.);
- If applicable, any document the alien used to lawfully enter the United States (including, but not limited to, Form I-94, Arrival/Departure Record, passport with visa and/or admission stamp, and any other documents issued by other components of DHS or legacy INS);
- Form G-325A, Biographic Information;
- Two identical, color, passport style photographs; and
- Evidence of any additional discretionary factors that the requestor would like USCIS to consider.

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

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

3. A new subsection (3) is added to Chapter 21.1(c) to read as follows:

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

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

In all cases where a Form I-130 or Form I-360 has been filed, USCIS may grant either parole in place, as provided in AFM 21.1(c)(1), or deferred action, as provided in AFM 21.1.(c)(2), as long as the applicant's Form I-130 (or Form I-360) is pending or approved (and still valid). Even in cases where the Form I-130 or Form I-360 is required, it does not need to be approved prior to a grant of either parole in place or deferred action. Upon receiving the receipt notice for the Form I-130 or Form I-360, the alien may file the request for either parole in place or deferred action with the USCIS office with jurisdiction over the alien's place of residence. The request for either parole in place or deferred action must include documentation to establish an eligible family relationship. Such evidence may include a previously approved petition.

Note: Proof of filing the Form I-130 or Form I-360 is not required, even in applicable cases,

PM-602-0114: Discretionary Options for Designated Spouses, Parents, and Sons and Daughters of Certain Military Personnel, Veterans, and Enlistees
Page 10

for initial requests for parole in place or deferred action as provided under AFM 21.1(c)(1) and AFM 21.1(c)(2). See AFM 21.1(c)(3)(B).

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

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

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

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

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

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

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

4. The AFM Transmittal Memorandum button is revised by adding a new entry, in numerical order, to read:

AFM Update (11/23/2016)	Chapter 21.1	This PM amends AFM Chapter 21.1(c) to address discretionary options for designated spouses, parents, and sons and daughters of certain military personnel, veterans, and enlistees.
----------------------------	------------------------------	---

PM-602-0114: Discretionary Options for Designated Spouses, Parents, and Sons and Daughters of Certain Military Personnel, Veterans, and Enlistees
Page 11

Use

This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information

Questions or suggestions regarding this PM should be addressed through appropriate channels to the Field Operations Directorate or Office of Policy & Strategy.

*Immigrant Legal Resource Center
December 2016*

CHAPTER 7

SUMMARY OF DACA ELIGIBILITY REQUIREMENTS

This chapter includes:

§ 7.1	Introduction	7-1
§ 7.2	What Is Deferred Action for Childhood Arrivals (DACA)?	7-1
§ 7.3	Who Qualifies for DACA?.....	7-5
§ 7.4	Ineligibility Due to Criminal Conduct or Being a Threat to National Security or Public Safety	7-6

§ 7.1 Introduction

Over 700,000¹ undocumented immigrants who came to the United States at a young age, have received protection from deportation, work authorization, and other benefits, as a result of obtaining deferred action under the Deferred Action for Childhood Arrivals (DACA) policy that was announced over four years ago. Research indicates that hundreds of thousands more are eligible, and could benefit from this program. This chapter briefly discusses who is eligible for DACA, as well as criminal and national security grounds that may prevent someone from obtaining DACA. This chapter is included in this manual to provide an overview of the DACA requirements, and to help practitioners identify potentially eligible applicants. It is not intended to be a comprehensive guide on how to handle a DACA case from start to finish. See ILRC’s *DACA: The Essential Legal Guide* for a detailed practitioner’s manual for filing these types of cases.²

CAUTION: DACA is an executive action, not a law, and could be changed by the presidential administration at any point. President Trump has threatened to end DACA. Please stay tuned and visit www.ilrc.org/daca for updates.

§ 7.2 What Is Deferred Action for Childhood Arrivals (DACA)?

Deferred action is a form of prosecutorial discretion that protects a person from deportation, and has existed on a case-by-case basis for many years. However, the Deferred Action for Childhood

¹ This study found that as of 2016, 1.3 million are immediately eligible for DACA because they meet all the requirements—728,000 of those immediately eligible have received DACA, and several hundreds of thousands could benefit from this program. See Faye Hipsman, Barbara Gomez-Aguiñaga, and Randy Capps, Migration Policy Institute, *DACA at Four: Participation in the Deferred Action Program and Impacts on Recipients* (August 2016), available at www.migrationpolicy.org/research/daca-four-participation-deferred-action-program-and-impacts-recipients.

² Available for purchase at www.ilrc.org/publications.

Arrivals policy is a specific deferred action program, announced on June 15, 2012, for undocumented immigrants who came to the United States before the age of sixteen, have lived in the country since at least June 15, 2007, and meet other requirements.³ DACA was created by former DHS Secretary Janet Napolitano issuing a policy memorandum⁴ that authorized the use of prosecutorial discretion for this population. Those who are granted DACA receive a reprieve from deportation, in the form of deferred action, for a period of two years, with the possibility of renewal. Deferred action comes with eligibility for work authorization, and therefore a social security number, and eligibility for a driver's license or other state identification.⁵

With a grant of DACA, the federal government is basically saying: "We know you are in the country without permission or immigration status, and we could deport you, but instead we will defer any action against you." Importantly, the grant of DACA does not confer a legal immigration status, a visa, or a green card. And, it does not provide a path to citizenship. Since DACA is based on administrative action rather than on a law passed by Congress, or an executive order signed by the President, DHS or the President could modify or even eliminate the policy at any time.

DACA is available to people who are in removal proceedings, detained, or already have a final removal or voluntary departure order, as well as to those who have never had any contact with immigration authorities.

PRACTICE TIP: For purposes of this manual, we use the terms DACA "requests" and "applications" interchangeably; USCIS refers to the process as "requests." We call the individuals requesting DACA "applicants," while USCIS calls them "requestors."

A. Who Are the Agencies Involved with DACA and Who Adjudicates DACA Requests?

Several different agencies of the federal government are involved in DACA. These agencies include:

- U.S. Department of Homeland Security (DHS): The agency with the overall responsibility for enforcing U.S. immigration laws.

³ On November 20, 2014, President Obama announced an expansion of the DACA program. However, this expanded version was enjoined by the courts and is not in effect. This expansion was enjoined after a lawsuit was filed by 27 states against the federal government, in the case of *State of Texas, et al. v. United States*, No. 1:14-cv-254 (S.D. Tex. Feb. 16, 2015) (order granting temporary injunction). In June 2016, the lower court's decision was upheld by the U. S. Supreme Court. For more information about the litigation, see: www.nilc.org/issues/immigration-reform-and-executive-actions/united-states-v-state-of-texas/.

⁴ Janet Napolitano's June 15, 2012 policy memorandum announcing the DACA program is available at: www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

⁵ For more information on which states have allowed DACA recipients to obtain driver's licenses, see www.nilc.org/dacadriverslicenses.html.

- U.S. Citizenship and Immigration Services (USCIS): Part of DHS, USCIS is the agency responsible for adjudicating most applications for immigration benefits. USCIS has jurisdiction to adjudicate DACA requests from all applicants, except those that are in immigration detention at the time of filing.
- U.S. Immigration and Customs Enforcement (ICE): Part of DHS, ICE is the agency responsible for enforcing the immigration laws internally, that is, within the borders of the United States, including removing immigrants from the United States. ICE, in exercising prosecutorial discretion, can decline to place someone eligible for DACA in removal proceedings, or can release them from custody so that they can file their application with USCIS.⁶
- U.S. Customs and Border Protection (CBP): Part of DHS, CBP is the agency responsible for guarding the United States' borders and deciding who to let in to the United States. If a DACA recipient is approved to leave the country and return under Advance Parole,⁷ she will still be inspected by CBP upon reentry.
- Executive Office for Immigration Review (EOIR): Part of the U.S. Department of Justice, EOIR is the court system for immigration issues. In immigration court, an immigration judge can grant several forms of relief, but must agree to close the case for a person to pursue DACA (or at least agree to continue the case while the person's DACA application is being adjudicated by USCIS).

Applicants that are not currently in immigration detention should send their DACA request to USCIS. An individual that is currently in immigration detention who believes he meets the guidelines for DACA should identify himself to his deportation officer, who will review the case along with the local Office of Chief Counsel and if it appears that the individual does meet the DACA requirements, will release him on an alternative form of supervision to allow him to pursue DACA with USCIS. An individual that is in removal proceedings, but is not detained, will also submit his DACA application to USCIS, not to ICE or EOIR.

⁶ Applicants who are currently in ICE immigration detention and believe they are eligible for DACA should identify themselves to their deportation officer or Jail Liaison, or contact the ICE Detention Reporting and Information Line at 1-888-351-4024 (staffed 8:00 am–8:00 pm, Monday–Friday), or by email at ERO.INFO@ice.dhs.gov.

⁷ Advance Parole is a temporary permission to travel abroad that DACA beneficiaries may be able to obtain if they are able to show that their purpose for traveling is for one of three purposes: education, employment or humanitarian. A person should not travel outside the United States without first receiving DACA, and applying for and receiving advance parole. Travel without advance parole after August 15, 2012, will terminate DACA for someone who already has received it, and will prevent someone from obtaining DACA for the first time. See USCIS DACA Frequently Asked Questions (hereinafter “DACA FAQs”), questions 56 and 57, available at: www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions#travel.

B. Where Can You Find Policy and Guidelines on DACA?

Since DACA is not a law or executive order, the DACA guidelines will not be found in the Immigration and Nationality Act or in the Code of Federal Regulations. As mentioned earlier in this chapter, the DACA program was announced through former DHS Secretary, Janet Napolitano's June 15, 2012 policy memorandum. That memo lays out the basic framework for who is eligible to receive deferred action and which agencies should exercise prosecutorial discretion. USCIS's webpage on DACA⁸ and Frequently Asked Questions contain all of the detailed policy instructions for DACA. The instructions sheets for the Form I-821D (DACA Request Form) also have helpful information.

Thanks to a FOIA request conducted by Shoba Sivaprasad Wadhia from the Center for Immigrants Rights at Penn State's Dickinson School of Law, advocates now have access to agency documents and instructions on DACA.⁹ These documents are:

- National Standard Operating Procedures for Deferred Action for Childhood Arrivals (hereinafter "DACA SOP v.2"), prepared by Service Center Operations Directorate, April 4, 2013;
- Training Module for Immigration Officers about DACA; and
- Training Module on Responding to DACA Related Requests through the Service Request Management Tool.

USCIS's National Standard Operating Procedures (SOP) on DACA and other documents include very helpful information and provide insight on how USCIS is training their officers and adjudicating DACA requests. Additionally, DACA guidelines from CBP can be found at: AILA InfoNet Doc. Nos. 13031443, 13031444, 13031445, and 13031446 (posted 3/14/13).

Since DACA can be modified or eliminated at any time (as evidenced by President Obama's expansion of DACA), it is important to check the USCIS website frequently for updates, modifications, and alerts on the program. Advocates and community members can also find updates and helpful resources on our ILRC DACA page, available at: www.ilrc.org/daca.

WARNING: USCIS has policies governing the issuance of a NTA (Notice to Appear) and also the referral of cases to ICE for possible placement in removal proceedings in immigration court. If a person submits a DACA request and USCIS decides to deny it, USCIS will not refer the case to ICE for removal proceedings unless the case involves a criminal offense, fraud, or a threat to national security or public safety, including gang allegations. For more detailed information on

⁸ USCIS has a webpage dedicated to DACA, which is available at: www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca. On the USCIS DACA webpage, advocates will be able to find links to the forms and instructions, links to information on DACA in different languages, as well as statistical information on DACA fillings, approvals, and denials.

⁹ All these documents are available at: https://pennstatelaw.psu.edu/file/2013-HQFO-00305_Document.pdf. Note that a second version of the DACA SOP was released on April 4, 2013, available here: www.legalactioncenter.org/sites/default/files/DACA%20Standard%20Operating%20Procedures.pdf.

the applicable NTA guidelines, visit www.uscis.gov/NTA. Always explain the risks to clients, and discuss the advantages and disadvantages of applying for DACA, so that the client can decide whether to apply.

§ 7.3 Who Qualifies for DACA?

A person may qualify for DACA if she:

1. Was under 31 years of age as of June 15, 2012, when DACA was announced (i.e., was born after June 15, 1981)
2. Is at least 15 years old at the time of filing for DACA;
 - *Exception:* an individual currently in removal proceedings, who has a final order of removal, or has a voluntary departure order can request DACA even though she is under the age of 15.
3. Came to the United States under the age of 16;
 - *However,* if the individual entered and left the United States before age 16 and returned after 16, she will have to show that she established residency in the U.S. before age 16.
4. Has continuously resided in the United States since June 15, 2007, up to the present time;
 - “[B]rief, casual, and innocent” absences from the United States will not break the continuous residence requirement, but any departure of any length without advance parole after August 15, 2012 will break continuous residence;
5. Was physically present in the United States on June 15, 2012, and at the time of making the request for DACA;
6. Was undocumented on June 15, 2012;
7. Is currently in school, has graduated from high school, has obtained a certificate of completion from high school, has obtained a General Education Development (GED) certificate, or is an honorably discharged veteran of the U.S. Coast Guard or U.S. Armed Forces; and
8. Has not been convicted (as an adult) of a felony offense, a significant misdemeanor offense, three or more non-significant misdemeanor offenses, or does not otherwise pose a threat to national security or public safety.

Although DACA eligibility requirements seem to be simple, there are various exceptions and additional requirements. Some of those have been added above to the list of requirements, and others related to the criminal and national security grounds of ineligibility are discussed below. For more information about continuous residence, departures that break continuous residence,

meeting the education requirement, and other eligibility criteria, consult ILRC’s manual, *DACA: The Essential Legal Guide*.

PRACTICE TIP: When analyzing DACA eligibility, make sure to fully consider the requirements, exceptions (if any), and their interpretations. Our experience has been that many people do not know that an applicant does not have to be 15 years old to apply for DACA. There are exceptions and so prior contact with immigration officials and possible removal orders should be investigated with the client. Some clients do not know that they have received removal orders at the border or in court because they were very young when it happened. Similarly, continuous residence does not require that the applicant never left the United States; thus, certain departures will not disqualify an applicant. This is all to say that advocates should read the requirements, and the USCIS FAQs, carefully in order to fully understand the requirements, exceptions, and bars.

§ 7.4 Ineligibility Due to Criminal Conduct or Being a Threat to National Security or Public Safety

USCIS discusses the criminal bars in Part V of the DACA “Frequently Asked Questions” (“FAQ’s”), which can be found at the USCIS website.¹⁰ The bars also are discussed in the DHS “Standard Operating Procedures” (SOP v.2) for DACA, Part G, which can be found online.¹¹

If an applicant falls into one or more of the automatic criminal bars and/or raises other concerns such as posing a public safety threat, submitting an affirmative application for DACA should only be done after informing the client of all the risks, including the likelihood of denial, loss of application fee, and possible referral to ICE. Of course, a person who is already in deportation proceedings has little to lose by submitting a DACA application as a defense to deportation.

PRACTICE TIP: All potential DACA applicants who have ever been arrested or convicted, including if they have been arrested by immigration authorities, or as juveniles, and even if they believe their conviction to have been “erased,” should be thoroughly screened to determine if their criminal history could affect their eligibility to apply. While not all criminal history will bar someone from applying for DACA, it is very important to fully understand what happened in your client’s case, it is not sufficient to rely solely on the information your client recalls about the incident. Often, clients understand very little about what transpired or do not recall important details. For this reason, it is very important to obtain a copy of their criminal record. For information on how to do this, visit ILRC’s advisory on how to obtain criminal records, available at: www.ilrc.org/background_check_advisory.

This section covers the type of convictions that will automatically make an applicant ineligible for DACA, except in exceptional circumstances.

¹⁰ DACA FAQs available at: www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions.

¹¹ DACA SOP v.2 available at: www.legalactioncenter.org/sites/default/files/DACA%20Standard%20Operating%20Procedures.pdf.

A. Criminal Convictions That Are Automatic Disqualifiers, Absent Exceptional Circumstances

A conviction for certain types of crimes will make a person automatically ineligible for DACA. A conviction for a felony, a “significant misdemeanor,” or three or more convictions for non-significant misdemeanors arising from three different incidents will disqualify the applicant from DACA benefits. The FAQs (Question 60) state that if an applicant can show “exceptional circumstances,” DHS may exercise its discretion to grant DACA even though the conviction falls within one of the criminal bars. However, such approvals are extremely rare, and are generally not worth the risk of applying unless the client is already in removal proceedings.

DHS has provided some clarification regarding the offenses that will be deemed a felony, significant misdemeanor, or non-significant misdemeanor.¹²

1. Conviction of a felony

Conviction of one or more felonies is an automatic bar to DACA. A felony for purposes of DACA is defined as any federal, state or local offense that has a potential sentence of more than one year. The potential sentence controls, not the state’s label. Thus, even if state law labels an offense with a potential sentence of more than a year a “misdemeanor,” for DACA purposes the offense is a felony.

To determine if a conviction is a felony, research the potential jail sentence for the offense in the relevant criminal code. In some cases, the potential sentence will be listed in the same code section that defines the criminal offense, but in other cases it may be listed somewhere else in the criminal code and may be difficult to find. In case of doubt, consult with an expert to confirm the potential sentence.

The measure is the maximum possible sentence, not the sentence that the person received. Even if the person was not sentenced to any time in jail, as long as the possible sentence was one year, the offense is a felony for DACA.

Example: Abe was convicted of felony theft under New York Penal Law 155.30. The NY code provides that as a class E felony, a person convicted of § 155.30 can be sentenced to up to four years in prison. Abe was sentenced to nine months in jail with additional probation time. This would be deemed a felony for purposes of DACA because the potential sentence is more than one year.

Example: Ana was convicted of class A misdemeanor theft under Texas penal code 31.03, which carries a maximum sentence of one year. Because a felony for DACA purposes requires a possible sentence of more than one year, this conviction is not a felony.

In some cases it may be possible to change a felony conviction to a misdemeanor. Some states give criminal court judges discretion to reduce certain felonies to a misdemeanor. Note that in

¹² See USCIS DACA FAQs, Questions 1-9 under “National Security and Public Safety.”

2014, California designated several felony offenses to be misdemeanors as a matter of law, including all convictions for simple possession of a drug, and many property crimes.¹³

2. *What is a misdemeanor for purposes of DACA?*

Like the definition of felony, a misdemeanor is defined by the potential jail sentence for the offense, and not by the local or state label. For DACA purposes only, a misdemeanor is defined as an offense that carries a potential jail sentence of one year or less, but greater than five days (i.e., at least six days to a maximum of one year).

In some states, an infraction, municipal offense, or other non-misdemeanor, or even some misdemeanor offenses, are only punishable by a fine, and no jail time. This is not a misdemeanor under DACA. Conversely, a state infraction that is punishable by at least six days to a maximum of one year does meet the DACA definition of a misdemeanor, even though it is not considered a misdemeanor under state law. For example, “violations” in New York carry up to 15 days in jail, and thus are considered misdemeanors for DACA. In some states a person can request a judge to reduce a misdemeanor charge or conviction to an infraction. See, e.g., Cal. Penal Code § 17(d).

Misdemeanor convictions can result in automatic disqualification from DACA in either of two ways: (a) one conviction for a significant misdemeanor; or (b) three or more convictions for non-significant misdemeanors that do not arise out of a single scheme.

3. *Conviction of one significant misdemeanor*

A conviction can constitute a significant misdemeanor in either of two ways: (1) it is for one of six enumerated types of offenses or (2) it is not an enumerated offense, but the sentence to time in custody for the offense is more than 90 days.

a. **One misdemeanor involving certain enumerated crimes**

A significant misdemeanor that triggers an automatic criminal bar for DACA includes any misdemeanor conviction for:

- Burglary,
- Domestic violence,
- Drug distribution or trafficking,
- Driving under the influence (DUI),
- Sexual abuse or exploitation, or
- Unlawful possession or use of a firearm.

As long as the *potential* sentence is at least six days to one year for one of these offenses (so that it qualifies as a misdemeanor), the actual sentence *imposed* does not matter. In other words, the conviction is a significant misdemeanor even if a sentence of 90 days or less is imposed.

¹³ See, Kathy Brady and Rose Cahn, *Helping Immigrant Clients with Proposition 47 and Other Post-Conviction Legal Options: A Guide for Legal Services Providers*, available at: www.ilrc.org/sites/default/files/resources/csj-immigrationtoolkit-final-online.pdf.

Advocates must assume the criminal categories will be interpreted broadly. For example, the DUI category has been applied to a variety of state violations involving driving while intoxicated or impaired, as well as state violations that prohibit persons under age 21 from driving with any level of alcohol. See the Practice Tip box below.

In the “regular” immigration context—for example, in deportation proceedings or applications for a green card—strict federal rules govern how to analyze the criminal offense that is the subject of a conviction. These rules are referred to as the categorical approach. Under this approach, burglary, domestic violence, drug trafficking, sexual abuse (of a minor), and firearm offenses have specific federal definitions that apply when determining whether someone is inadmissible or deportable. For instance, burglary is defined as an unlawful entry into or remaining in a building or structure with the intent to commit a crime.¹⁴ If a state’s burglary statute is much broader than this federal definition—for example, if it includes a lawful or unlawful entry, or an entry into a boat—the conviction under that statute might not count as “burglary” for immigration purposes because it does not sufficiently match the federal definition.

DACA treats crimes differently. USCIS has not strictly applied federal definitions in reviewing DACA applications—and even if it did, it has tremendous discretion to deny a case based solely on discretion. Thus, advocates should assume that any offense that is labeled or appears to describe “burglary” or “domestic violence” or any of the significant misdemeanor categories will be problematic.

Further, USCIS might even go beyond the definition of the offense that the person was convicted of, and look at the offense the person was originally charged with, or at the underlying facts of the case. This appears to contradict the USCIS language that a person is barred who actually is “convicted of” a significant misdemeanor. While the language used in the USCIS guidelines indicates that the offense should be specifically listed, advocates should presume that USCIS will take a broad view, such that any offense involving those types of crimes, even if the offense label differs, may trigger the significant misdemeanor bar. In practice, this has been especially true of domestic violence offenses.

Example: Samuel pled guilty to a simple battery offense against his wife. This battery can be committed by a mere “offensive touching” without actual violence. Under federal immigration laws, the offense would not be held a deportable “crime of domestic violence” because the minimum conduct required for guilt does not meet the definition of a crime of violence under 18 USC § 16. See INA § 237(a)(2)(E)(1). However, USCIS does not apply this legal analysis in DACA cases. It still may deny the application on the grounds that the record indicates that the victim of the battery was a domestic partner.

In fact, several DACA applicants who were charged with a domestic violence offense but ultimately were convicted of disorderly conduct or another misdemeanor have been denied DACA. USCIS has found that the domestic violence charges meant that the crime was a significant misdemeanor, even though the actual conviction was not a domestic violence offense at all, and in some cases the charges did not even result in conviction. When advocates argued

¹⁴ *Taylor v. United States*, 494 U.S. 575 (1990) (definition of burglary).

that these were not domestic violence convictions, the agency has denied these cases on discretion. As a result, immigrants with a DV arrest or charge may not want to apply affirmatively for DACA unless they can present evidence that the arrest was erroneous, or unless they have succeeded in expunging the conviction.

In 2015, ICE published an FAQ about its interpretation of the DHS Enforcement Priorities issued in November 2014.¹⁵ As of July, 2016, the FAQ says that application of many of the enforcement priorities will be defined on a case by case basis. More specific information was provided about how ICE will interpret the DUI and Domestic Violence significant misdemeanor categories. The FAQs state that ICE will apply a technical analysis, using the federal categorical approach, to determine whether interpretation of what counts as a domestic violence offense, following the definition in INA § 237(a)(2)(E)(i). This interpretation is from ICE, and therefore does not clearly direct USCIS adjudications for DACA. However, this authority is worth citing to in DACA applications, and may be incorporated into DACA more directly in the future. For more analysis of these FAQs, see ILRC’s practice advisory “Parsing the FAQs on DHS Enforcement Priorities.”¹⁶

Any DACA applicant who has been charged with domestic violence faces a risk in applying. To succeed in spite of a domestic violence charge, an applicant should offer specific arguments or evidence that they in fact were not engaged in domestic violence, as well as compelling equities in their favor overall. Expunging the conviction has also worked for DACA eligibility. A few individuals with domestic violence charges have successfully obtained DACA with a showing that they were in fact victims of domestic violence. USCIS amended the DACA FAQs to clarify that: “In evaluating whether an offense is a significant misdemeanor involving domestic violence, careful consideration will be given to whether the person convicted was the *victim* of domestic violence as a mitigating factor.”¹⁷

PRACTICE TIP: Key defense strategies available in deportation proceedings generally do not apply in DACA applications. In removal proceedings, courts usually use what is known as the “categorical approach.” They compare the elements of the statute under which the person was convicted with the elements of the federal definition of the removal ground at issue to determine if the conviction triggers immigration consequences, e.g., is an aggravated felony, a deportable or inadmissible offense. When the categorical approach applies, the court is permitted to review the individual’s record of conviction only in very limited circumstances. In DACA, however, USCIS conducts an expanded inquiry into the conviction and does not limit its review to the categorical approach or to documents only in the record of conviction.

PRACTICE TIP ON DUIS: The DUI category is broad. USCIS denies DACA for most offenses that involve any intoxication while driving—despite advocates arguing that lesser alcohol-related

¹⁵ ICE, Frequently Asked Questions Relating to Executive Action on Immigration, www.ice.gov/immigrationAction/faqs.

¹⁶ Available at www.adminrelief.org/resources/item.577623-Practice_Advisory_Parsing_the_FAQs_on_DHS_Enforcement_Priorities.

¹⁷ DACA FAQ #62.

traffic offenses should be excluded. For example, applicants with convictions for Driving While Ability Impaired, a Colorado offense that involves driving after consuming alcohol but below the legal DUI limit, have been denied.

One exception is that in California, individuals charged with a DUI may be able to plead to the lesser crime of reckless driving involving alcohol (“wet reckless”). Some DACA applicants with a California wet reckless conviction have been approved. However, these applicants included evidence of significant equities to counterbalance the conviction. Applicants with wet reckless convictions can argue that it is a non-DUI offense and point to the fact (if true) that their blood alcohol content was below the legal limit of 0.08, and that the conviction does not require any finding of actual impairment of the driver. However, convictions of offenses from other states that also do not require a blood alcohol content of .08 or more have generally not been successful.

DUIs in a few states, such as Wisconsin and North Dakota, do not meet the DHS definition of a misdemeanor, because the first offense is a violation with a potential jail sentence of less than six days. Similarly, California Vehicle Code § 23140, prohibiting person under 21 from driving with even a low blood alcohol level, is an infraction punishable only by a fine. In these cases, advocates should point out that these offenses cannot be significant misdemeanors and cannot act as an absolute bar to DACA. Applicants who only have infractions can mark “no” to question 1 of Part 4 on Form I-821D, Consideration of Deferred Action for Childhood Arrivals, because they have not ever been arrested, charged, or convicted of a felony or misdemeanor.

In general, DHS has increasingly prioritized DUIs as enforcement priorities and views them as strong negative factors for prosecutorial discretion. But advocates representing a client applying for DACA as a defense to removal have nothing to lose. If they can expunge or set aside the conviction they will have much better chances of a DACA approval. Otherwise, if possible they should assert that a DUI offense punishable by less than six days in jail does not meet the definition of a significant misdemeanor and thus is not an automatic bar. Advocates should also present the client’s equities to demonstrate that DACA should be granted as a matter of discretion. Finally, the ICE FAQs on the Enforcement Priorities lay out further policies on DUIs and extenuating circumstances. In these FAQs, ICE identified factors for when DHS can determine that an applicant should not be an enforcement priority in spite of a DUI conviction, and defensive DACA applicants should try these arguments as well.¹⁸

b. Conviction of one misdemeanor with a jail sentence of at least 91 days

Any misdemeanor for which a person was sentenced to more than 90 days in jail is a “significant misdemeanor” and a bar to DACA. This does not include suspended sentences or probation.

¹⁸ The ICE FAQs lists relevant factors for officers to consider for making an exception to the DUI enforcement priority: “In the specific context of DUI offenses, such factors may also include the level of intoxication; whether the individual was operating a commercial vehicle; any additional convictions for alcohol or drug-related DUI offenses; circumstances surrounding the arrest, including presence of children in the vehicle, or harm to persons or property; mitigating factors for the offense at issue, such as the conviction being for a lesser-included DUI offense under state law, and other relevant factors demonstrating that the person is or is not a threat to public safety.”

Assault, battery, trespassing, vandalism, disturbing the peace, possession of a drug, being under the influence of a drug (other than when driving), fraud, theft, and possession of stolen property are examples of misdemeanors that will not be “significant” for DACA unless the 91-day sentence is imposed.

In some cases, understanding whether the 91 or more day sentence has been imposed can be a challenge. Different states have different sentencing schemes and may use different terms to describe what happened. The key question always is, did the criminal court judge order the person to actually spend that time in jail, as a penalty for a conviction? Here is a discussion of some common situations. In case of doubt, check with a criminal law expert.

Early Release. If the court orders the person to spend at least 91 days in jail, but the person is released early due to jail overcrowding, the person’s good behavior, or similar factors, the person still is barred.

Example: Toy was convicted of misdemeanor fraud and sentenced to 95 days in jail. With time off for good behavior, she was released after serving only 60 days. She still is barred from DACA, however, because the judge ordered her to serve at least 91 days.

Suspended Imposition of Sentence; Probation. Generally, a person sentenced to probation is required to maintain good behavior, and in some cases fulfill specific tasks such as complete counseling or pay restitution, for a set period of time, such as one or three years. Probation is not a jail “sentence” for DACA or any other immigration purpose. (The exception is that in a few states, such as Texas and Georgia, some forms of suspended sentence may be called probation.)

Example: Joy was convicted of possession of marijuana. The criminal court judge suspended imposition of sentence (did not impose any sentence) and sentenced her to three years of probation. Joy has no sentence for DACA purposes because the probation is not a jail sentence.

In some cases, however, a criminal court judge may order a defendant to spend time in jail as a condition of probation. Because the judge ordered the person to jail, that is a sentence.

Example: In Joy’s case described above, if the judge did everything the same way except that she also ordered Joy to serve 100 days in jail as a condition of probation, that would be a 100-day sentence and Joy would be barred from DACA.

Suspended Execution of Sentence. If a judge imposes a sentence but “suspends the execution” of it (orders that the sentence should not be carried out), there is no sentence for DACA.

Example: Roy was convicted of battery. He is sentenced to probation for a three-year term and is given a one-year jail sentence, execution suspended. With execution suspended, Roy is not required to go to jail. This is not a significant misdemeanor, because the judge has not ordered Roy to spend any time in jail.

If in the future Roy violates his probation, the criminal court judge could decide to execute (carry out) the one-year sentence, and order Roy to spend a year in jail. At that point, the sentence would not be suspended anymore, and it would count for DACA.

In some areas, a judge might impose a one-year sentence and, for example, suspend “all but two months” of it. In that case, the person would be ordered to spend two months in jail, but the other ten months would be suspended. That would be a two-month sentence for DACA.

Jail Time, but Not for a Conviction. Sometimes a person may spend time in jail that is not part of a sentence—for example, time awaiting trial or awaiting charges. This is not a sentence for DACA, unless the person asks the judge to count this “time served” as part of the eventual sentence.

Example: Esther spent 120 days in jail awaiting trial. She was found not guilty at her trial, and was released. Although she spent 120 days physically in jail, she has no “sentence” for DACA purposes. She was detained awaiting trial.

Example: Martin spent 120 days in jail awaiting trial. He finally pled guilty to a misdemeanor. The judge wants to sentence him to 180 days. A common practice would be for Martin to accept that sentence and ask for “credit for time served” for the 120 days he already spent in jail. In that case, those 120 days would be subtracted from the 180-day sentence, so that Martin would only have 60 days left to serve. Unfortunately, he also would have a 180-day “sentence” and would be barred from DACA.

Luckily, Martin’s defense attorney is prepared. She persuades the judge to give Martin a sentence of just 60 days, as long as Martin “waives credit for time served,” so that his time already spent in jail does not count against his new sentence. With this deal Martin still will spend another 60 days in jail—but now he has a 60-day, not 180-day, sentence and he is not barred from DACA.

Sentences and “Regular” Immigration Law. DACA is unusual in immigration law, in that suspended sentences do not count toward criminal-sentence bars. For most immigration law purposes, the sentence imposed includes a suspended sentence. See INA § 101(a)(48)(B), 8 USC § 1101(a)(48)(B). For example, some offenses are “aggravated felonies” only if a sentence of a year or more is imposed—but for this definition, a suspended sentence is included. This difference between DACA and other immigration provisions can lead to the strange result, where a conviction is an aggravated felony, but is not a significant misdemeanor.

Example: Tania is convicted of a theft offense that becomes an aggravated felony if a sentence of a year or more is imposed. See INA 101(a)(43)(G), 8 USC 1101(a)(43)(G). The judge imposes a sentence of one year in jail, but suspends execution. This is not a significant misdemeanor for DACA, because the suspended sentence counts as no sentence for that purpose. But this is an aggravated felony, because if one counts the suspended sentence, Tania has a sentence of one year imposed.

So Tania is eligible for DACA, but her conviction also makes her an enforcement priority, according to the administration's guidance.¹⁹ In addition, an aggravated felony makes her permanently ineligible for many other forms of immigration relief.²⁰ Therefore, Tania should probably not risk applying for DACA unless she is already in removal proceedings.

4. Conviction of three or more non-significant misdemeanors

A person convicted of three or more non-significant misdemeanors is automatically barred from DACA. A non-significant misdemeanor is defined as a "misdemeanor" conviction that is not a "significant" misdemeanor by category, and for which the person was not sentenced to more than 90 days in jail time, (excluding suspended sentences).

A non-significant misdemeanor must also meet the definition of a misdemeanor, meaning that it must carry a potential jail sentence of at least six days and maximum one year. Look carefully at the offense to make sure that a jail sentence of at least six days could be imposed for the offense. For many state infractions or violations this might not be the case. If so, then this is a potential defense against triggering the non-significant misdemeanor bar.

An important limitation to this criminal bar is that the three convictions must be from three separate criminal schemes. If multiple misdemeanor convictions are based on conduct that occurred on the same day and arose from the same act, omission or scheme of misconduct, those convictions will just count as one of the three misdemeanors. The term "single scheme of misconduct" appears elsewhere in immigration law, but the other terms, "same act or omissions," do not. In the DACA context, the single scheme argument has worked for applicants who were convicted of two or more misdemeanor counts arising from the same incident, such as possession of marijuana and unlawful consumption of alcohol under age 21, where the applicant also had a previous misdemeanor.

Example: Angela was arrested for vandalism, public drunkenness and disorderly conduct after getting drunk with her friends and painting graffiti on a bridge. The public drunkenness charge was dismissed, but Angela pled guilty to misdemeanor vandalism and disorderly conduct, and was sentenced to six months suspended sentence and two years' probation. For purposes of the three misdemeanor bar, Angela has only one misdemeanor: the vandalism and disorderly charges occurred on the same day and were part of the same scheme, and so should not count as separate misdemeanors for this bar. (As always, however, Angela could be denied in USCIS's discretion.)

A Note on Foreign Convictions: Part 4, Question 1 on the Form I-821D asks applicants whether they have ever been "arrested for, charged with, or convicted of a crime in any country other than

¹⁹ See "Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants" (November 20, 2104), referred to as the Enforcement Priorities Memo, found at www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

²⁰ For example, cancellation for non-permanent residents and asylum are barred by an aggravated felony. See sources such as the ILRC *Relief Toolkit* at www.ilrc.org/files/documents/17_relief_toolkit_jan_2015_final.pdf.

the United States.” The FAQs do not discuss foreign convictions. However, the DHS Standard Operating Procedures (SOP v.2) provide that “a foreign conviction, standing alone, will generally not be treated as a disqualifying felony or misdemeanor. Such convictions, however, may be considered when addressing whether the person poses a threat to public safety.”²¹ While there is case law on how to treat foreign offenses for purposes of immigration,²² it is unclear whether the analysis under this existing case law will control or whether DHS will evaluate the foreign offense using the DACA definition of a felony or misdemeanor based on the potential jail sentence in the foreign country.

IMPORTANT: Exceptions to the DACA Criminal Bars. DHS announced that certain dispositions will not be considered to be misdemeanor or felony convictions that act as automatic bars to DACA. This includes dispositions that do serve as convictions for almost all other immigration purposes, such as an expunged conviction. These DACA-specific rules may differ from the current rules on what meets the definition of a conviction under the INA, generally to the advantage of DACA applicants.

Here are the exceptions to the automatic criminal bars:

- A conviction for a minor **traffic offense**, such as driving without a license or insurance. A misdemeanor conviction for a minor traffic offense will not be considered a misdemeanor for purpose of DACA, even if the jurisdiction labels it a misdemeanor. (FAQ, question 64.) But remember that a conviction for driving under the influence of drugs or alcohol is always a significant misdemeanor.
- A conviction of a **state immigration-related offense**, such as the immigration-related criminal penalties (felony or misdemeanor) in states that have passed anti-immigration legislation including Arizona, Alabama, and Georgia. (FAQ, Question 66.) The situation is less clear regarding other state offenses that do not specifically refer to immigration status, but actually are designed or enforced to target immigrants, such as Ariz. Rev. Stat. § 13-2009, which punishes ID theft for the purpose of obtaining employment. The ICE FAQs on DHS enforcement priorities state that such convictions will be presumed to count as convictions, but that officers should be “sensitive to the overall circumstances of the arrest and conviction.”²³

²¹ National Standard Operating Procedures Version 2 (SOP) Deferred Action for Childhood Arrival (April 13, 2013) prepared by Service Center Operations Directorate of the US Department of Homeland Security, p. 83.

²² See, e.g., *Matter of De La Nues*, 18 I&N Dec. 140 (BIA 1981).

²³ ICE Frequently Asked Questions Relating to Executive Action on Immigration, www.ice.gov/immigrationAction/faqs. (“Circumstances that may be relevant in [ID theft or similar prosecutions] include whether DHS was the agency that presented the case for prosecution, whether there is a victim in the case, the nature of any loss or harm experienced by the victim as a result of the crime, the sentence imposed as a result of the conviction (including whether the conviction was subsequently reclassified as a misdemeanor), whether there is any indication that the conviction has been collaterally challenged based on allegations of civil rights violations, and the nature and extent of the individual’s criminal history.”)

- **Expunged convictions.** This arguably includes any state conviction treated under rehabilitative relief, meaning where the conviction is eliminated based on successful completion of probation or similar factors. (FAQ, Question 67.)
- **Juvenile delinquency adjudications.** These civil adjudications are for youth who are treated in the juvenile justice system and not as adults. Juvenile adjudications are not criminal convictions and do not constitute a bar to DACA, although they can serve as a negative discretionary factor. (FAQ, question 67.)
- **A disposition that is not a “conviction” because it lacks key constitutional protections.** In some jurisdictions, a person can be found guilty of an “infraction” or other minor offense in a proceeding that does not provide the legal protections normally found in a criminal case, such as the requirement of proof of guilt beyond a reasonable doubt, or the availability of a jury trial. Advocates can cite BIA cases to argue that this is not a conviction at all.²⁴ We do not know if this has been used successfully in DACA cases.
- **Exceptional circumstances.** The FAQs state that an applicant who can show exceptional circumstances could be approved in spite of having a conviction that would be an automatic bar to DACA. (FAQ, Question 60.) However, we are aware of only one instance in which DHS applied this exception.

The criminal bars to DACA can be complex, and simply having a criminal conviction, or prior arrest does not necessarily mean a person is not eligible for DACA. As discussed above, there are exceptions to the criminal bars. Additionally, while a person may not be categorically barred from requesting DACA, it is important to evaluate whether applying will nevertheless expose them to being referred to ICE. These and other topics are discussed in greater detail in ILRC’s manual, *DACA: The Essential Legal Guide*.

²⁴ For further discussion of this argument, see www.ilrc.org/resources/arguing-that-a-california-infraction-is-not-a-conviction-test-for-non-misdemeanor-offenses.

CHAPTER 8

ADVANCE PAROLE AND TRAVEL

This chapter includes:

§ 8.1	What Is Advance Parole?	8-1
§ 8.2	Requesting Advance Parole as a DACA Recipient	8-2
§ 8.3	Risks of Traveling Abroad for DACA Recipients	8-4
§ 8.4	Advance Parole and Adjustment of Status	8-8

§ 8.1 What Is Advance Parole?

One benefit of DACA is that recipients may apply for permission to travel abroad temporarily through advance parole. Advance parole grants a person a specific window of time during which they may leave the United States and be permitted to return. Parole, in immigration law more generally, is “the authorization to allow an otherwise inadmissible person to physically proceed into the United States under certain safeguards and controls.”¹ Section 212(d)(5) of the Immigration and Nationality Act (INA) provides DHS with the discretionary authority to parole an individual into the United States “for urgent humanitarian reasons” or “significant public benefit.” Note that parole is not an “admission” into the United States; an individual who has been paroled has not been “admitted.”² Instead, the parolee is considered an “applicant for admission” and, as such, is subject to removal proceedings based upon grounds of inadmissibility, notwithstanding the grant of parole.³

Advance parole gives an individual who is in the United States advance authorization to enter the United States after temporary travel abroad.⁴ A person within the United States applies in advance for parole, with which they can leave and then re-enter despite inadmissibility or lack of status. U.S. Citizenship and Immigration Services (USCIS) has the authority to grant advance parole and issue a Form I-512L, an advance parole authorization document.⁵ This document allows a Customs and Border Protection (CBP) or other immigration inspector at a U.S. port of entry to parole an individual into the United States. Advance parole does not guarantee subsequent parole into the United States, however; the inspecting immigration official may, in his

¹ USCIS DACA National Standard Operating Procedures Manual at 135, April 4, 2013, available at www.cliniclegal.org/resources/deferred-action-childhood-arrivals (hereinafter DACA SOP).

² INA § 212(d)(5).

³ See, e.g., *Matter of G-A-C*, 22 I&N Dec. 83, 88-89 (BIA 1998).

⁴ Advance parole is an administrative practice derived from the general parole authority in INA § 212(d)(5). 8 CFR § 212.5(f); see also USCIS definition of Parolee, including definition of Advance Parole, <http://1.usa.gov/91KMKG>; USCIS Adjudicator’s Field Manual, § 54.1(c); *Matter of Arrabally & Yerrabelly*, 25 I&N Dec. 771, 777 (BIA 2012) (providing general information about advance parole).

⁵ INA § 212(d)(5); 8 CFR §§ 212.5(a), (f); USCIS Adjudicator’s Field Manual, § 54.1(a).

or her discretion, deny parole at the port-of-entry.⁶ In order to receive advance parole, a DACA recipient generally must show that she is traveling abroad for humanitarian, employment, or educational purposes.

WARNING: An advance parole authorization document (Form I-512L) authorizes re-entry into the U.S., but does not guarantee that the bearer will be paroled into the United States upon her return.⁷ When a recipient of advance parole presents herself at a U.S. port-of-entry, upon her return, she will be subject to inspection by an immigration official who will make a discretionary decision as to whether she will be paroled into the United States.⁸ As mentioned above, a person who enters with parole is not “admitted,” and will still be considered an applicant for admission even after entering the United States. The grounds of inadmissibility will still apply to a parolee.

§ 8.2 Requesting Advance Parole as a DACA Recipient

DACA recipients interested in traveling abroad will have to apply for advance parole by filing Form I-131 (Application for Travel Document)⁹ along with supporting documents, and pay the \$360 fee to USCIS.¹⁰ This fee is likely to increase to \$575 (or similar) by fall of 2016. Consult the form instructions for the most up-to-date filing fee. The updated instructions to Form I-131 include information to help DACA recipients properly fill out the form. The instructions also explain what additional documents DACA recipients must submit with their application.¹¹

CAUTION: DACA is an executive action, not a law, and could be changed by the presidential administration at any point. President Trump has threatened to end DACA. Please stay tuned and visit www.ilrc.org/daca for updates.

USCIS will currently only grant advance parole to DACA recipients if the travel abroad is in furtherance of one of the following categories:

- **Humanitarian purposes**, including travel to obtain medical treatment, attending funeral services for a family member, or visiting an ailing relative;
- **Educational purposes**, such as semester-abroad programs and academic research, or;

⁶ Instructions for Application for Travel Document at 1, available at <http://1.usa.gov/xOVcM> (hereinafter Form I-131 instructions).

⁷ Form I-131, Instructions, p. 1.

⁸ *Id.*

⁹ Form I-131, Application for Travel Document, is available at www.uscis.gov/i-131.

¹⁰ For more information about how to apply for advance parole as a DACA recipient, see The Legal Action Center: American Immigration Council and the Catholic Legal Immigration Network, Inc. practice advisory, “Advance Parole for Deferred Action for Childhood Arrivals (DACA) Recipients (Aug. 28, 2013), p. 3, available at www.legalactioncenter.org/practice-advisories/advance-parole-deferred-action-childhood-arrivals-daca-recipients. See also E4FC and Curran & Burger, LLP, “Got DACA Now What? ...” guide, pp.4–7.

¹¹ Form I-131, Instructions.

- **Employment purposes** such as overseas assignments, interviews, conferences or, training, or meetings with clients overseas.¹²

Travel for purely vacation purposes is not a valid basis for advance parole for DACA recipients.¹³

USCIS will review all advance parole requests on a case-by-case basis, determine whether the DACA recipient's purpose to travel abroad is justifiable, and if it falls within one of the above three categories. In evaluating the advance parole request, USCIS will look at the evidence submitted by the applicant to support her reason for travel outside of the United States. The instructions to Form I-131 and the Standard Operating Procedure for DACA list some examples of appropriate evidence for requesting advance parole under each of the three categories.¹⁴

- **Evidence to support a request for humanitarian purposes** should show "emergent, compelling or sympathetic circumstances,"¹⁵ and might include:
 - Documentation of a family member's serious illness or death, such as a letter from a hospital or treating physician explaining the family member's illness or a death certificate of a deceased relative, or
 - A letter from the applicant's physician explaining the nature of the applicant's medical condition, the specific medical treatment sought outside of the United States, and a brief explanation of why travel outside of the U.S. is medically necessary.
- **Evidence to support a request for educational purposes** may include:
 - A letter from the applicant's educational institution, or from an employee of the institution acting in his or her official capacity explaining why the travel is required or beneficial; or
 - A document showing enrollment in a specific program or class requiring travel.
- **Evidence to support a request for employment purposes** must show that the travel relates to 'fulfilling job requirements,'¹⁶ and may include:
 - A letter from the applicant's employer describing the need for travel; or
 - A document showing a specific employment need, such as a conference program that also shows the applicant's participation.

¹² USCIS FAQs Question 58.

¹³ *Id.* Please note that advance parole is available in other contexts apart from DACA, such as for those with pending adjustment applications or those with TPS. Those with TPS or pending adjustment applications may travel for purposes outside those approved for the DACA program. The requirements for advance parole are distinct for DACA.

¹⁴ Form I-131, Instructions, p. 8. See also, DACA SOP v.2, pp. 136-137.

¹⁵ DACA SOP v.2, p. 136.

¹⁶ DACA SOP v.2, p. 137.

NOTE: The list of evidentiary examples provided by USCIS is not exhaustive. Therefore, advocates requesting advance parole for DACA recipients based on any of the three categories may submit evidence not specifically listed. Remember that advance parole is discretionary and USCIS will look to the circumstances described in the request (including supporting documents) to determine whether the purpose for international travel is justified.

PRACTICE TIP: USCIS may grant very limited time for travel on Advance Parole. A DACA recipient whose plane is delayed could miss her advance parole deadline and be unable to return to the United States. Therefore, the applicant must plan carefully and should ask for sufficient time to complete the travel safely.

§ 8.3 Risks of Traveling Abroad for DACA Recipients

Traveling outside of the United States, even for DACA recipients who have been granted advance parole, may impact their ability to return to the United States or to obtain a permanent form of relief in the future. DACA grantees interested in traveling abroad through advance parole should consult with an expert immigration practitioner before leaving the United States to determine if there are any circumstances in their immigration case, such as a prior removal order, or other grounds of inadmissibility that may have potentially serious future immigration consequences or present risks to reentering successfully.

1. *Exclusion, deportation, and removal orders*

A DACA recipient that has been previously ordered deported may still request and obtain advance parole.¹⁷ However, if she leaves the United States after being ordered deported, her departure from the United States will result in her executing that removal order, with potentially serious future immigration consequences, including the inability to be lawfully admitted to the United States for many years.¹⁸ This is true even if the client has received deferred action from USCIS or ICE and has been granted advance parole. If a DACA recipient has an outstanding order of removal or is in proceedings, they should consult with an immigration attorney before leaving on advanced parole.

2. *Unlawful presence bars*

In general, a person who leaves the United States after having been in the United States unlawfully for more than six months and then seeks admission may be subject to the unlawful presence provisions of INA § 212(a)(9)(B)—the unlawful presence bars.¹⁹ These bars are

¹⁷ USCIS FAQs Question 58.

¹⁸ See INA § 212(a)(9)(A). If the deportation order has already been executed in the past, and the DACA applicant subsequently reentered, departure on advance parole will not re-execute the order. However, it may be risky to travel in such a situation, where CBP could decide to reinstate that removal order rather than allow reentry on parole.

¹⁹ INA § 212(a)(9)(B) includes two grounds of inadmissibility commonly referred to as the “three-” and “ten-year” bars. Generally, someone who remains more than 180 days without authorization may be subject

triggered on departure from the United States. Unlawful presence is not counted against a person until she leaves. However, there is an exception to the unlawful presence bars: they do not apply to a person traveling with advance parole. In 2012, the BIA ruled in *Matter of Arrabally and Yerrabelly* that travel on advance parole was not a “departure” for purposes of inadmissibility under 212(a)(9)(B)(i).²⁰

Matter of Arrabally involved applicants for adjustment of status who travelled on advance parole while their adjustment applications were pending. Their adjustment was then denied because USCIS determined that, notwithstanding their advance parole, their departure to India had triggered the unlawful presence bars to admissibility. In *Matter of Arrabally*, the BIA overruled this finding and held that it would be unreasonable to apply the unlawful presence bar when the applicants had specifically sought and received the government’s approval to travel.²¹ As such, the BIA held that a departure with advance parole is not a “departure” that would trigger the unlawful presence bars.

Matter of Arrabally and Yerrabelly has since been applied to TPS and DACA recipients who traveled on advance parole and then sought adjustment of status. They were able to adjust status because they had not triggered the unlawful presence bars when they left and returned under advance parole.

WARNING: *Matter of Arrabally* does not prevent the *execution* of a removal order that was outstanding. A person who was ordered removed but never left the United States, then received DACA, will execute that removal order if they leave the country, even with advance parole. They may be permitted to reenter on parole, but they will have triggered grounds of inadmissibility based on that removal.

In November, 2014, President Obama issued a number of executive actions, including a memo on parole.²² This memo directed the Office of General Counsel to “issue written legal guidance on the meaning of the *Arrabally* decision, which will clarify that in all cases when an individual physically leaves the United States pursuant to a grant of advance parole, that individual shall not have made a ‘departure’ within the meaning of section 212(a)(9)(B)(i) of the INA.”²³ This further legal guidance has not yet been released, but in general, practitioners can expect that immigrants who obtain advance parole to travel should not trigger the unlawful presence bars.

Example: Marta entered the U.S. without inspection in 1997, when she was 7 years old, and has never left. She got DACA last year, and she recently got engaged to Anton, a U.S. citizen, and they are preparing her I-130 petition. Marta’s employer would like to send her on a trip to China for work. Marta can qualify for advance parole because her

to a three-year bar to legal re-entry and a person who has lived in the United States unlawfully for a year or more may be subject to the 10-year bar.

²⁰ *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012).

²¹ *Id.* at 775.

²² See www.dhs.gov/immigration-action.

²³ Secretary Jeh Johnson, Department of Homeland Security, “Directive to Provide Consistency Regarding Advance Parole” Nov. 20, 2014.

travel is for employment purposes. If she travels with advance parole, she will not trigger the unlawful presence bars when she goes to China, because her trip will not count as a ‘departure’ for purposes of INA § 212(a)(9)(B). Marta may also be able to adjust status as an immediate relative after her return, see § 8.4 below.

WARNING: INA § 212(a)(9)(C) sets out a “permanent bar” to admissibility for those that re-enter illegally, or attempt to re-enter the United States illegally after more than a year of unlawful presence, in aggregate or after a prior removal or deportation order. This provision also applies to minors. Therefore, if a child or adult had unlawful presence for more than a year in the United States after April 1, 1997, then leaves and re-enters illegally, she will be inadmissible under INA § 212(a)(9)(C). However, the permanent bar does not make a person ineligible for DACA.

USCIS does not consider parole pursuant to INA § 212(d)(5) to be an illegal reentry without admission that would trigger the permanent bar. Therefore, reentry with advance parole would not make someone inadmissible under INA § 212(a)(9)(C). However, a departure and illegal reentry in the past could have already triggered the permanent bar. It is important to ask your client about all prior departures and entries.

3. *Other grounds of inadmissibility*

CBP may screen for inadmissibility, even though parole is not an admission, and the returning DACA parolee remains an applicant for admission. CBP has discretion to grant parole in spite of inadmissibility; in fact, that is the purpose of the parole power. Nonetheless, CBP will have a particular eye out for travelers who pose a threat to security or have some concerns about criminal history or fraud.

There are many ways a person might be found to be inadmissible under the immigration laws. These include grounds based on smuggling (including helping a family member cross the border illegally), lying or making a material misrepresentation to an immigration official (such as using a false U.S. passport or green card to enter the U.S.), and criminal bars. Advocates should pay close attention to criminal history, drug use, past contact with immigration officials, and multiple entries to the United States. These are just a few examples of the many ways that a person can be found to be inadmissible, even though they were eligible for and received DACA.

Example: Two years ago, Sonja, a college student, was caught with tabs of ecstasy and convicted of misdemeanor possession of a controlled substance. In spite of this, Sonja was able to get DACA, because her conviction was not a bar to eligibility, and she presented evidence of her strong ties to the U.S. and excellent academic achievements. Sonja would like to get advance parole and participate in a study abroad program in India. Although Sonja is eligible for advance parole because she has DACA and wishes to travel for an educational purpose, it is very risky for Sonja to leave the country if she hopes to return. Even if she has advance parole, she could be found inadmissible under INA § 212(a)(2)(A)(i)(II) for her conviction involving a controlled substance, and prevented from re-entering.

The example with Sonja illustrates the current conundrum of advance parole. While USCIS has authorized a re-entry for someone who is otherwise inadmissible, CBP may still exercise discretion in allowing this person to re-enter. Because CBP still inspects the person granted advance parole upon return, they may deny re-entry. While there is no requirement that a person is admissible to be granted advanced parole, indeed it is a mechanism to enter for those that are otherwise not admissible, CBP may still deny re-entry for those with admissibility issues. Criminal and fraud grounds, in particular, might cause an officer to deny entry at time of inspection. Advocates are lobbying to reduce this uncertainty at the border for those granted advance parole. However, to date CBP still has final authority as to whether to allow the person to re-enter on parole.²⁴

Example: Manuel came to the U.S. without inspection in 1992, when he was ten years old, and lived in El Paso for nine years. In 2001, when he was nineteen, he went back to Mexico for the summer, and then reentered without inspection to start college. He got DACA two years ago. Manuel is a scientist and wishes to get advance parole for a conference in Montreal. Manuel can qualify for advance parole because he wishes to travel for employment purposes. If he goes to Montreal, he will not trigger the unlawful presence bars because he is not making a ‘departure’ for purposes of 212(a)(9)(B). However, when he returns, Manuel will still be inadmissible because he triggered the permanent bar when he went to Mexico and reentered unlawfully several years ago. As a result, he could be denied entry at the border.

4. Complications related to renewal of DACA

Individuals who travel outside the country after August 15, 2012 without advance parole are not eligible for initial DACA.²⁵ Likewise, after a person has received DACA, if she travels outside the country after August 15, 2012 without advance parole, she will not be eligible to renew DACA.²⁶ Finally, USCIS may terminate a person’s DACA if she leaves the U.S. without advance parole, although it is more likely that the person will be denied DACA at the time of renewal.

When renewing DACA, USCIS will likely request documentation related to the applicant’s travel. For this reason, DACA recipients should keep originals or copies of: (a) Form I-512L, *Authorization for Parole of an Alien into the United States*; (b) Form I-94, *Arrival or Departure Record* (if issued by CBP); (c) completed Form I-131, *Application for Travel Document*; (d) Form I-797, *Notice of Action* or document from ICE granting deferred action; (e) passport stamps; and (f) plane, bus, or other travel documentation.

DACA recipients should take photographs or make copies of all of the above documents as soon as they receive them because CBP may take these documents when the DACA recipient leaves or

²⁴ See this FOIA for a 2008 CBP directive regarding parole and admissions procedures at the border: www.nationalimmigrationproject.org/PDFs/press_releases/2008_Sep_parole-authority.pdf.

²⁵ USCIS FAQs Question 51.

²⁶ See *id.*, (requiring that an individual did “not depart the United States on or after Aug. 15, 2012, without advance parole” to be eligible for renewal of DACA).

re-enters the country. When requesting renewal, DACA recipients should submit as much of the above documentation as possible with their request, *especially* Form I-512L.

When applying to renew DACA, the applicant should include a cover letter that clearly explains that she traveled on advance parole. She should state that she applied and received advance parole, left within the periods of advance parole (if applicable), and list the supporting documents she is including in her renewal request verifying the travel. Additionally, applicants should inform a legal representative filing DACA renewal on their behalf of travel with advance parole and provide the relevant dates and supporting documentation. Applicants must disclose travel on advance parole when filing for renewal using Form I-821D.

WARNING: Although technically a person does not have to be admissible in order to be paroled in to the U.S., CBP has discretion at the border to deny entry. CBP can apply the grounds of inadmissibility even though parole is not an ‘admission.’ Therefore, it is more risky for someone subject to the grounds of inadmissibility, other than unlawful presence, to travel.

Remember that one of the most common grounds of inadmissibility for DACA recipients, presence without ‘being admitted or paroled’ under INA § 212(a)(6)(A)(i) does not apply to someone seeking entry from outside the U.S. Nonetheless, as discussed above, many other grounds of inadmissibility might affect a DACA recipient who leaves with advance parole, especially any criminal bars or a history of fraud in an individual’s immigration history.

An immigration expert should assess whether a DACA recipient is admissible to the United States and whether any of the inadmissibility bars apply. For a more detailed discussion about the grounds of inadmissibility see ILRC’s manual, *Inadmissibility & Deportability*.

§ 8.4 Advance Parole and Adjustment of Status

A DACA recipient who travels on advance parole may gain the ability to adjust status in the United States upon their return. To adjust status, a person must have been inspected and admitted or paroled into the United States.²⁷ Many DACA recipients originally entered the United States without inspection, and therefore are not able to apply for adjustment of status within the U.S. Obtaining DACA, and then travelling and re-entering the U.S. with parole, may give some of these individuals the ability to adjust status through a family member after their return to the U.S.

Before the Board’s decision in *Matter of Arrabally and Yerrabelly*, this was generally impossible, because leaving the U.S. would trigger the unlawful presence bars, and they would be inadmissible and unable to get a green card. But following *Arrabally* and the President’s directive about advance parole (discussed above), immigrants can be reasonably confident that travelling under a grant of advance parole will not trigger the unlawful presence bars in INA § 212(a)(9)(B).²⁸ Indeed, a number of DACA applicants have successfully adjusted their status

²⁷ INA § 245(a).

²⁸ *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012); Secretary Jeh Johnson, Department of Homeland Security, “Directive to Provide Consistency Regarding Advance Parole” Nov. 20, 2014.

after being paroled back into the United States. For a more in-depth discussion surrounding these issues, consult *DACA, Advance Parole, and Family Petitions*, a practice advisory by the Immigrant Legal Resource Center at www.ilrc.org/resources/from-advance-parole-to-a-green-card-for-daca-recipients.

1. Requirements for adjustment of status

USCIS may adjust a person's status to permanent residence if they have been "inspected and admitted or paroled" into the United States, and if they meet the other requirements of INA § 245(a): 1) they must apply for adjustment; 2) they must be eligible to receive an immigrant visa and be admissible to the United States for permanent residence, and 3) an immigrant visa must be available when they file the adjustment application. In addition, they must not be barred from adjustment of status under INA § 245(c).

Most undocumented immigrants, including DACA recipients, are not able to adjust because they were not inspected and admitted or paroled into the U.S. or are otherwise inadmissible. However, the availability of advance parole changes this analysis. A DACA recipient who travels outside the U.S. on advance parole has now been paroled, and meets the threshold requirements of INA § 245(a). Now, if they are otherwise admissible and an immigrant visa is available, they may apply to adjust status to permanent resident.

WARNING! INA § 245(c) sets out several bars to adjustment of status. Those that are eligible to adjust as immediate relatives are exempt from these bars. If your client is not adjusting as the spouse, parent or child of a U.S. citizen, these bars will apply! See **Subsection 3** below.

2. Inadmissibility under INA § 212(a)(6)(A)(i)

The inspection and parole after a trip with advance parole cures a parallel problem of inadmissibility under INA § 212(a)(6)(A)(i). INA § 212 lays out many different grounds of inadmissibility, all of which must be avoided (or waived) to obtain adjustment of status. One very common ground of inadmissibility is INA § 212(a)(6)(A)(i), which makes inadmissible any immigrant who is present in the United States "without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General."²⁹ In other words, those that entered without documents, illegally, are subject to this ground of inadmissibility. However, re-entering the country pursuant to advance parole is sufficient to avoid this ground of inadmissibility, because the person has been "paroled."

In 2013, USCIS issued a memorandum describing a prosecutorial discretion option for "parole in place" which provided detailed guidance about how parole interacts with INA § 212(a)(6)(A)(i). "Parole in place" is another form of parole, which the Obama administration has applied to

²⁹ INA § 212(a)(6)(A)(i).

certain family members of U.S. military and veterans. Those granted parole in place are considered “paroled” into the United States without traveling at all.³⁰

In this memorandum, USCIS writes that: “An alien who entered the United States without inspection, but subsequently receives parole, is not inadmissible under either of the two inadmissibility grounds contained in section 212(a)(6)(A)(i).”³¹ Therefore, if a person’s only bar to adjustment of status as an immediate relative was that they entered the United States without being “inspected, admitted, or paroled,” then receiving Parole in Place means that they are no longer inadmissible on this basis, because they have now been paroled. Although this analysis and explanation is in the policy for family members of U.S. military and veterans, the memo states: “This amendment to AFM chapter 40.6 applies to any paroled alien, not only to the family members of Armed Forces personnel.”³²

As a result, DACA recipients who entered without inspection, but who are not subject to any other grounds of inadmissibility, may be able to adjust status as immediate relatives, if they successfully obtain a grant of Advance Parole and are paroled back into the United States after travel. As always, the person seeking to adjust must have an immigrant visa available to them and must not otherwise be inadmissible.

Example: Marta, from the first example above, traveled to China for work with advance parole. When she returned, she was paroled into the United States. She is no longer inadmissible under 212(a)(6)(A)(i) for presence without admission or parole, nor is she inadmissible under the unlawful presence bars for having departed the United States after accruing unlawful presence, because her trip was not a ‘departure’ for purposes of

³⁰ Advocates should be aware that the parole in place memorandum for close relatives of U.S. Military members eliminates only the grounds of inadmissibility found in INA § 212(a)(6)(A)(i) (related to entry without inspection, admission, or parole). Persons seeking adjustment of status still must overcome all other grounds of inadmissibility.

³¹ The Memorandum continues: “For an alien who entered without inspection, a grant of parole under INA § 212(d)(5)(A) affects at least two of the eligibility requirements for adjustment of status. First, adjustment of status requires that the person be ‘admissible.’ INA § 245(a)(2). As discussed above, parole eliminates one ground of inadmissibility, § 212(a)(6)(A)(i). Second, adjustment of status requires that the alien have been ‘inspected and admitted or paroled.’ INA § 245(a). The grant of parole under INA § 212(d)(5)(A) overcomes that obstacle as well. The alien must still, however, satisfy all the other requirements for adjustment of status. One of those requirements is that, except for immediate relatives of United States citizens and certain other individuals, the person has to have ‘maintain[ed] continuously a lawful status since entry into the United States.’ INA § 245(c)(2). Parole does not erase any periods of prior unlawful status. Thus, an alien who entered without inspection will remain ineligible for adjustment, even after a grant of parole, unless he or she is an immediate relative or falls within one of the other designated exemptions. Moreover, even an alien who satisfies all the statutory prerequisites for adjustment of status additionally requires the favorable exercise of discretion.”

³² Also, as discussed above, in November 2014, Secretary Jeh Johnson issued a memo regarding advance parole, directing the DHS General Counsel to issue further legal guidance on advance parole, clarifying that leaving the United States with a grant of advance parole will not be a departure for purposes of INA § 212(a)(9)(B)(i). Secretary Jeh Johnson, Department of Homeland Security, “Directive to Provide Consistency Regarding Advance Parole” Nov. 20, 2014.

212(a)(9)(B). She is also eligible to adjust under INA § 245(a) because she now has been paroled. As a result, Marta can apply for adjustment of status based on her husband Anton's petition.

Example: Manuel, the scientist from the other example above, goes to a lawyer for help applying for advance parole to go to the conference in Montreal. He also explains to the lawyer that last month he married his fiancé, a U.S. citizen, and wants to know if he can get a green card. Although he is married to a U.S. citizen, he will not be able to adjust because he was already inadmissible under 212(a)(9)(C) as a result of his trip to Mexico and unlawful reentry in 2001. Even if he is lucky and got paroled back in, it will not cure inadmissibility caused by the prior illegal reentry. Additionally, it is possible he could be denied entry on parole because of his inadmissibility.

Example: Sonja, the college student from above, did not study abroad in Germany, but she renewed her DACA status, and got her possession conviction expunged so that she qualified for certain scholarships. She recently married a U.S. citizen, who filed an I-130 petition for her. Sonja is unable to adjust status because she is still present without admission or parole and inadmissible under INA § 212(a)(6)(A)(i). If she travels on advance parole, she could be paroled into the U.S. and avoid this bar. However, Sonja is also inadmissible under INA § 212(a)(2)(A)(i)(II), for having a conviction involving a controlled substance. Although expunged convictions allow a person to get DACA, expungements do not negate a conviction for purposes of the criminal bars to admissibility. So Sonja is still inadmissible and cannot apply for adjustment of status or seek a green card through consular processing. Additionally, like in Manuel's case, if Sonja did leave with advance parole, there is a risk that the CBP officer would not allow her back into the U.S. because of her past conviction. In Sonja's case, this risk is probably higher because her criminal record is more likely to come up in inspection than Manuel's unlawful reentry in 2001.

3. Advance parole and consular processing

Although DACA recipients who are immediate relatives of U.S. citizens may be able to adjust status after being paroled into the U.S., the same is not necessarily true for those who are beneficiaries of a family preference category petition. This is largely because of INA § 245(c), which prevents an immigrant (except immediate relatives of U.S. citizens and special immigrants) from adjusting status if they, among other things:

- Continue in or accept unauthorized employment prior to filing an application for adjustment of status
- Are in unlawful immigration status on the date of filing the application for adjustment of status

- Have failed (other than through no fault of his own or for technical reasons) to maintain continuously a lawful status since entry into the United States
- Were admitted as a nonimmigrant visitor without a visa under § 212(l) or § 217.³³

These limitations are not grounds of inadmissibility; they are limitations on eligibility to apply for adjustment of status within the United States. Nonetheless, the prohibitions on working without authorization or having any period of unlawful status are very strict. DACA recipients will always fall within one of these categories because DACA is not a lawful status, and DACA applicants were required to be out of status as of June 15, 2012 in order to be eligible for DACA. As a result, *unless a DACA recipient is the immediate relative of a U.S. citizen*, they must consular process to obtain a green card via a family petition.

So an immigrant with a current family-based visa available may be able to obtain their green card via consular processing.³⁴ Again, advance parole may help the DACA recipient with this process.

Traditionally, family preference visa beneficiaries who sought consular processing would frequently trigger the unlawful presence bars in INA § 212(a)(9)(B)(i) when they left the United States to attend their interviews at the consulate. They would then need a waiver of inadmissibility for unlawful presence and would be unable to return to the U.S. or obtain their green card until that waiver had been granted. However, many DACA recipients have successfully obtained advance parole in order to travel to the Consulate for their interview.³⁵ With advance parole, the DACA recipient will be able to return with their advance parole rather than waiting for the waiver adjudication, which decreases the risk of leaving the U.S. to undergo the process to become a lawful permanent resident through the consulate. If the person's visa or waiver is denied, they may still be able to return with their advance parole, and keep their DACA status.

Currently, the exception to the unlawful presence bars established in *Matter of Arrabally* does not apply to consular processing. Advocates have argued that a DACA recipient who travels on advance parole to the consulate has not triggered the unlawful presence bars based on *Matter of Arrabally* (This argument would mean that the person could consular process without needing a waiver for unlawful presence). So far, however, the consulates have not applied *Matter of*

³³ INA § 245(c). This excerpted list is not exhaustive of the restrictions on eligibility for adjustment of status, but includes some of the most common limitations that bar undocumented immigrants from adjusting their status.

³⁴ Additionally, some might benefit from 245(i), which allowed immigrants to adjust status in the United States, despite some grounds of inadmissibility, if they paid a \$1000 fee. Although this provision is no longer available, those that had visa petitions filed on their behalf prior to April 30, 2001 might still benefit. If someone filed a petition before April 30, 2001, under which your client could be considered a beneficiary at the time it was filed, your client should seek advice from an expert attorney to see if this provision might be helpful.

³⁵ Applicants argued that going to the Consulate was for humanitarian purposes—to allow them to be safely united with their family in the U.S.

Arrabally so generously and have required waivers for the unlawful presence grounds even to those who traveled on advance parole to their consular interview.³⁶

Nonetheless, traveling with advance parole will offer a further protection for those seeking to consular process. Should their visa processing be denied at the consulate, they should still be able to return on advance parole and maintain their DACA status. For those that are inadmissible on other grounds, such as crimes, this process may still be quite risky. Make sure to screen your client thoroughly for all possible inadmissibility concerns.

Example: Elena is 20 years old, and received DACA last year. Elena came to the United States without inspection when she was two, and has always lived here. Elena’s father recently became a permanent resident and has filed an I-130 for Elena.

- Elena’s priority date is not yet current. But when it becomes current, Elena cannot adjust status under INA 245(a), because she has not been inspected and admitted or paroled.
- In addition, she does not have lawful status in order to apply for adjustment. (This requirement—INA 245(c)(2)—does not apply to immediate relatives, but does apply to Elena because her father is a permanent resident and she does not qualify as an “immediate relative”). Also, even if she were paroled in to the U.S., she has failed to maintain lawful status for the entire time she was in the U.S., which is an additional bar to adjustment.

Based on the above, Elena cannot adjust status based on her father’s I-130 petition. But she can consular process when her priority date is current. Then she does not have to meet the requirements of INA 245; but she has to be admissible.

- When Elena travels to the consulate, she will trigger inadmissibility under 212(a)(9)(B), because she was unlawfully present for about a year before she got DACA, and she will need an inadmissibility waiver in order to get her green card.

Elena can apply for advance parole to go to her consular interview, but she will still need the unlawful presence waiver. Because the waivers can take months to adjudicate, Elena may return to the U.S. with her advance parole while she waits.

³⁶ Hopefully the administration will clarify this issue when it releases further legal guidance on advance parole, and will broadly interpret *Matter of Arrabally* to mean that travelling to the consulate with advance parole is not a departure for purposes of INA 212(a)(9)(B), and so no waiver of unlawful presence is necessary. See discussion of the November 2014 advance parole memo above.

CHAPTER 9

SCREENING FOR OTHER IMMIGRATION RELIEF

This chapter includes:

§ 9.1	Introduction	9-1
§ 9.2	Self-Petitioning Visas for Battered or Abused Family Members of U.S. Citizens or Lawful Permanent Residents	9-2
§ 9.3	The U Visa	9-6
§ 9.4	The T Visa.....	9-9
§ 9.5	Asylum and Restriction on Removal.....	9-12
§ 9.6	Special Immigrant Juvenile Status	9-13
§ 9.7	Cancellation of Removal for Non-Permanent Residents.....	9-13
§ 9.8	NACARA	9-15
§ 9.9	Cancellation of Removal for Certain Permanent Residents	9-16
§ 9.10	Temporary Protected Status (TPS).....	9-17
§ 9.11	Diversity Visas	9-18
§ 9.12	Prosecutorial Discretion and Deferred Action	9-18
§ 9.13	Motions to Suppress and Challenging Removability	9-21
§ 9.14	Voluntary Departure.....	9-22
§ 9.15	Private Bills Passed by Congress	9-25
§ 9.16	Other Immigration Remedies	9-26

§ 9.1 Introduction

This chapter aims to provide a brief overview of other possible types of immigration relief for immigrants. This chapter briefly discusses some of the ways people gain lawful permanent residency and other kinds of immigration relief, including relief under the Violence Against Women Act, U Visas, T visas, Asylum, Special Immigrant Juvenile Status, Cancellation of Removal for Non-Lawful Permanent Residents, Cancellation of Removal for Battered Spouses and Children, NACARA, Cancellation of Removal for Permanent Residents, Temporary Protected Status, Diversity Visas, Prosecutorial Discretion and Deferred Action, Motions to Suppress and Challenging Removability, Voluntary Departure, and private bills passed by Congress. Review this chapter to identify other possible forms of relief that might be available to your client.

IMPORTANT NOTE: This chapter is not a complete text on immigration law. If you are not an experienced immigration practitioner, you should refer people who might apply for immigration relief to experienced practitioners for evaluation. If you want to learn more about any of these areas, each section will provide information about further resources on that form of relief.

§ 9.2 Self-Petitioning Visas for Battered or Abused Family Members of U.S. Citizens or Lawful Permanent Residents

Under the Violence Against Women Act (VAWA) certain undocumented family members who have been battered or abused by their U.S citizen or lawful permanent resident spouse or parent or U.S. citizen son or daughter can file immigrant visa petitions for themselves if they can show that their spouse, parent, son or daughter battered them or subjected them to extreme cruelty, and that they are of good moral character.¹ An approved VAWA self-petition can make them eligible for deferred action, a work permit, public benefits in some states, a green card, the ability to help some other family members get immigration status, and more.

A. Who Can Apply

VAWA allows certain abused spouses, children and parents to self-petition for lawful permanent residence and thus a green card. The following persons are eligible to self-petition under VAWA:

- abused spouses of U.S. Citizens (USCs) or lawful permanent residents (LPRs)

Example: Guadalupe’s U.S. citizen husband, Ron, began abusing her as soon as they got married. Guadalupe can qualify for VAWA.

- non-abused spouses of USCs or LPRs if their children have been abused by the USC or LPR spouse, even if the children are not related to the USC or LPR abuser;

Example: Jane, from England, is married to Sam, a permanent resident in the United States. Together they have a child who was born in Canada. Sam has not yet petitioned for Jane or their child. Sam has been abusing their child but does not abuse Jane. Both Jane and her child can qualify for VAWA.

- abused “intended spouses” of USCs and LPRs [the term “intended spouse,” means an immigrant who believes that he or she has married a USC or LPR and for whom a marriage ceremony was actually performed, but whose marriage is not legitimate solely because of the U.S. citizen or lawful permanent resident spouse’s bigamy];

Example: Jessica married Adam, an LPR, in 2008. For the past year, Adam has been abusing Jessica. Adam failed to tell Jessica that he never divorced his first wife whom he married in 2000. Even though Jessica’s marriage is not valid, she still qualifies for VAWA as an “intended spouse.”

- abused children of USCs or LPRs and, as derivatives, their children;
- non-abused or abused children included in a self-petitioning parent’s VAWA application as derivatives, even if the children are not related to the USC or LPR abuser;

¹ The Violence Against Women Act (VAWA) is a federal law that was originally passed by the U.S. Congress in October 1994, and was amended and expanded in 2000, 2005, and 2013. The law is found at INA § 204(a)(1) and the regulations are found at 8 CFR § 204.2(c).

Example: Although Duane has been abusing Guadalupe, he has never hurt their three-year-old daughter, Sofia. Nonetheless, Sofia qualifies for VAWA as a derivative of her mother's self-petition.

- abused parents of USC sons and daughters. Note that this provision does not apply to the parents of abusive LPR sons and daughters.

Example: Bernice moved to the United States to live with her 40-year-old son who is a USC. While living in his home, he began abusing her. Bernice can qualify for VAWA.

B. Basic Requirements

To be eligible to self-petition, the battered spouse or intended spouse of a USC or LPR must demonstrate the following:

- good moral character;
- the marriage or intended marriage was entered into in good faith;
- during the marriage, the self-petitioner or his or her child has been battered or subjected to extreme cruelty committed by the USC or LPR spouse;
- residence, past or present, with the USC or LPR spouse; and

Example: Paula lived with her U.S. citizen spouse for two years. During that time he often would come home drunk and beat her up. Paula left her husband and went to a shelter for refuge. Paula can apply for VAWA because although she does not presently live with her husband, she did live with him in the past.

- either (a) current residence in the United States or (b) if living abroad, that the abusing spouse is an employee of the U.S. government or a member of the uniformed services or subjected the self-petitioner or the self-petitioner's child to battery or extreme cruelty in the United States.

Example: Laura's husband abused her for several months while they lived together in the United States. Laura had to escape the abuse so she moved back to her hometown in Michoacan, Mexico. Even though Laura no longer has current residence in the United States, she can still qualify for VAWA because her husband abused her in the United States.

Similarly, the child of an abusive USC or LPR or the parent of an abusive USC son or daughter must establish:

- good moral character;
- past or present residence with the abusive USC or LPR;
- during that residence, he or she has been battered by or been the subject of extreme cruelty committed by the USC or LPR; and

- either (a) current residence in the United States or (b) if living abroad, that the abusing parent, son or daughter is an employee of the U.S. government or a member of the U.S. uniformed services or subjected the child to abuse in the United States.

The law is found in the Immigration and Nationality Act § 204(a)(1) and the regulations are in Title 8 of the Code of Federal Regulations § 204.2(c). They provide the following details on how some of the self-petition provisions are to be interpreted:

Good Faith Marriage. The self-petitioning spouse must establish that the marriage or intended marriage was entered into in good faith. The most important factor in establishing a good faith marriage is whether the couple intended to establish a life together at the time of the marriage. Conduct after a couple is married—even separation shortly thereafter—is relevant only to establish intent at the time the marriage was entered into.

Example: Mary, from England, married her roommate John, a U.S. citizen. Although they shared an apartment, they never were in love. They got married because John wanted to help Mary get a green card. After being married for six months, John told Mary that he would only apply for her green card if she had sex with him. She refused and he started beating her.

Mary would *not be eligible* for VAWA relief because they did not get married in “good faith.” Instead, they got married to get Mary a green card.

Marital Relationship. The rules provide that certain abused spouses whose marriage has been terminated within the past two years may still self-petition. A battered spouse formerly married to a USC or LPR may self-petition only if 1) the legal termination of the marriage occurred less than two years from the date the VAWA petition is to be filed; and 2) there was a connection between termination of the marriage and the domestic violence. In addition, the abused spouse of a deceased USC may self-petition up to two years after the U.S. citizen’s death. The death of an abusive USC or LPR *after* the filing of a VAWA petition in no way jeopardizes the self-petitioner’s eligibility.

IMPORTANT NOTE: Battered spouses married to LPRs are not afforded the same protection if their abusive spouse dies. The death of an abusive LPR bars a self-petitioner from qualifying for VAWA.

Marriage or Remarriage of Self-Petitioners. A self-petitioner is free to remarry once the VAWA application has been *approved*. However, remarriage prior to receiving an approval terminates eligibility.

Parent-Child Relationship. The self-petitioning child must be unmarried and under 21 years of age when the self-petition is filed. There is one exception to this. Where a self-petitioner had been eligible to self-petition before turning 21 as the child of an abusive USC or LPR and the abuse was one central reason for the delay in filing, the self-petitioner may self-petition up to 25 years of age.

A self-petitioning child must be the child of the abusive USC or LPR parent, but need not be the child of a self-petitioning spouse. The term “child” includes children born in wedlock as well as certain stepchildren, adopted children, and children born out of wedlock. If assisting a stepchild, adopted child, or child born out of wedlock, please consult with an immigration specialist to determine if the child qualifies to self-petition.

The self-petitioning child does not have to be in the abuser’s legal custody, nor will changes in parental rights or legal custody affect the status of the child’s self-petition. The child will not lose his or her opportunity to continue to be eligible for a work permit and LPR status.

Example: Sven filed a VAWA application while he was 20 years old and unmarried. Even though he is now 22 years old, he can still qualify for VAWA relief because he was under 21 at the time he filed the petition.

The self-petitioning parent of a USC son or daughter must show that the abusive son or daughter is over the age of 21.

Derivative Children. Children of the abused spouse who are unmarried and under age 21 qualify for derivative status provided they are included on the spouse’s self-petition. Derivative children of the abused spouse are not required to have been the victims of abuse, nor do they have to have resided in the United States. They also need not have any biological or legal relationship to the abuser. As with self-petitioning children, a derivative child, upon attaining 21 years of age, will not lose his or her opportunity to continue to be eligible for a work permit and LPR status.

Example: Maria has applied for VAWA because her U.S. citizen spouse has been beating her. If USCIS approves Maria’s application, then her six-year old son Rafael can become a permanent resident too as part of her application.

Status of Abuser. Normally, a battered spouse, child or parent can only self-petition if the batterer is a USC or LPR. However, where the USC has lost or renounced citizenship because of an incident of domestic violence, the abused spouse and children may self-petition up to two years after the USC’s loss of citizenship. Similarly, if an LPR’s loses his or her immigration status because of an incident of domestic violence, the abused spouse and children may self-petition up two years from the LPR’s loss of status. Changes in the abuser’s citizenship status or loss of the abuser’s permanent residence after the filing of a self-petition do not preclude the granting of the self-petition or the self-petitioner’s obtaining lawful permanent residence status.

Example: Maria is married to Juan, an LPR. Juan has been abusing Maria for several months. Finally, Maria called the police and Juan was arrested and ultimately convicted. He was eventually deported on June 16, 2016 because he had been convicted of a domestic violence crime. Although Juan lost his LPR status, Maria is eligible for VAWA as long as she files within two years of Juan’s deportation (by June 16, 2018) because Juan was deported for a domestic violence crime.

Definition of Abuse. To qualify as abuse under the statute, the spouse or child must show that he or she “has been battered or has been the subject of extreme cruelty” perpetrated by a spouse,

parent, son or daughter. Abuse includes a broad range of acts and behaviors, including physical, sexual, and psychological acts, as well as economic coercion.

Under the United States Citizenship and Immigration Service's (USCIS) definition of battery or extreme cruelty, the phrase includes, but is not limited to, "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. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution shall also be considered acts of violence."²

Other abusive acts that may not initially appear violent but are part of an overall pattern of violence are also part of the definition.³ Violence against another person or thing may be considered abuse if it can be established that the act was deliberately used to perpetrate extreme cruelty against the victim. USCIS's definition is supposed to be flexible and sufficiently broad to encompass all types of domestic battery and extreme cruelty.

Extreme cruelty includes social isolation of the victim, accusations of infidelity, incessantly calling, writing, or contacting the victim; interrogating friends and family members; stalking; threats; economic abuse; not allowing victim to get a job; controlling all money in the family; or degrading the victim.

Resources. There may be groups in your area who are expert in this field and can provide assistance. You may also contact the National Immigration Project of the National Lawyers Guild in Boston (www.nationalimmigrationproject.org) or ASISTA (www.asistahelp.org). The ILRC also has a comprehensive manual available entitled *The VAWA Manual: Immigration Relief for Abused Immigrants*.

§ 9.3 The U Visa

The U visa is a nonimmigrant (temporary) status that allows non-citizen victims of crimes to stay in the United States, obtain employment authorization, and eventually apply for a green card.⁴ U visa status is intended to protect victims of certain crimes who have gathered the courage to come forward, report the crime, and assist in its criminal investigation and prosecution. It is available to non-citizens who suffer substantial physical or mental abuse resulting from a wide range of criminal activity, including domestic abuse.⁵

To be eligible, the applicant must have suffered substantial physical or mental abuse as a result of having been a victim of a qualifying criminal activity; have information concerning that criminal activity; and have been helpful, currently be helpful, or be likely to be helpful in the investigation or prosecution of the crime.⁶ The criminal activity must have violated U.S. laws. The list of

² 8 CFR § 204.2(c)(1)(vi).

³ *Id.*

⁴ In this chapter, the terms "U visa" and "U nonimmigrant status" are used interchangeably.

⁵ INA §§ 101(a)(15)(U), 214(p), 245(m).

⁶ INA § 101(a)(15)(U).

qualifying crimes includes abduction, abusive sexual contact, blackmail, domestic violence, extortion, false imprisonment, female genital mutilation, felonious assault, fraud in foreign labor contracting, being held hostage, incest, involuntary servitude, kidnapping, manslaughter, murder, obstruction of justice, peonage, perjury, prostitution, rape, sexual assault, sexual exploitation, slave trader, stalking, torture, trafficking, witness tampering, unlawful criminal restraint, or the attempt, solicitation or conspiracy to commit one of these crimes.

The U visa is an important immigration option to be aware of because it provides waivers for many immigration issues and inadmissibility grounds that would bar many other forms of immigration status, such as false claims to U.S. citizenship, expedited removal orders, and most inadmissibility grounds.

U nonimmigrant status is generally capped at four years,⁷ and there is an annual limit of 10,000 U status approvals that can be granted per year.⁸ At the time of this manual's writing, the waitlist for a U visa is several years long. However, when an applicant in the United States gets placed on the waitlist, she receives deferred action and can obtain employment authorization.⁹ In August of 2016, USCIS announced that it would implement a parole policy to allow U applicants and their derivatives abroad to obtain parole to enter the country;¹⁰ at the time of this manual's writing, this policy is not yet in place.

After three years in U nonimmigrant status, the U visa holder may be able to adjust status to obtain lawful permanent residency (a green card).¹¹ There are also provisions to grant derivative U visas and permanent resident status to certain family members of U visa holders.¹²

A. Who Is Eligible for U Nonimmigrant Status?

U nonimmigrant status, or the U visa, is an option available to non-citizens who have been victims of serious crimes that resulted in physical or mental abuse and who can also procure certification from a law enforcement official that they are, have been, or are likely to be helpful in the criminal investigation or prosecution of the crime. Unlike eligibility for the Violence Against Women Act (VAWA), there is no requirement that the victim be related to the perpetrator of the crime or that the perpetrator have any specific immigration status.

Example: Sonya is an undocumented woman. A doctor in her rural area sexually abused her and many undocumented women patients. Sonya is participating in a criminal investigation and prosecution of the doctor for sexual assault. Sonya may be eligible for a U visa, even though she is not related to the doctor.

⁷ INA § 214(p)(6).

⁸ INA § 214(p)(2)(A).

⁹ 8 CFR 214.14(d)(2).

¹⁰ USCIS, *Response to Recommendations on Parole for Eligible U Visa Principal and Derivative Petitioners Residing Abroad* (Aug. 18, 2016), available at www.dhs.gov/sites/default/files/publications/2016-0818%20CISOMB%20Formal%20Recommendation%20on%20U%20Parole%20SIGNED.pdf.

¹¹ INA § 245(m).

¹² INA § 101(a)(15)(U)(ii).

1. U visa eligibility requirements

There are five basic eligibility requirements for U nonimmigrant status:

- The immigrant has *suffered substantial physical or mental abuse* as a result of *having been a victim of certain criminal activity*;
- The immigrant (or in the case of an immigrant child under the age of 16, the parent, guardian or next friend of the child) *possesses information* concerning that criminal activity;
- The immigrant (or in the case of an immigrant child under the age of 16, the parent, guardian or next friend of the child) *has been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution* of the criminal activity;
- The immigrant has *certification from a federal, state or local law enforcement authority* certifying his or her helpfulness in the investigation or prosecution of the criminal activity; and
- The criminal activity violated the laws of the United States or occurred in the United States.¹³

B. Waivers of Inadmissibility

Petitioners for U nonimmigrant status who fall under a ground of inadmissibility under INA § 212(a) will have to file a waiver request for that ground. According to the statute, USCIS may waive all inadmissibility grounds, other than INA § 212(a)(3)(E) [genocide and Nazi persecutions] for U visa petitioners, if the waiver is in the public or national interest.¹⁴

Example: Lupe is being abused by her LPR husband and would like to self-petition under VAWA. However, she has been told that she will not be able to get a green card later because she lied and said she was a USC when she entered the country.

Section 212(a)(6)(C)(ii) of the INA [false claim to U.S. citizenship] is a ground of inadmissibility for which there is no waiver if committed by a VAWA self-petitioner after September 30, 1996. Therefore, even if Lupe were to have a VAWA self-petition granted, she would not be able to adjust status later. However, if she otherwise meets the requirements for a U visa, she could apply for a U visa and later apply to adjust status if she receives the U visa. This is because she could apply for the generous waiver mentioned above to pardon the false claim in her initial U visa application. After she receives the U visa and seeks to adjust status based on her U visa, she is only subject to the ground of inadmissibility under INA § 212(a)(3)(e) for participants in Nazi persecution, genocide, torture, and extrajudicial killings. Otherwise, U adjustment applicants do not have to establish that they are admissible based on the other grounds in INA § 212(a).¹⁵ Nevertheless, the U adjustment process is highly discretionary. Applicants are advised to offset any adverse factors, including any inadmissibility grounds, with mitigating evidence in their favor.

¹³ INA § 101(a)(15)(U).

¹⁴ INA § 212(d)(14).

¹⁵ 73 FR 75540 IV(B)(3).

For detailed information about the eligibility requirements and application process for the U visa, the ILRC has a comprehensive manual available entitled, *The U Visa: Obtaining Status for Immigrant Victims of Crime*.

§ 9.4 The T Visa

The Victims of Trafficking and Violence Prevention Act,¹⁶ enacted in October 2000, introduced the T visa for victims of severe forms of trafficking in persons.¹⁷ The T visa reflects Congress' concern with the growing impact of trafficking and Congress' intention to pursue the prosecution of traffickers and the protection of victims. Beneficiaries of the T nonimmigrant visa receive authorization to stay in the United States, employment authorization, and the same public benefits available to refugees. Moreover, after three years in T nonimmigrant status, the nonimmigrant may be eligible to adjust status from nonimmigrant to permanent resident. There are also provisions to grant T nonimmigrant and permanent residence status to certain spouses, children, and parents of T nonimmigrants.

A PRELIMINARY NOTE: Victims of human trafficking in many cases will have needs in addition to immigration relief, and may be suffering from serious physical or emotional injuries. Advocates representing trafficking victims may wish to consult the *Guide for Advocates Providing Services to Victims of Human Trafficking*, by CLINIC, the U.S. Catholic Conference's Migration and Refugee Services (MRS), and the Los Angeles Legal Aid Foundation (LAFLA). The manual is available for download free of charge at www.dcjs.virginia.gov/victims/humantrafficking/ca/documents/HT_Advocate_Legal_Guide.pdf.

To be eligible for a T nonimmigrant visa, the applicant must be or have been a victim of a "severe form of trafficking in persons."¹⁸ That term is defined as:

- a. sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform the act is under 18 years of age, or
- b. the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.¹⁹

Some of the terms used in the definition of severe forms of trafficking in persons are defined in regulations:

- "Sex trafficking" means the recruitment, harboring, transportation, provision, or obtaining of a person for the purposes of a commercial sex act.²⁰

¹⁶ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386 (Oct. 28, 2000) [hereinafter "TVPA" and subsequent reauthorizations in 2003, 2005, 2008, and 2013, known as the Trafficking Victims Protection Reauthorization Act "TVPRA"].

¹⁷ INA § 101(a)(15)(T).

¹⁸ INA § 101(a)(15)(T)(i)(I) (added by § 107, Division A, TVPA).

¹⁹ 22 USC § 7102 (added by § 103(8), Division A (Trafficking Victims Protection Act), TVPA).

- “Coercion” means threats of serious harm to or physical restraint against any person, any scheme intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person, or the abuse or threatened abuse of the legal process.²¹
- “Debt bondage” means the status of a debtor arising from the debtor’s pledge of his or her personal services or the services of a person under the debtor’s control as a security for debt, if the value of those services is not applied to satisfy the debt or if the length and nature of the services are not appropriately limited and defined.²² Similar to peonage, debt bondage is a circumstance where the debt seemingly can never be paid off.
- “Involuntary servitude” means a condition of servitude induced by causing a person to believe that the person or another person would be seriously harmed, physically restrained, or subjected to abuse or threatened abuse of legal process if the person did not enter into or remain in the servitude.²³

In addition to showing that the applicant is or was a victim of a severe form of trafficking in persons, the applicant must demonstrate that he or she:

- Is physically present in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands, or at a port of entry on account of the trafficking;²⁴
- Has complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking, unless he or she is under 18 years of age, in which case compliance is not a requirement;²⁵ and
- Would suffer extreme hardship involving unusual and severe harm if he or she were removed from the United States.²⁶

IMPORTANT: The requirements for obtaining a T visa for applicants under the age of 18 vary in two important respects from applications for adults. First, applicants under the age of 18 who are victims of trafficking for sex need not show that the commercial sex act was induced by force, fraud, or coercion. Second, applicants under age 18 need not show compliance with reasonable law enforcement requests for assistance.

The T visa applicant must prove the above criteria by a preponderance of the evidence. She may satisfy the evidentiary requirements either by providing primary or secondary evidence.²⁷ There

²⁰ 8 CFR § 214.11(a).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ INA § 101(a)(15)(T)(i)(II).

²⁵ INA § 101(a)(15)(T)(i)(III).

²⁶ INA § 101(a)(15)(T)(i)(IV).

²⁷ 8 CFR § 214.11(f).

are two forms of primary evidence: a Form I-914 Supplement B obtained from a law enforcement agency (LEA), or evidence that the applicant has been granted continued presence²⁸ under 28 CFR § 1100.35.²⁹ However, submission of primary evidence is not required; secondary evidence is sufficient for USCIS to make a determination to issue a T visa.³⁰ Secondary evidence must include the applicant’s statement that she was a “victim of a severe form of human trafficking,” and also may include police reports, medical records, psychological evaluations, expert statements, media articles and news reports, academic articles, pay stubs, evidence of “debts” or debt ledgers, airplane tickets, text messages, emails, social media communication, photographs, contracts, other witness affidavits, letters and affidavits from case managers and social workers, arrest records, Internet records demonstrating that traffickers and their addresses exist—anything to show that your client’s case is credible and that the place and people described are real.

T visa recipients are allowed to adjust status three years from the date of approval, or sooner if they are able to obtain a letter from the U.S. Department of Justice demonstrating their compliance with and the completion of a criminal case. Without this compliance letter, they cannot adjust status early. Your client will lose status upon expiration of her T visa if she does not either apply to extend her status or apply to adjust her status to become a lawful permanent resident (LPR).³¹ For T visa recipients to be eligible to adjust to LPR status, the applicant must demonstrate:

- Admission and current status as a T nonimmigrant;³²
- Continuous physical presence for three years OR less if an investigation or prosecution is complete, exempting any individual absence of 90 days or less or an aggregate of 180 days or less;³³
- Good moral character during her continuous physical presence;³⁴

²⁸ Continued presence (CP) is an interim immigration remedy for trafficking survivors. CP can only be requested by federal law enforcement and is sent to ICE for approval. See 28 CFR § 1100.35; see also Immigration and Customs Enforcement, *Continued Presence: Temporary Immigration Status for Victims of Human Trafficking* (Aug. 2010), available at www.ice.gov/doclib/human-trafficking/pdf/continued-presence.pdf.

²⁹ 8 CFR § 214.11(f)(1)–(2).

³⁰ 8 CFR § 214.11(f)(3).

³¹ USCIS Policy Memorandum: “Extension of Status for T and U Nonimmigrants; Revisions to Adjudicator’s Field Manual (AFM) Chapter 39.1(g)(3) and Chapter 39.2(g)(3) (AFM Update AD11-28)” at www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2011/April/exten.status-tandu-nonimmigrants.pdf.

³² 8 CFR § 245.23(a)(2); 8 CFR § 245.23(b)(2).

³³ 8 CFR § 235.23; INA § 245(l).

³⁴ 8 CFR § 245.23(g). If a T nonimmigrant is under 14, she is presumed to have good moral character and need not submit proof of good moral character. Also, 8 CFR § 245.23(g)(5) mandates that any T visa recipient who engaged in prostitution or commercialized vice after obtaining a T visa is statutorily precluded from adjustment of status.

- Compliance with any reasonable request for assistance during continuous presence³⁵ OR a showing that she would suffer extreme hardship upon removal;³⁶
- Admissibility or the grant of a waiver of applicable grounds of inadmissibility.³⁷

Trafficking survivors are specifically exempted from two admissibility grounds: (1) INA § 212(a)(4),³⁸ likely to become a public charge; and (2) INA § 212(a)(9)(B), unlawful presence.³⁹ In addition to these exempted grounds, trafficking survivors are eligible for special waivers of other inadmissibility grounds, including all of the health-related grounds and all other inadmissibility grounds “caused by or incident” to the trafficking victimization if it is in the national interest to do so. The only grounds that cannot be waived are the security and related grounds, international abductions, and renunciation of citizenship by a former citizen to avoid taxation.⁴⁰

For a comprehensive guide to T visas, please see the ILRC’s publication, *Representing Survivors of Human Trafficking*, available at www.ilrc.org/publications.

§ 9.5 Asylum and Restriction on Removal

People who have a well-founded fear of being persecuted in their home country or who have actually been persecuted in the past can qualify for asylum so long as they can demonstrate that the persecution was based on their race, religion, nationality, membership in a particular social group, or political opinion.⁴¹ Asylum is available by applying affirmatively to USCIS or as a defense to removal proceedings before an immigration judge. A year after winning asylum, a person can apply for permanent residence.⁴² Four years after being granted status as a lawful permanent resident, the individual can apply to naturalize for U.S. citizenship.⁴³

An applicant for asylum must apply within one year of entering the United States, although there are some exceptions, such as for unaccompanied minors. Someone who needs to apply past the one-year mark should speak to an expert in asylum law. Additionally, there are crime bars and other issues that might bar someone from asylum. Anyone who has fear of return to her country should speak to an expert.

Restriction on removal under INA § 241(b)(3), commonly referred to as “withholding of removal” may be an option if someone is otherwise barred from asylum, such as due to criminal convictions or applying more than one year after arriving in the United States. Withholding is

³⁵ 8 CFR §§ 245.23(d), 245.23(f)(1).

³⁶ 8 CFR §§ 245.23(d)–(e), 245.23(f)(2). USCIS can exercise discretion in granting adjustment by considering factors of favorability like family ties, hardship, and length of residence in the United States.

³⁷ 8 CFR §§ 245.23(a)(4), (b)(4), (c)(2)–(3).

³⁸ INA § 212(d)(3).

³⁹ INA § 212(a)(9)(B)(iii)(V).

⁴⁰ INA § 212(d)(13).

⁴¹ INA § 208.

⁴² INA § 209.

⁴³ 8 CFR § 209.2(f).

available to people in removal proceedings whom the immigration judge determines would have their life or freedom threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. The standard for withholding of removal is whether or not the applicant would have a clear probability of persecution if she were to return to her home country.⁴⁴ Withholding of removal and asylum are similar except the standard in asylum, “well-founded fear of persecution,” is lower than the standard for restriction on removal, “clear probability of persecution.”⁴⁵

Unlike asylum, the successful withholding of removal applicant does not become eligible to become a lawful permanent resident and will not be able to apply for naturalization. For additional information on asylum and withholding, see the ILRC’s manual, *Asylum and Related Immigration Protections*.

§ 9.6 Special Immigrant Juvenile Status

Special Immigrant Juvenile Status (SIJS) is a pathway to lawful permanent residency for youth who have been abandoned, abused, or neglected. In order to qualify for SIJS, a person must be unmarried, under age 21, and obtain an order from a juvenile court with the following findings:

1. the person has been declared dependent on a juvenile court, or the court has placed the person under the custody of an agency, department of a state, individual, or entity appointed by a state or juvenile court;
2. the person’s reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law; and
3. it is not in the person’s best interest to return to his or her country of origin.⁴⁶

A “juvenile court” is a court located in the United States having jurisdiction under state law to make judicial determinations about the custody and care of juveniles. The Trafficking Victims Protection and Reauthorization Act of 2008 (TVPRA) broadened and clarified who is eligible for SIJS, although some ambiguities remain as the regulations have not been updated. For more information, please see the ILRC’s manual, *Special Immigrant Juvenile Status and Other Immigration Options for Children and Youth*.

§ 9.7 Cancellation of Removal for Non-Permanent Residents

A. Cancellation of Removal for Non-Permanent Residents

People who have lived in the United States for ten years or more may be eligible to apply for cancellation of removal under INA § 240A(b). Cancellation of removal is a defense in removal proceedings; it is not an affirmative application, and a person cannot simply walk into a USCIS office and file the papers. A person can apply for cancellation of removal only if she is in removal proceedings before an immigration judge and facing deportation. Thus, if a person applies for

⁴⁴ *INS v. Stevic*, 467 U.S. 407 (1984).

⁴⁵ *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

⁴⁶ 8 USC § 1101(a)(27)(J).

cancellation of removal, is denied, and then loses all appeals, she will be forced to leave the United States. If the person wins her case, she becomes a lawful permanent resident of the United States.

Cancellation of removal is designed to balance the U.S. government's desire to limit immigration and its concern for fairness for people who have developed roots, made contributions to society, and whose U.S. citizen or permanent resident family members would suffer exceptional and extremely unusual hardship if the cancellation applicant were deported.

To qualify for cancellation of removal, an applicant must show that:

1. she has been *physically present* in the United States for a *continuous period* of at least ten years. The ten-year period stops when the government serves the applicant with a Notice to Appear, which is the document that places someone in removal proceedings, or when the person has committed an offense which is both listed in the criminal grounds of inadmissibility in INA § 212(a)(2) and renders the person inadmissible or deportable;
2. she has had *good moral character* during those ten years;
3. her removal would cause *exceptional and extremely unusual hardship* to the applicant's spouse, parent, or child, who is a U.S. citizen or a lawful permanent resident; and
4. she has not been convicted of certain offenses (see INA §§ 212(a)(2), 237(a)(2), or 237(a)(3)).⁴⁷

Cancellation of removal is a discretionary form of immigration relief. Even if the applicant meets all of the above requirements, the immigration judge may still deny the case as a matter of discretion. In deciding whether or not to exercise favorable discretion, the immigration judge will balance the positive and negative aspects of the applicant's case.

WARNING! It Is Extremely Risky to Place Your Client in Removal Proceedings in Order to Apply for Cancellation. It is *very, very* difficult to win a cancellation of removal case because of the "*exceptional and extremely unusual*" hardship requirement. Practitioners should pursue cancellation cases only when their clients are *already* in removal proceedings.

The following groups of people are *not* eligible for cancellation of removal:

1. People who already received cancellation of removal, suspension of deportation, or 212(c) relief;
2. People who persecuted others, or are inadmissible or deportable under the anti-terrorist grounds;
3. Crewmen who entered after June 30, 1964; and
4. Certain "J" visa exchange visitors (either those who received graduate medical education or failed to satisfy their two year requirement of returning to their home country).⁴⁸

⁴⁷ See INA § 240A(b).

⁴⁸ INA § 240A(c).

More information about cancellation of removal and other forms of immigration relief involving hardship is available in the ILRC's comprehensive manual entitled *Hardship in Immigration Law: How to Prepare Winning Applications for Hardship Waivers and Cancellation of Removal*.

B. Cancellation of Removal for Battered or Abused Spouses or Children

Persons who are abused spouses, children, sons or daughters of U.S. citizens or lawful permanent residents and persons who are parents of abused children of U.S. citizens and lawful permanent residents can apply for a special form of cancellation of removal.⁴⁹ To qualify for this type of cancellation of removal, an applicant must show:

1. She has been battered or subjected to extreme cruelty by a spouse or parent who is a U.S. citizen or permanent resident, or she is the parent of a child who has been battered or subjected to extreme cruelty by a U.S. citizen or permanent resident;
2. She has been continuously physically present in the United States for at least three years prior to submitting his or her application;
3. She has had good moral character for the three-year period;
4. She (or the applicant's child or non-abuser parent) would suffer extreme hardship if the applicant were removed from the United States; and
5. She is not inadmissible or deportable under grounds relating to crimes or terrorism, and has not been convicted of an aggravated felony.⁵⁰

The 4,000 Person Limit. Only 4,000 applicants may be granted cancellation of removal for non-permanent residents and adjust status each fiscal year. INA § 240A(e).

More information about the Cancellation of Removal provisions for battered or abused spouses or children is available in the ILRC's comprehensive manual entitled *The VAWA Manual: Immigration Relief for Abused Immigrants*.

§ 9.8 NACARA

On November 19, 1997, President Clinton signed into law the Nicaraguan Adjustment and Central American Relief Act (NACARA). Section 203 allows Salvadoran and Guatemalan individuals who meet certain criteria to qualify for cancellation of removal under the prior suspension of deportation requirements instead of under the stricter guidelines of cancellation of removal discussed in the previous section. In order to qualify the person must show that she: 1) applied for asylum on or before April 1, 1990; 2) had Temporary Protective Status (TPS); or 3) was a registered class member of the American Baptist Church lawsuit (ABC). If the person fits into one of these categories, she can apply for NACARA relief by showing:

1. continuous residence in the United States for seven years;
2. good moral character; and

⁴⁹ See INA § 240A(b)(2).

⁵⁰ INA § 240A(b)(2).

3. deportation would cause extreme hardship to the applicant or to a spouse or minor child who is a U.S. citizen or permanent resident.

These requirements come from the prior suspension of deportation requirements (which was replaced by cancellation of removal for nonpermanent residents by legislation in 1996). Note that the NACARA applicant does not have to meet the “exceptional and extremely unusual hardship” standard required for cancellation of removal for nonpermanent residents, as discussed in § 9.7. In fact, the Department of Justice’s interim regulations created a rebuttable presumption of extreme hardship for Salvadorans and Guatemalans who qualify as principals for NACARA. This makes it very easy for most of these applicants to meet this hardship standard. The interim regulations also permit most eligible persons to apply for cancellation under NACARA through the asylum offices. Many former Soviet bloc nations may also apply for NACARA. There is no filing deadline for this provision.

Although NACARA cancellation and suspension only benefits those that entered over 20 years ago and certain spouses and children, it is very important to screen nationals from the qualifying countries for this relief. You might find that those that have been here since 1990 meet the requirements. Because NACARA cancellation is a much more lenient form of relief than cancellation for nonpermanent residents, it is worth exploring eligibility with potential applicants.

In addition, NACARA included a provision (§ 202) permitting Nicaraguan and Cuban nationals continuously present in the United States since December 1, 1995 to obtain permanent residence. Qualified persons had to apply by April 1, 2000. Congress enacted a similar, but not identical provision for Haitians, entitled the Haitian Refugee Immigration Fairness Act of 1998. The filing deadlines for these programs have passed.

For more information on NACARA, see the ILRC’s publications *Winning NACARA Suspension Cases* and *Hardship in Immigration Law: How to Prepare Winning Applications for Hardship Waivers and Cancellation of Removal*.

§ 9.9 Cancellation of Removal for Certain Permanent Residents

Lawful permanent residents who commit certain crimes or other actions can be found deportable and placed in removal proceedings. A permanent resident can also travel abroad for too long or at a time when she is inadmissible, and be refused entry upon her return. Some permanent residents in this situation can defend themselves against removal by applying for cancellation of removal under INA § 240A(a).

To qualify for this form of cancellation of removal, the person:

1. must have been in the United States for seven years after some kind of legal admission, and must have been a permanent resident for at least five years;
2. must not have been granted cancellation of removal, 212(c) relief, or suspension of deportation before filing this application; and
3. must not have been convicted of an aggravated felony.⁵¹

Most importantly, the resident must convince the judge that the positive factors for allowing her to remain in the United States outweigh the reasons for ordering removal. The rehabilitation of the applicant is usually one of the key issues in these cases. If successful, the person will retain her lawful permanent resident status. If not, the person will lose her permanent residency and will be ordered deported. For more information on Cancellation of Removal for permanent residents, please see the ILRC's manual *Remedies and Strategies for Permanent Resident Clients*.

§ 9.10 Temporary Protected Status (TPS)

Temporary Protected Status (TPS) is not a path to residency. It is temporary protection available for people from certain countries for certain periods of time. A person granted TPS receives some protection from deportation, work authorization, and the ability to travel on advance parole. The United States government designates which countries' nationals can apply for TPS (generally based on either civil strife or a natural disaster) and for how long.⁵²

People who receive TPS must register with the government every year. The government can deny a person TPS if the person fails to register. As of this manual's writing, it applies to certain people from El Salvador, Guinea, Haiti, Honduras, Liberia, Nepal, Nicaragua, Sierra Leone, Somalia, Sudan, South Sudan, Syria, and Yemen.⁵³

To be eligible for TPS, a person must:

1. Be a national of a country designated for TPS, or a person without nationality who last habitually resided in the designated country;
2. File during the open initial registration or re-registration period, or meet the requirements for late initial filing during an extension of that country's TPS designation;
3. Have been continuously physically present in the United States since the effective date of the most recent designation date for that country; and
4. Have been continuously residing in the United States since the date specified for that country.
5. Has not been convicted of any felony or two or more misdemeanors in the United States;
6. Is not a persecutor, or otherwise subject to one of the bars to asylum;

⁵¹ See INA § 240A(a).

⁵² INA § 244.

⁵³ For current information on TPS, see USCIS, Temporary Protected Status, available at www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure.

7. Is not subject to one of the criminal or security related grounds of inadmissibility for which a waiver is not available; and
8. Has met all the requirements for TPS registration or re-registration as specified for the country.

When TPS programs end for a designated country, USCIS or ICE may issue a Notice to Appear to the applicant and begin removal proceedings,⁵⁴ although this has not happened in the past. Thus, *all practitioners and their clients must carefully discuss the risks and benefits of the program*. Ultimately the client must weigh these risks and benefits and decide whether or not to apply.

§ 9.11 Diversity Visas

Natives of certain countries can apply for and obtain immigrant visas under the Diversity Visa Program.⁵⁵ The advantage of this program is that the applicant does not need a family member or employer to petition for her but instead can apply on her own. The government issues a total of 55,000 immigrant visas each year. Only natives of certain designated countries that have relatively low immigration to the United States can qualify for these visas. The qualifying countries are designated by DHS each year. Because of high immigration levels, the following countries are generally barred from participation in the Diversity Lottery program: Mexico, Canada, Colombia, the Dominican Republic, El Salvador, Jamaica, China, Haiti, India, South Korea, Pakistan, Philippines, Vietnam, and the United Kingdom (except Northern Ireland).

§ 9.12 Prosecutorial Discretion and Deferred Action

Requesting prosecutorial discretion is an option when a person has no other immigration remedies available to her.

A. Prosecutorial Discretion

“Prosecutorial discretion” is the authority of a law enforcement agency or officer charged with enforcing a law to decide whether—and to what degree—to enforce the law in a particular case. A law enforcement officer who decides *not* to enforce the law against a person has *favorably* exercised prosecutorial discretion. Examples of favorable prosecutorial discretion in the immigration context include a grant of deferred action; a stay of removal; or a decision not to issue a Notice to Appear (NTA).

⁵⁴ Because of the settlement in the *American Baptist Church v. Thornburgh* case, the details of what happens to many of the Salvadoran TPS/DED recipients are different from what happens at the end of the TPS programs for people from other countries.

⁵⁵ INA § 203(c).

Although ICE officials have always had this power and exercised it in different ways throughout the years, in June 2011, ICE announced a more specific policy to use this power.⁵⁶ This was technically not a new policy, as over the years the government has issued several memoranda discussing when agencies will exercise prosecutorial discretion in immigration proceedings. This announcement, however, indicated that ICE will exercise prosecutorial discretion—i.e., decide not to pursue deportation—in cases it considers “low priority.” On November 20, 2014, the administration restructured its enforcement priorities and issued new prosecutorial discretion guidelines based on these priorities, still directing DHS personnel to exercise prosecutorial discretion in low priority cases.⁵⁷ See **Chapter 10** and **Subsection B** below.

ICE, CBP, and USCIS officers have the authority to exercise prosecutorial discretion. ICE and CBP will primarily exercise prosecutorial discretion with respect to removal proceedings (including the decision whether to place a person in proceedings), detention, parole, and the execution of removal orders. USCIS uses its prosecutorial discretion when it grants waiver requests, deferred action, or parole in place. Deferred Action and Deferred Action for Childhood Arrivals (DACA) are forms of prosecutorial discretion.

Example: Juana attends her adjustment interview at USCIS, and they determine that she is not eligible to adjust because her visa petition, filed by her father, is not yet current. The USCIS officer denies her case, but decides not to issue an NTA in her case. Instead the officer explains that Juana must wait for her visa to become current. The officer favorably exercised prosecutorial discretion.

In removal proceedings, DHS counsel can also offer prosecutorial discretion by agreeing to close or terminate proceedings. It is important to remember that immigrants who might not meet the specific criteria for any form of immigration relief might still have good equities to ask for prosecutorial discretion in this manner, so that their removal proceedings are closed and they are not ordered deported. For instance, a young person in removal proceedings might not have the continuous residence required for DACA, but might have no criminal history. DHS could exercise prosecutorial discretion and decide to stop pursuing her removal in immigration proceedings.

However, some of the individuals offered prosecutorial discretion might have stronger relief available, and should seek advice before agreeing to close their case instead of adjudicating the merits of their claim. Additionally, if no application is on file that provides for work authorization, administratively closing a case before the immigration court in the exercise of prosecutorial discretion will not provide for work authorization. Other people may have weak cases and might have to convince DHS officials that they merit prosecutorial discretion. In these cases, representatives must help clients prepare compelling requests for prosecutorial discretion that outline their equities and favorable factors for consideration.

⁵⁶ USCIS, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities* (June 17, 2011), superseded by DHS, *Policies for Apprehension, Detention, and Removal of Undocumented Immigrants* (Nov. 20, 2014) [hereinafter “Johnson Memo”].

⁵⁷ See generally Johnson Memo.

Although DHS does offer prosecutorial discretion in some cases, you cannot rely on DHS to do so. More often than not, it is up to the attorney to request and advocate for prosecutorial discretion, and DHS will not offer it affirmatively. Moreover, there is generally no way to appeal DHS's decision not to grant prosecutorial discretion. It is important to remember, and to fully explain to your client, that a favorable grant of prosecutorial discretion does not give lawful immigration status to the client.

B. DHS Guidance on Prosecutorial Discretion

Over the last few decades, DHS has issued many memoranda interpreting its inherent authority to engage in prosecutorial discretion and offering guidance for how and when to exercise it.

Johnson Memo. On November 20, 2014, President Obama announced new immigration enforcement priorities, set forth in a memorandum entitled “Policies for the Apprehension, Detention and Removal of Undocumented Immigrants,” effective January 5, 2015 (Johnson Memo). This memorandum outlined the categories of people who are at greatest risk of deportation.

The Johnson Memo also sets forth the circumstances in which individuals falling into one of the three new enforcement priorities defined in the memorandum might receive a favorable exercise of discretion, in spite of being an enforcement priority.⁵⁸ In addition, it may be possible for a person, on a case by case basis, to cease being a priority by expunging her criminal convictions or reducing felony convictions. The Trump administration has changed the enforcement priorities but provided no new guidance on prosecutorial discretion. See **Chapter 10** for a summary of the new enforcement priorities. In the absence of any guidance to the contrary, advocates should use the old prosecutorial discretion memoranda where it helps their clients.

For example, the Johnson Memo also directs that certain categories of people should not be detained. The memorandum states that absent extraordinary circumstances or the requirement of mandatory detention, field office directors should not detain immigrants who are known to be suffering from serious physical or mental illness, who are disabled, elderly, pregnant, or nursing, who demonstrate that they are primary caretakers of children or an infirm person, or whose detention is otherwise not in the public interest.⁵⁹

The current enforcement priorities and prosecutorial discretion guidelines are set by the President and can be changed. For updates regarding prosecutorial discretion, visit the Immigrant Legal Resource Center's website at www.ilrc.org.

C. Deferred Action in Sympathetic Cases

Deferred action was an option available in compelling circumstances prior to the June 15, 2012 announcement of a special deferred action process for young people (DACA), and continues to be an option for clients with compelling circumstances. DHS may place someone in the deferred action category either before or after a removal hearing. A person in deferred action may remain

⁵⁸ See Johnson Memo, pp. 5–6.

⁵⁹ Johnson Memo, p. 5.

in the United States indefinitely (until taken out of this category). In some instances, she may be eligible for certain public benefits and for work authorization.

Because deferred action is an extraordinary remedy, it should be used only when the client is not eligible for any other relief. Deferred action is wholly discretionary, so ICE can consider any positive or negative factor in the case. Therefore, you need to argue all positive facts in your case. As with any discretionary decision, ICE can deny the request. The consequence of a denial depends in large part on whether the client is in removal proceedings when she requests deferred action. If ICE does not yet know the person and the person applies for and is denied deferred action, ICE might start removal proceedings. If ICE already knows the person because she is in proceedings and then denies deferred action, there are fewer risks involved in applying for deferred action because DHS has already placed the applicant in proceedings.

Example: Marcello, from Italy, is a gay man who entered as an LPR. He is deportable for having been convicted for possession for sale of a small amount of marijuana, after a jury trial. Marcello has been in the country for five years and has no relatives here. He is now ill with AIDS and his doctors say he is too sick to travel. He has health insurance and friends who have been caring for him.

Marcello is not eligible for any other relief. He has not lived in the United States long enough to be eligible for cancellation of removal, nor is there any other relief for which he could apply. Should Marcello request deferred action?

Whether Marcello should apply for deferred action depends on whether he is already in removal proceedings or believes that ICE will become aware of his criminal offense. If Marcello has already come to ICE's attention, he has little to lose in making a request for deferred action, although he is likely to be denied unless he can be useful to law enforcement. If Marcello has not yet come to ICE's attention, it is important to ask why he wishes to have this status—is it to get some sort of needed public benefit? Does he have anything to offer law enforcement? If not, the request would increase the risk of his removal without benefiting Marcello. Importantly, Marcello still has his LPR status until it is taken away from him, so he should not apply for deferred action now if ICE is unaware of him.

§ 9.13 Motions to Suppress and Challenging Removability

There are some ways to try to protect your client from being deported that focus on challenging the government's charges against your client. It is the government's burden to prove that your client is removable. By challenging the government's case against your client, you are holding the government to its burden. This is not a way to establish eligibility for immigration relief, but it could protect your client from deportation. Challenging removability is a defensive strategy and is only appropriate if your client is *already* in removal proceedings. There are several different ways to challenge the government's case against your client. To start, you should evaluate whether the government: improperly served the Notice to Appear, unlawfully obtained evidence of your client's alienage, or otherwise violated its own rules in the process of the enforcement proceedings. Examples of this include mistreatment at the border, failure to issue Form I-770,

Notice of Rights and Disposition, or constitutional violations such as coercive interrogation. If any of these things occurred, you may challenge removability. Some advocates only challenge removability when the client is not clearly eligible for immigration relief, or if she suffered egregious constitutional or regulatory violations. However, it is important as advocates to make sure that the government is always abiding by due process and respecting the rights of our clients. Even if your client is eligible for relief, you can still challenge the government's charges against your client if you have reason to do so.

If you are going to challenge removability, you will need to make sure that your client does not concede the factual allegations and charges on the Notice to Appear. DHS has the initial burden to prove alienage, so if you deny the allegations and charges, the burden remains on DHS to prove its case.⁶⁰ In other words, your client has no obligation to concede her removability to the immigration judge, and you can put DHS to its burden through a contested removability hearing. If DHS produces evidence of alienage, the burden shifts back to the respondent to challenge the legality of this evidence. The most common way to challenge any evidence of alienage is through the filing of a motion to suppress or a motion to terminate.

A motion to suppress is a request to the court not to consider certain evidence, usually on the basis that it was obtained unlawfully. A motion to terminate is a request to the court to close removal proceedings. In this context, the basis for the motion to terminate would be that the government has not met its burden to show that the client is removable. For more information on motions to suppress, please see the ILRC's manual *Motions to Suppress, Protecting the Constitutional Rights of Immigrants in Removal Proceedings*.

§ 9.14 Voluntary Departure

Voluntary departure (VD) is a request to the immigration court to allow your client to depart the country voluntarily instead of pursuant to an order of deportation. VD is a form of relief in removal proceedings that is authorized by INA § 240B. It is seen as a form of immigration relief, even though it does not allow individuals to stay in the United States, because it is technically relief from an order of removal and carries less serious consequences than an order of removal. People who leave the United States under an order of VD do not have a removal order on their records. This is significant because people who have been removed are inadmissible for five or ten years under INA § 212(a)(9)(A) and can be prosecuted for a felony if they return to the United States without permission. In addition, people seeking admission before the five-year or ten-year bar expires need a waiver of the prior deportation in order to be allowed to re-enter the United States. None of these bars apply to people who left under VD.

Nonetheless, VD is not a generous remedy. ICE may impose any condition necessary to ensure that an individual leaves the United States upon a grant of VD. Such conditions can include the posting of a bond, continued detention pending removal, and removal under safeguards.

⁶⁰ 8 CFR § 1240.8(c).

A. Eligibility Requirements

The INA provides for a grant of VD at two distinct times. First, immigration authorities may grant VD prior to the conclusion of removal proceedings.⁶¹ Second, the immigration judge may grant voluntary departure instead of removal at the conclusion of removal proceedings.⁶² It is easier for the applicant to qualify for the VD that comes prior to the conclusion of proceedings.

1. VD grant before removal proceedings or prior to the completion of removal proceedings

If an individual requests voluntary departure before the initiation or the completion of removal proceedings, she may be granted a period of up to 120 days of voluntary departure. Generally, the person must depart at her own expense.⁶³ However, if the individual is a child or youth classified as an unaccompanied minor under 6 USC § 279(g)(2), then voluntary departure is available to her at no cost.⁶⁴

ICE has authority to grant VD instead of commencing removal proceedings against a person.⁶⁵ The regulations allow ICE to revoke a grant of VD if it determines that the application should not have been granted. ICE does not have to notify the applicant before revocation but must notify the applicant in writing of the revocation, from which there is no appeal.⁶⁶ However, if ICE revokes a grant of VD that was granted prior to the commencement of proceedings, the person should still be able to request voluntary departure in removal proceedings.

Once ICE has initiated removal proceedings, the immigration judge has the authority to grant VD.⁶⁷ The immigration judge may require the person to post a bond, which will be reimbursed when the person provides proof that she has departed from the United States within the time specified.⁶⁸ For unaccompanied children, ICE will arrange transportation for them to leave the country “under safeguards” and therefore, they will not be required to post a bond.

A person will be disqualified from this form of voluntary departure if she:

1. is deportable for a conviction of an aggravated felony under INA § 237(a)(2)(A)(iii) or for “terrorist activities” under INA § 237(a)(4)(B); or
2. was previously granted voluntary departure after having been found inadmissible under INA § 212(a)(6)(A).

The regulations state that the immigration judge may only grant this more generous form of VD pursuant to INA § 240B(a) if the individual makes the request *prior to or at the master calendar*

⁶¹ INA § 240B(a)(1).

⁶² INA § 240B(b).

⁶³ See INA § 240B(a)(1).

⁶⁴ See TVPRA § 235(a)(5)(D)(ii).

⁶⁵ See 8 CFR § 240.25(a).

⁶⁶ See 8 CFR § 240.25(f).

⁶⁷ See 8 CFR § 1240.26.

⁶⁸ See INA § 240B(a)(3).

hearing at which the case is initially scheduled for a merits hearing.⁶⁹ The individual also must make no additional requests for relief and withdraw any pending requests, concede removability, and waive appeal on all issues.⁷⁰

2. Requirements for voluntary departure at the conclusion of removal proceedings

To be granted VD at the conclusion of removal proceedings, the applicant must meet stricter criteria. This form of VD is often sought as an alternative to other relief. The applicant must demonstrate pursuant to INA § 240B(b)(1) that she:

1. has the financial means to depart and intends to do so;
2. has been a person of “good moral character” for the five years prior to the date of the application for voluntary departure;
3. has been physically present in the United States for a period of at least one year immediately preceding the date the notice to appear was served; and
4. is not removable under INA § 237 (a)(2)(A)(iii) [conviction of an aggravated felony] or § 237(a)(4) [security & related grounds].

The statute also states that a person is disqualified if she was previously granted VD after having been found inadmissible under INA § 212(a)(6)(A).⁷¹ If a person was granted VD and failed to depart in the specified time frame, she is ineligible for VD for ten years.⁷²

The immigration judge cannot grant voluntary departure for more than 60 days.⁷³ For adults, the immigration judge must set a bond of at least \$500.⁷⁴ The bond must be posted within five business days of the immigration judge’s order. If the bond is not posted within this time period, the voluntary departure order is automatically vacated and becomes a removal order.⁷⁵ In the case of children and youth, the immigration judge typically asks for evidence that they are leaving, such as a plane ticket, but bond is not usually required. The immigration judge may impose other conditions that “he or she deems necessary to ensure the alien’s timely departure from the United States.”⁷⁶ The immigration judge cannot grant extensions of the period of voluntary departure; those requests must go to ICE.⁷⁷

No court has jurisdiction to hear an appeal regarding the denial of voluntary departure requested at the conclusion of removal proceedings.⁷⁸ Once a person has been granted voluntary departure,

⁶⁹ See 8 CFR § 1240.26(b)(1)(i)(A).

⁷⁰ See 8 CFR §§ 1240.26(b)(1)(i)(B)–(D).

⁷¹ INA § 240B(c).

⁷² INA § 240B(d).

⁷³ See INA § 240B(b)(2).

⁷⁴ See INA § 240B(b)(3); 8 CFR § 1240.26(c)(3).

⁷⁵ See 8 CFR § 1240.26(c)(4).

⁷⁶ See 8 CFR § 1240.26(c)(3).

⁷⁷ 8 CFR § 1240.26(f).

⁷⁸ See INA § 240B(f).

she must present a passport or other valid travel documentation to ICE within 60 days unless exempted.⁷⁹

There are serious immigration and civil penalties for failure to depart under VD. A noncitizen that fails to depart on time is ineligible for many forms of immigration relief for ten years and is subject to civil penalties, including \$1,000–\$5,000 fines.⁸⁰

WARNING! If a person is considering voluntary departure in lieu of removal, it should only be requested if the person is actually going to leave the United States, the immigration judge denies all other relief, and all appeals fail. If the person does not leave on time, the voluntary departure order will convert into a removal order, and she will be subject to civil and immigration penalties.

§ 9.15 Private Bills Passed by Congress

Congress has the power to pass legislation to benefit an individual person. Such legislation is known as a “private bill.” The bill might grant permanent residence, citizenship, a waiver, or some other remedy.

This sounds great, but in reality it is difficult to get Congress to pass one of these bills. Very few of these bills have succeeded in the past. Nevertheless, current immigration laws are so harsh and create so much hardship for U.S. citizens and others who will lose family members that private bills have become much more important. Generally speaking, a congressional representative or senator will not consider a private bill unless all other legal avenues of relief have already been exhausted.

There are two advantages to lobbying a representative for a private bill, if the case is sympathetic and you bring strong support:

1. It is conceivable that you might win (or, even if you do not win a private bill, the legislator might lean on the local ICE to get some kind of discretionary assistance); and
2. You can educate the representative about the realities of how the laws affect immigrants, for everyone’s future benefit.

The second reason is a very important one. Suspension of deportation, which was replaced by INA § 240A(b) cancellation of removal, was created by Congress because its members were overrun with people bringing requests for private bills. They did not want to deal with the problems individually, and they understood how great the hardship was. We must again bring these cases directly to the lawmakers so that they can see firsthand the effects of the current inhumane immigration laws and how harmed and angry their constituents are.

A private bill can be introduced in either the U.S. Senate or the House of Representatives. To start the process, you and the client should approach your local Congressperson or Senator with the facts of the case. If the member of Congress is interested, she will introduce the legislation. A

⁷⁹ See 8 CFR § 240.25(b); 8 CFR § 1240.26.

⁸⁰ See INA § 240B(d).

subcommittee will then review the bill. Both the House and the Senate must pass the bill, and then the President decides whether or not to sign it and make it law. You are likely to be more successful if your case is sympathetic and if you have strong community support. A Congressperson will be less likely to ignore your request, for example, if it is backed by representatives of churches, the local human rights commission, a community center, a mayor or city councilperson, and other local centers of power.

During this process, there is *not* an automatic stay of removal unless, at some point, a subcommittee of the House or Senate requests a report from ICE on the case.

§ 9.16 Other Immigration Remedies

There are other possible immigration remedies for clients. Some of these include, but are not limited to: **registry** (for someone who has lived in the United States since before January 1, 1972, has good moral character and is admissible as an immigrant), **employment-based immigrant visas**; and **non-immigrant visas such as student visas**. A discussion of these remedies is beyond the scope of this manual. For more information, please see the ILRC's *A Guide for Immigration Advocates*, or *Kurzban's Immigration Sourcebook*, published by the American Immigration Law Foundation.



CLIENT INTAKE FORM

Date: _____ Referred by: _____

Name: _____ Tel:(cell) _____ (other): _____

Address: _____ Date of Birth: _____

Email: _____

Nationality: _____ Place of Birth: _____

Immigration History

1. When did you first enter the U.S.? _____ When was the last time? _____

2. How did you enter the last time?

Visa: _____

No papers, but at a check point: _____

Not inspected/other: _____

3. List all entries to and exits from the U.S. (Give dates, and whether or not you went through an immigration inspection upon those entries.)

Entry	Exit	Inspected by Imm Authorities?	If yes, what status (visa) did you have on entry?	When did authorized stay expire?

(Make a copy of any visas and I-94s)

4. What problems have brought you here to this office? What do you hope that the advocate can do about those problems?

5. Have you ever been ordered removed or deported from the U.S.? Yes/No

6. Have you ever been in immigration court? Yes/No

7. Have you ever been stopped by immigration officials? Yes/No

If yes to any of above, describe:

8. Have you ever applied for any immigration benefit? (Permanent residency, asylum, amnesty, TPS, cancellation, suspension, Family Unity, Deferred Action for Childhood Arrivals [DACA], visa petition, or any other immigration benefit)

If so, please tell us when and what types of paperwork: _____

What was the result? _____

9. Any paperwork filed on your behalf? (Visa petition by family?) Yes/No

Family

10. Were your parent(s) or your grandparents U.S. citizens? Yes/No

11. Are you married? Yes/No When and where? _____

Name of spouse, status, date married: _____

Name of previous spouse, status, and date marriage ended: _____

12. Do you have children? Yes/No

If so, provide the following information:

Children	Date and Place of Birth	Immigration status	In U.S. now?

13. Do you have any other family members in the U.S.? Yes/No

Name	Relation	Immigration status	In U.S. now?

14. Employment in U.S. -- Dates and types of employment, name & address of employer:

Name of Employer	Address of Employer	Type of Employment	Period of Employment	Work authorized?

15. Have you ever had trouble with the police or been arrested in the U.S.? If so when and for what? What sentence did you receive? _____

16. Do you have any reason to fear going back to your country? Who do you fear and why?

17. Have you ever been a victim of domestic abuse by a spouse, parent or child? Yes/No
18. Have you ever been threatened or harmed by a spouse, parent or child? Yes/No
- If so, did your spouse, parent or child have U.S. citizenship status or lawful permanent residency? Yes/No

19. Have you ever been the victim of a crime? If so, what crime? Yes/No

- If so, did you report it to the police or help with the criminal investigation or prosecution? Yes/No

20. Did anyone recruit you in your home country to work in the United States? Yes/No
Did you feel forced to work or tricked into working? Yes/No
Were you required to work without pay? (or less pay than allowed or expected)? Yes/No
21. Have you been abandoned, abused, or neglected by a parent? Are you currently under the jurisdiction of a juvenile court (dependency, delinquency or probate guardianship)? Yes/No

Additional Notes

Screening Reminders for the Advocate

If Undocumented:

- If **under 16 when entered**, screen for possible DACA.
- If **parent is a USC**, screen for possible derivative or acquired citizenship.
- If **LPR or USC parent, spouse, child, sibling**, screen for possible adjustment or consular process options.
- If **harmed in home country**, screen for asylum and related relief.
- If **harmed in the U.S.**, screen for VAWA and U non-immigrant status.
- If a **victim of a crime**, screen for VAWA and U non-immigrant status.
- If family member **military**, screen for parole-in-place and naturalization for military.
- If **under 21**, screen for possible SIJS.
- If **brought to work in US** or forced into commercial sex act, screen for T visa.
- If **TPS country**, check list here: www.uscis.gov/humanitarian/temporary-protected-status#Countries%20Currently%20Designated%20for%20TPS, screen for possible TPS or late registration.
- If **been here at least 10 years** and has LPR or USC spouse, child or parent, screen for cancellation of removal for non-LPRs (and suspension if only conviction before April 1, 1997).
- If from **El Salvador** and entered the U.S. by Sept. 19, 1990 or **Guatemala** and entered by Oct. 1, 1990, screen for NACARA. Screen children if parents entered by the above dates.

For LPRs:

- Screen for naturalization
- If parent is a USC or can become a USC by the time client turns 18, screen for derivation
- If parent or grandparent a USC, screen for acquisition
- If potential deportation:
 - Cancellation of removal; and prior 212(c)
 - If fear of harm in home country, screen for asylum, CAT, withholding
 - If any family members in status, screen for possible re-adjustment as defense

Common Forms of Relief

U.S. Citizenship: An LPR can apply for U.S. citizenship after five years LPR status, or three years of marriage to a USC while an LPR; must establish good moral character and should not be deportable. But some current and former military personnel can naturalize without being LPRs and while in removal proceedings.

Acquisition or Derivation of U.S. Citizenship: If the answer to *any* question is yes, client could be a USC or national.

- Was the client born in the United States or its territories? Or,
- At time of his or her birth abroad, did client have a USC parent or grandparent? Or,
- Before age of 18, in either order: did client become an LPR, and did one of client's parents naturalize to U.S. citizenship? Or, was the client adopted by a USC before the age of 16 and became an LPR before age 18?

LPR Cancellation: Client must be a LPR who (a) is not convicted of an aggravated felony; (b) has been a LPR for at least five years; and (c) has lived in the U.S. for at least seven years since being admitted in any status (e.g. as a tourist, LPR, border crossing card).

Former 212(c): An LPR whose convictions pre-date April 24, 1996 might be eligible for the former 8 USC § 1182(c), INA § 212(c), even if the conviction(s) are aggravated felonies. **Screen for this relief if client is an LPR who is deportable based on one or more convictions for an aggravated felony, or other deportable offense, that occurred before April 24, 1996.** Section 212(c) might be available for a conviction occurring between April 24, 1996 and April 1, 1997.

Immigrating Through Family: Client might apply for a green card if has: (a) USC spouse; USC child at least age 21; or USC parent if client is unmarried & under age 21 (“immediate relative”); or (b) LPR spouse; LPR parent if client is unmarried; USC parent if client is at least age 21 and/or married; or USC sibling (“preference”). To immigrate through family the person must be “admissible.” *See Unit 3.* That means either she must not come within any of the grounds of inadmissibility at INA § 212(a), or *if* she comes within one or more inadmissibility grounds, she must qualify for and be granted a waiver of the ground(s). One can consular process outside the U.S. or “adjust status” if within the U.S. and meets the requirements at INA §245. *Adjustment can be a defense for LPRs facing deportation, as well as for those that are undocumented and are seeking LPR status.*

DACA-Deferred Action for Childhood Arrivals: Client entered U.S. before turning 16 and before 6/15/2007 (depending on a pending lawsuit, this date may become 1/1/2010), and is in or could enroll in certain educational programs or military.

DAPA- Deferred Action for Parents of Americans and Lawful Permanent Residents: Program is not available for the foreseeable future. The program was intended for a client who (a) has continuously resided in the U.S. since January 1, 2010 and (b) as of November 20, 2014 was undocumented, and had a USC or LPR son or daughter of any age, married or unmarried.

Cancellation of Removal for Nonpermanent Residents: To be eligible for this defense in removal proceedings, client must have lived in U.S. at least ten years and have a USC or LPR parent, spouse or child, and not have a conviction for a deportable or inadmissible crime. The client must show that the family member(s) will suffer exceptional and unusual hardship. The client must also be able to show good moral character for the ten years prior to decision and warrant cancellation in discretion.

Suspension of Deportation: This relief might permit an undocumented person with old convictions—even old drug convictions—to become a lawful permanent resident. This is a defense under pre-1997 deportation proceedings that can be applied for in removal proceedings arising in the *Ninth Circuit Court of Appeals*; other circuit courts of appeals may not have considered the issue. The Ninth Circuit indicated that a noncitizen still may apply for suspension of deportation today in removal proceedings, if he was convicted of a deportable offense before April 1, 1997. The court used the same reliance analysis on eligibility for suspension that the U.S. Supreme Court used in considering the former §212(c) relief, in *INS v. St. Cyr*, 533 U.S. 289, 316 (2001). See *Lopez-Castellanos v. Gonzales*, 437 F.3d 848, 853 (9th Cir. 2006), *Hernandez De Anderson v. Gonzales*, 497 F.3d 927, 935 (9th Cir. 2007).

VAWA Relief: Your client, or certain family member/s, have been abused (including emotional abuse) by a USC or LPR spouse, parent, or adult child. See §17.8 *VAWA Relief*. (If abuser is not a USC/LPR, consider U Visa, below.)

Special Immigrant Juvenile Status: For juveniles, and must be able to file immigration process by age 21. Client must be in delinquency, dependency, probate, family court, etc. proceedings and can't be returned to at least one parent due to abuse, neglect or abandonment.

U Visa: Client must have been a victim of a crime such as incest, DV, assault, false imprisonment, extortion, obstruction of justice, or sexual abuse, and be or have been willing to cooperate in investigation or prosecution of the crime.

T Visa: Client must have been victim of (a) sex trafficking of persons (if under age 18, could have been consensual), or (b) labor trafficking, including being made to work by force, fraud, etc.

Asylum, Withholding of Removal and Convention Against Torture: If client fears harm that amounts to persecution or even torture if returned to the home country, consider all above forms of humanitarian protection. Asylum is preferable, because after one year the person can apply for lawful permanent residence. INA §209(b), 8 USC § 1159(b). An asylum applicant (a) must submit the application within one year of entering the U.S., absent extraordinary or changed circumstances, (b) faces stricter bars based upon criminal convictions, (c) can be denied asylum as a matter of discretion, and (d) only needs to prove a “well-founded fear” of persecution (interpreted as a 10% likelihood). There are various bars to asylum and withholding.

TPS: Noncitizens from certain countries that have experienced a devastating natural disaster, civil war or other unstable circumstances may be able to obtain Temporary Protected Status (TPS). See www.uscis.gov/humanitarian/temporary-protected-status for list of countries and requirements. There are certain bars, including any two misdemeanors or one felony.

NACARA: Your client might be eligible for a program if he/she (a) is from the former Soviet bloc, El Salvador, Guatemala, or Haiti; and (b) applied for asylum or similar relief in the 1990's or is a dependent of such a person. Certain nationals from El Salvador, Guatemala, or former Soviet bloc countries who applied for asylum or similar relief in the early 1990's are eligible to apply for lawful permanent resident status (a greencard) under the 1997 Nicaraguan Adjustment and Central American Relief Act (NACARA). See 8 CFR §240.60-65. They can apply for a special form of suspension or cancellation of removal now, under the more lenient suspension of deportation standards that were in effect before April 1, 1997. Persons who became deportable or inadmissible for a criminal offense more than ten years before applying for NACARA can apply under the lenient rules governing the former “ten-year” suspension (see §17.15), except that an aggravated felony conviction is an absolute bar to NACARA. See 8 CFR §§ 240.60-61, 65. Family members of these persons also may be eligible to apply.

CHAPTER 10

IMMIGRATION ENFORCEMENT PRIORITIES

This chapter includes:

§ 10.1	Executive Action on Enforcement	10-1
§ 10.2	DHS Enforcement Priorities.....	10-1

§ 10.1 Executive Action on Enforcement

On January 25, 2017, President Trump signed two executive orders on immigration. One of them, among other things, greatly expanded the immigration enforcement priorities. **Enforcement priorities** are the term given to the characteristics of groups of immigrants that the government has ordered ICE to target for apprehension and deportation. The enforcement priorities outline the factors that will cause people to be targeted for detention and deportation. These enforcement priorities are not law; they are discretionary agency policy guidance. Many, but not all, of the enforcement priorities are tied to criminal convictions or suspicion that the individual is a danger to public safety or security. However, the current enforcement priorities also include several immigration-related, non-criminal categories.

§ 10.2 DHS Enforcement Priorities

Within a few days of being sworn in to office, President Trump promulgated new enforcement priorities. The executive order, entitled *Enhancing Public Safety in the Interior of the United States*, directs government agencies to take action in a number of immigration areas, including to terminate the previous Priority Enforcement Program (PEP), to punish jurisdictions that do not cooperate with ICE, to publish data on the apprehension and removal of noncitizens, and to review visa policies. As part of the order, President Trump also lays out factors for agents to consider in the prioritization of noncitizens for apprehension and removal.¹ In particular, the order directs ICE to prioritize all immigrants who:

- a. Have been convicted of any criminal offense;
- b. Have been charged with any criminal offense, where such charge has not been resolved;
- c. Have committed acts that constitute a chargeable criminal offense;
- d. Have engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental agency;
- e. Have abused any program related to receipt of public benefits;

¹ See Donald Trump, *Enhancing Public Safety in the Interior of the United States* (Jan. 25, 2017), available at www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united.

- f. Are subject to a final order of removal, but who have not complied with their legal obligation to depart the United States; or
- g. In the judgment of an immigration officer, otherwise pose a risk to public safety or national security.

The prior enforcement priorities, issued by former President Obama on November 20, 2014,² established three tiers of priority for enforcement actions. These tiers had different standards for when a discretionary exception might apply, and what resources ICE should devote to pursuing deportation. President Trump’s priorities do not appear to be tiered, and are far more expansive than previous enforcement categories. There is no language in his order about when or how prosecutorial discretion might play out for people who fall inside, or outside, of the categories. Thus, it remains to be seen how these priorities will be implemented in practice. It is clear, however, that the administration plans to increase the targeting of immigrants who have had contact with the criminal justice system, and criminalize immigration violations.

In light of the new enforcement priorities, we encourage all practitioners to screen for other forms of relief thoroughly (**Chapter 9**), to pursue post-conviction relief where helpful, and to stay tuned as we learn more about the new enforcement priorities. We invite you to visit the Immigrant Legal Resource Center’s website at www.ilrc.org for updates and to join our education listserv by subscribing at www.ilrc.org/subscribe to receive email messages about updates to this manual as well as in-person and webinar trainings opportunities related to immigration executive actions.

² See Jeh Johnson, Secretary of Homeland Security, “Policies for the Apprehension, Detention and Removal of Undocumented Immigrants” (November 20, 2014) available at www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (hereafter “Enforcement Priorities Memo”).



Attorney of the Day Service

ILRC Technical Assistance

Since 1979, the ILRC has provided a unique, nationwide consultation service called Attorney of the Day (AOD), in which your immigration case questions are answered by our expert staff attorneys. We offer consultations on several aspects of immigration law to attorneys, employees of nonprofit organizations, public defenders, and other practitioners that assist immigrants.

There are two options available:

Contract Service

This option allows you to secure an on-going contract with us for a lower rate than the one-time consultation fee. You can create an individual or group contract so that members of your organization have access to this service. To begin the process, we obtain a signed contract and collect an initial deposit. Each time you contact us with a question, we will deduct the pro-rated charge from this deposit. You will be billed when your account falls below \$50.

One-Time Consultation

This option allows you to ask questions on a one-time basis. Payment must be made by VISA, MasterCard, or American Express. Please have your credit card information handy when you contact us. There is a minimum charge of 1/10 hour. All charges will be prorated.

AOD consultation hours are Monday through Thursday between 10:00 am and 3:00 pm Pacific time. Inquiries will be answered within two business days, excluding Fridays. Questions can be sent to aod@ilrc.org.

For more information, please visit www.ilrc.org/legal-assistance or call **415-255-9499**.



Reprint Permissions

To reprint any of the information contained in an ILRC publication, please see our **Reprint Permissions Policy** available on our website at:

<http://www.ilrc.org/publications/reprint-permissions>

The following are guidelines for ILRC materials to appear in printed or electronic* format:

All materials produced or published by the ILRC are protected by copyright. By submitting a request form, you agree to abide by our copyright restrictions and requirements.

*For access to ILRC materials on intranets or public websites, ILRC will only allow for hyperlinking to the electronic materials already available on ILRC's website, and grantee will specifically state that the ILRC material is available only for internal use and not for commercial use or mass distribution.

For materials to appear in printed, electronic, or audio format, you may be granted a one-time usage license to copy and distribute the materials. You may not modify, delete or add any text, images or audio to the materials without express permission from the ILRC. All materials must be copied or distributed in whole, not in part. If the materials are to appear within another medium, or as a shortened version of the original, ILRC must review the particular usage before it can grant permission.

All materials must be used in conjunction with the following credit line: Reprinted from [insert name of the original material] with permission of the Immigrant Legal Resource Center, San Francisco, CA, 415-255-9499; www.ilrc.org.



Subscribe to ILRC Listservs

The ILRC maintains several e-mail listservs that address developments within specific areas of immigration law. We welcome you to join one or all of them. To do so, follow these instructions for each hotline, and YOU must self-subscribe to the ones of your choosing.

You can join the listservs by visiting <http://www.ilrc.org/ilrc-email-lists/subscribe-or-unsubscribe>, then select “Subscribe” and complete the simple form as instructed. There are eight lists to choose from:

Education @ ILRC

Want to stay informed about ILRC training opportunities and recent publication releases? This listserv will be dedicated to keeping you updated about our unique and timely educational resources.

Famvisa

Family immigration topics and updates, including legal developments and practitioner materials pertaining to accessing and applying the benefits of 245(i) through the LIFE Act.

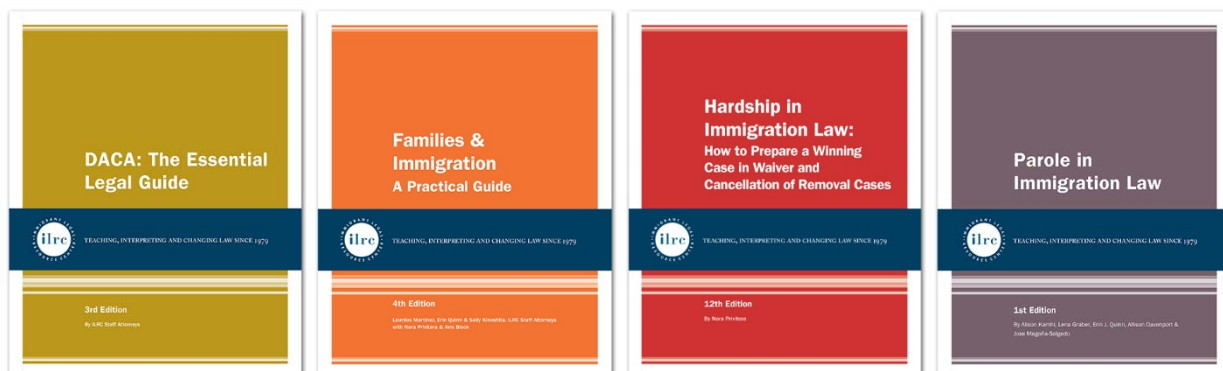
SIJS (Special Immigrant Juvenile Status)

Immigrant children’s rights advocacy and policy updates.

NACARA (Nicaraguan Adjustment & Central American Relief Act)

Network of advocates, pro bono attorneys, and nonprofit agencies who are working directly with clients in the adjustment process.

ESSENTIAL ILRC PUBLICATIONS



DACA: The Essential Legal Guide

This manual is an updated, comprehensive and practice-oriented overview of Deferred Action for Childhood Arrivals (DACA). Thorough and user-friendly, this manual consists of eleven easy to read and understand chapters and appendices, covering the DACA eligibility requirements, the entire process of representing a DACA applicant from the initial client meeting to the closing of the client case, a detailed discussion of the criminal bars to DACA, tips on how to help clients obtain the necessary documentation to apply, best practices on how to fill out all of the immigration forms, and helpful suggestions on both procedural issues and ways to effectively work with DACA applicants.

Families & Immigration: A Practical Guide

This guide provides a comprehensive overview of family immigration law, with clearly worded explanations about each topic, including sample applications, declarations, waivers, and charts. It reaches all aspects of family-sponsored immigration and provides an understanding of qualifications for who can file and how to submit a family-based visa petition. It also offers practical advice on how to engage your client to bring forth necessary information to allow you to more effectively assist them through the petition process.

Hardship in Immigration Law

How to Prepare a Winning Case in Waiver and Cancellation of Removal Cases. This uniquely useful manual, designed as a toolbox, is an essential reference tool for immigration practitioners. Practical and informative, it breaks down the elements that the BIA and federal courts have identified as relevant to claims of hardship, and demonstrates how to work with clients to elicit the information that will best present their hardship claims.

Parole in Immigration Law

The first comprehensive manual about parole in immigration law to provide practitioners with a one-stop guide to the legal requirements of all the different types of parole, practice pointers about when and how to file for parole, and discussions of the evolving issues in parole policy, *Parole in Immigration Law* thoroughly addresses the three main types of parole: advance parole, humanitarian parole, and parole-in-place. The appendices include numerous sample parole applications and cover letters; USCIS, ICE, and CBP memoranda on parole issues; a sample RFE; an advance parole cover letter template; travel checklist; and many other essential tools for both private attorneys and nonprofit practitioners exploring parole as an option for their clients.

**To receive information on new publications:
Sign up for our Education Listserve at www.ilrc.org/subscribe**