HOW TO RECAPTURE/RETAIN AND UTILIZE PRIORITY DATES

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Many people find the concept of recapturing or retention of priority dates confusing. This practice advisory is designed to walk you through how this concept works, as well as how it intersects with other provisions of law, such as the Child Status Protection Act (CSPA),[1] and adjustment of status under § 245(i) of the Immigration and Nationality Act (INA). A brief discussion and summary of the utilization of cross-chargeability of priority dates is also included. In this practice advisory, the focus will be on family visa petitions rather than employment-based categories.

I. First, the Basics

A. Recapturing or Retention?

The terms "recapturing" and "retention" of priority dates are used interchangeably, which can lead to some confusion. They really mean the same thing. Sometimes you may see the term "retention" used to describe when a visa petition automatically converts to a different category and the priority date remains the same. Sometimes you may see "recapturing" used to describe when a new visa petition is filed, but the priority date of a previously filed petition can be applied to the new one. However, there really is no meaningful difference between these two terms, and it's more important to understand the rules governing priority dates than to worry about the terminology used.

B. The Preference System and the Definition of "Priority Date"

All preference visa categories are subject to quotas limiting the number of people who can immigrate in each category per country per year. The quotas differ depending on the particular visa category and the demand for that type of visa in the person's country of origin. Because of

[1] Pub.L. 107-208.

the size of the demand, citizens of some countries are subject to extremely long waiting periods before they can immigrate. Over the last few decades in the family immigration categories, these countries have usually been China, India, Mexico and the Philippines.

The term "priority date" for a family visa preference petition (Form I-130) refers to the date the petition is properly filed with (received by) the U.S. Citizenship and Immigration Service (USCIS). The priority date "becomes current" when the waiting period is up for that petition's visa category and country. This is also referred to as the "visa availability date." At that point, if also "admissible," the beneficiary of the visa petition is eligible to either adjust status to permanent resident (LPR) within the U.S., or obtain an immigrant visa through consular processing and then travel to the U.S. and be admitted as a permanent resident. One can determine what filing dates are presently "current" by checking the U.S. Department of State (DOS) Visa Bulletin online and looking at the "final action dates" chart for family sponsored preference immigrants.[2]

Under the family visa preference system, there are four visa preference categories, with the second preference category further split into two subcategories:

- First preference (F1): unmarried sons and daughters (age 21 and over) of U.S. citizens (USCs).
- Second preference (split into two):
  - F2A: spouses and minor children (under 21) of lawful permanent residents (LPRs).
  - F2B: unmarried sons and daughters (age 21 and over) of LPRs.
- Third preference (F3): married sons and daughters of U.S. citizens
- Fourth preference (F4): siblings of U.S. citizens.

All preference petitions include derivative beneficiaries, the spouses and unmarried, minor children of the "principal" beneficiary. These derivative beneficiaries may be able to immigrate with the principal beneficiary if they still qualify as derivatives when the priority date becomes current. For example, third preference beneficiaries include the principal beneficiary, who is a married son or daughter of a U.S. citizen, plus the spouse and children of the principal beneficiary, including qualifying step-children and adopted children as defined under the INA. However, derivative beneficiaries cannot have their own derivative beneficiaries.

[2] U.S. Department of State, *The Visa Bulletin*, https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html

> **Example:** Mateo, a U.S. citizen, petitions for his married daughter, Amanda. Amanda has a daughter, Clara, who is 18 and though unmarried, has a child of her own, Giovanna. Clara is a derivative beneficiary of Mateo's (her grandfather's) petition for Amanda (her mother) and will be able to immigrate through Mateo's petition together with her mother Amanda, or at a later date, as long as she still qualifies as a derivative. However, Giovanna (Mateo's great-granddaughter) will not be able to immigrate with her mother (Clara) when the priority date for Amanda's third preference petition becomes current. She is the "derivative of a derivative" and so does not qualify as a beneficiary of Mateo's petition for Amanda.[3]

The parents, spouses, and minor, unmarried children (petition filed while child was under 21)[4] of U.S. citizens are ***immediate relatives.*** Immediate relatives are not subject to the quota system, so they have no waiting period before they can apply to adjust status or begin consular processing. An immigrant visa is always immediately available in the immediate relative category. However, immediate relatives have one significant disadvantage: they have ***no derivative beneficiaries***.[5]

> **Example:** John, a U.S. citizen, files a visa petition on behalf of his wife, Sonia. Sonia has a child from a previous marriage, Carlos, who is seven. Carlos cannot be included as a derivative beneficiary of John's petition for Sonia. Instead, John must file a separate petition for Carlos as his stepson.

> **Example:** Jessica, a 21-year-old U.S. citizen, files two separate visa petitions for her parents. But her siblings, who are 15 and 12 years old, respectively, cannot be included as derivatives of Jessica's immediate relative petitions, and so cannot immigrate together with their parents. If the family is living abroad, they will have some tough decisions to make regarding Jessica's siblings.

II. Automatic Conversion of Visa Petitions

Many things can happen to families while they are waiting for a priority date to become current. For example, spouses can divorce or die, children may turn 21, children may marry or divorce,

[3] In certain circumstances, USCIS might be persuaded to approve an application for humanitarian parole for granddaughter Giovanna, such as often occurs now for the children of "U" visa derivatives. *See* ILRC, "The U Visa" (6th ed. 2019)

[4] Previously, children of U.S. citizens who turned 21 "aged out" and became first preference beneficiaries. However, under the CSPA, if the petition was filed when the child was under 21, that child remains an immediate relative, even after turning 21, as long as they remain unmarried. *See* INA 201(f)(1). The CSPA went into effect on August 6, 2002.

[5] There are exceptions to this rule for VAWA self-petitioners, and qualifying self-petitioning widow(er)s of U.S. citizens.

etc. These changes in family status may result in a change in or loss of a beneficiary's immigrant visa eligibility.

When someone's family status change results in the principal beneficiary qualifying for a new visa category, the visa petition is ***automatically converted into the new visa category.*** If the initial visa petition was in a preference category, the priority date remains unchanged. This is commonly referred to as "retention" of the priority date. If the initial petition was an immediate relative petition, then the date that petition was filed becomes the priority date in the new preference visa category. This often means that the beneficiary has a much longer wait in order to immigrate based on the new preference category. However, in certain circumstances the wait could get shorter, such as when an LPR petitioner parent naturalizes and their under 21-year-old child who was a preference beneficiary, then becomes an immediate relative.

A. Automatic Conversion Occurs When:

- An immediate relative child of a U.S. citizen marries. The beneficiary then falls within the third preference category, and the date the visa petition was originally filed becomes the priority date. The former immediate relative is now subject to the quota for third preference immigrants.[6]

  Example: Mike, a U.S. citizen, petitions for his 20-year-old daughter, Lien. Because she is under 21, and therefore meets the definition of a child under the INA, she is an immediate relative. A couple of months later, while the petition is still in process, Lin gets married to Hai. As a result, Lien is now subject to the family third preference category, and her priority date is the date the petition was filed. She does not need a new petition, and Hai, her husband, is now her derivative beneficiary.

- A first preference son/daughter of a USC marries. Again, the petition *automatically converts* to a third preference petition, the original priority date is retained, and the beneficiary is now subject to the quota for third preference.[7]

  Example: Phil, a USC, files a visa petition on behalf of his son Peter, who is over 21 and single. Peter is a first preference immigrant. Peter then marries Angela. Peter automatically becomes a third preference immigrant, without needing a new petition, and with the same priority date as before. Now Angela, as his wife, is Peter's derivative beneficiary.

[6] *See* 8 CFR §§ 204.2(i)(1)(ii) and 205.1(a)(3)(i)(G).

[7] *See* 8 CFR §§ 204.2(i)(1)(i) and 205.1(a)(3)(i)(H).

- A third preference beneficiary (married son/daughter of U.S. citizen) divorces or is widowed. If the beneficiary is still under 21 on the date the marriage terminated, they automatically convert to immediate relative status, and are no longer subject to a preference priority date.[8] If the beneficiary is over 21 on the date the marriage terminated, they convert to a first preference immigrant, and retain the original priority date.[9] However, it is important that any divorce in these situations is "bona fide" and not just entered into for immigration purposes.[10]

  Example: Lorenzo, a U.S. citizen, files a visa petition for their married 19-year-old daughter, Susanna, as a third preference immigrant. Susanna gets divorced. while she is still under 21. The I-130 filed on her behalf converts into an immediate relative petition, and her age "freezes," due to the CSPA, which means she will always remain an immediate relative of her father so long as she remains single.

- A U.S. citizen who filed an immediate relative petition for a spouse dies. The petition converts to an I-360 widow/er's self-petition provided the criteria for qualifying as a widow/er are met.[11]Any unmarried children under 21 of the widow/er may also be included as derivatives.

  Example: Laura files a visa petition on behalf of her wife Joanna. Unfortunately, Laura dies in an auto accident before Joanna can immigrate. Laura's I-130 visa petition for Joanna automatically converts into an I-360 widow(er)'s self-petition. If Joanna has any minor unmarried children, they may be included as derivatives.

- The LPR petitioner for their child under 21 naturalizes. The child becomes an immediate relative if under 21 on the date of the parent's naturalization.[12]

  Example: Ahmet, an LPR, files a visa petition on behalf of his 16-year-old son, Ali, who is an F2A beneficiary. Ahmet naturalizes and is now a U.S. citizen. Ali, who is now 19, becomes an immediate relative, and will remain an immediate relative as long as he remains unmarried.

- An LPR petitioner for a son/daughter over 21 naturalizes. The F2B beneficiary automatically becomes a first preference beneficiary, but can opt to remain F2B under the CSPA by filing

[8] In this situation, their ages would also automatically "freeze," pursuant to the Child Status Protection Act (CSPA), and they would remain immediate relatives even after turning 21.

[9] 8 CFR § 204.2(i)(1)(iii).

[10] *Matter of Aldecoaotalora*, 18 I&N Dec. 430 (BIA 1983).

[11] 8 CFR § 204.2(i)(1)(iv). Note that though the statute was amended to no longer require that the widow/er was married to the US citizen for two years prior to the citizen's death, that part of the regulation has not yet been amended, though no longer valid.

[12] 8 CFR § 204.2(i)(3).

a request to USCIS, if the waiting period for first preference exceeds the waiting period for an F2B petition.[13]

> **Example:** Sanjeev, an LPR, petitions for his son Ravi, who is 20. Sanjeev naturalizes when Ravi is 22. Ravi automatically becomes a first preference beneficiary, unless he chooses to stay an F2B beneficiary, and files a request with USCIS to "opt out" of the automatic conversion [14]

- An LPR petitioner for their spouse (F2A) naturalizes. The spouse becomes an immediate relative, and there is no longer a priority date because the beneficiary is no longer subject to a quota.[15]

  > **Example:** Jaime, an LPR files a second preference, F2A petition for his husband, Armando. While it is pending, Jaime naturalizes. Armando is now an immediate relative and is no longer subject to a visa quota.

- An LPR petitioner files for their child as an F2A beneficiary. The child turns 21. Unless the child's adjusted age under the CSPA is under 21 when the priority date for the F2A preference petition becomes current, this beneficiary will automatically become an F2B beneficiary. The priority date remains the same.

  > **Example:** Lakshmi, a LPR, files a petition for her 20-year-old son, Prakesh. Before his priority date as an F2A beneficiary becomes current, Prakesh turns 21. His adjusted age under the CSPA is also over 21 when the F2A priority date becomes current, so he ages out of F2A status. He automatically converts to an F2B beneficiary, with the same priority date, but under the F2B visa category. He does not require a new visa petition.

- An LPR files an F2A spousal petition with his children as derivative beneficiaries. The oldest child turns 21 before the priority date becomes current, and their adjusted age under the CSPA is still over 21 when the F2A priority date becomes current. The oldest child automatically converts to an F2B beneficiary, retaining the same priority date. Previously, the LPR parent petitioner had to file a new visa petition for their aged out (now F2B) adult children.[16] However, recent case law and a USCIS Policy Memo indicate that a new petition

[13] *Id., see also* ILRC's materials explaining the CSPA: https://www.ilrc.org/sites/default/files/resources/cspa_children_of_lpr_other_deriv_bene-20180629.pdf

[14] Id.

[15] 8 CFR §§ 204.2(i)(3).

[16] *See* 8 CFR § 204.2(a)(4).

is no longer required, even though the regulation[17] retains this requirement.[18] This policy change arose from litigation that arose over interpretation of the CSPA.[19]

> **Example:** Miguel files a petition for his wife, Graciela. They have 3 children, all under 21, who are derivative beneficiaries. The eldest, Maria, turns 21 while the petition is pending. Even under the CSPA, Maria's adjusted age is over 21 when the priority date becomes current for the F2A petition. Maria automatically converts to a F2B beneficiary, and retains the priority date of the petition, upon the request of her petitioner, Miguel. She does not need a new visa petition filed on her behalf in order to immigrate as an F2B.

- An LPR files an F2A petition for her child who is under 21. The child turns 21-years-old biologically, but their CSPA statutory age is still under 21, *when the parent naturalizes*. According to two circuit courts, the Second and the Ninth Circuits,[20] but not the BIA, the petition converts to that of an immediate relative, despite the fact that the child biologically is already 21, because the child's statutory age is protected by the CSPA.[21] Use caution, however, in filing for adjustment of status or sending an applicant for consular processing in these circumstances, especially, if the petitioner resides outside of the two presently favorable circuits.

  > **Example:** LPR Abayomi filed an F2A petition for her daughter, Kissa, while Kissa was 20 years old. It took USCIS two years to process the petition and it was finally approved when Kissa's biological age was 22, which meant her CSPA statutory age was still 20 years old. In the meantime, Abayomi naturalized when Kissa's biological age was 21, and Abayomi then asked USCIS to convert her petition for Kissa to that of immediate relative. Abayomi lives in the Second Circuit, so her request was granted. However, if she lived in a circuit that has not yet decided this issue, the BIA decision would stand, Abayomi's request would be denied, and USCIS would convert Kissa instead to the first preference category.

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[17] *Id.*

[18] See *Matter of Wang,* 25 I&N Dec. 28, at 35 (BIA 2009), affirmed by *Scialabba v. Cuellar de Osorio,* 573 U.S. 41, 134 S.Ct. 2191 (2014); see also USCIS Policy Memo, PM 602-0094, titled *Guidance to USCIS Offices on handling Certain Family-Based Automatic Conversion and Priority Date Retention Requests Pending a Supreme Court Ruling on Mayorkas v. Cuellar de Osorio* (November 21, 2013), AILA Doc. 13112251 [hereinafter referred to as the *USCIS Cuellar de Osorio Policy Memo*], https://www.uscis.gov/sites/default/files/document/memos/PM-602-0094_Family-Based_Priority_Date_Retention_Final_Memo.pdf

[19] See ILRC's materials on the CSPA: https://www.ilrc.org/sitewide-search?search=CSPA

[20] *Tovar v. Sessions*, 882 F.3d 895 (9th Cir. 2018); Accord, *Cuthill v. Blinken*, 990 F.3rd 272 (2nd Cir. 2021).

[21] *Matter of Zamora-Molina*, 25 I. & N. Dec. 606 (B.I.A. 2011).

B. When a New Petition *May* Be Required to Recapture a Priority Date

Based on the language of the DHS regulations, as well as dicta in the Supreme Court decision in *Cuellar de Osorio*,[22] there is a reasonable argument that *derivative beneficiary* children of LPRs who naturalize, automatically convert to immediate relative beneficiaries, without a new petition being filed by their newly naturalized parent. It is clear that the BIA in *Matter of Wang* overruled one regulation which required a new petition for aged out derivatives moving from the F2A to the F2B category.[23]Dicta in *Cuellar de Osorio* also noted that "automatic conversion[s]" never involved new petitioners, and "entailed nothing more than picking up the petition from one category and dropping it into another for which the alien now qualified."

In addition, a close read of another subsection of that same regulation appears to not require a new, separate visa petition for F2A derivatives who can be newly classified as principal beneficiary immediate relative children, even though the original principal beneficiary spouse (now also an immediate relative) would no longer have derivatives. This part of the regulation states:

> "Effective upon the date of naturalization of a petitioner who had been lawfully admitted for permanent residence, a currently valid petition according preference status under section 203(a)(2) of the Act to the petitioner's spouse and unmarried children under twenty-one years of age shall be regarded as having been approved for immediate relative status under section 201(b) of the Act."[24]

However, neither the DHS policy memos on the CSPA, nor the decisions in *Matter of Wang* and *Cuellar de Osorio*, nor the USCIS policy manual or any other resource, discuss or provide an example of this specific situation. Nor do they specifically allow these additional conversions of visa categories for derivatives without the filing of a new petition. The Foreign Affairs Manual of DOS (the FAM) explicitly rules out the possibility of a former F2A derivative immigrating as an immediate relative without a new petition.[25]But making the argument that no new petition is necessary, may be helpful in a case where the LPR petitioner only filed a petition for the spouse, with the children as derivatives, and the children turn 21. If after naturalizing, the new U.S. citizen parent didn't file new petitions for the formerly derivative children, USCIS might allege they are not immediate relatives, because no petition was filed for them as principal beneficiaries, clearly "freezing" their ages at under 21 years of age. Arguing the plain language of the DHS regulation

[22] 573 U.S. 41, 134 S.Ct. 2191 (2014)

[23] 25 I&N Dec. 28, at 35 (BIA 2009), affirmed by *Scialabba v. Cuellar de Osorio,* 573 U.S. 41, 134 S.Ct. 2191 (2014); *See* 8 CFR § 204.2(a)(4)

[24] 8 CFR § 204.2(i)(3)

[25] 9 FAM § 502.1-2(D)a.(1)(c)

along with the Court's dicta may help those children to avoid aging out and preserve both the priority date and the immediate relative status of the children. Additional helpful reasoning for this argument may be found in two circuit court decisions involving conversion of an F2A petition to that of immediate relative after the naturalization of the parent. The children's statutory age in both cases was under 21 pursuant to the CSPA, though their biological ages were already 21 or older. Both cases involved a principal beneficiary child.[26]

- The LPR petitioner filed for their spouse with derivative children on the same petition (F2A), and then naturalizes. The derivative sons and daughters (adjusted age under CSPA now over 21) of the former F2A spousal petition who automatically became F2B beneficiaries upon aging out, will likely still need a new petition filed on their behalf by their now U.S.C. parent. But they should request to retain the original petition's priority date. Arguably, since such derivatives do not need a new petition when they automatically converted from F2A to F2B, per the BIA and USCIS, they also should not need a new petition when the petitioner naturalizes, and they further convert their eligibility to first preference. Also, under the CSPA they can always opt to remain in 2B status if that category is more advantageous.

  Example: Ravi, a LPR, filed a visa petition for his wife Sariah that included their daughter, Mira. Before the priority date becomes current, Mira ages out (her adjusted age under CSPA is over 21). She therefore converts to the F2B preference, retaining the priority date of the original petition for Sariah. When Ravi becomes a USC, Mira arguably automatically converts to a first preference immigrant without a new petition, but definitely does so if Ravi files a new petition for her. If Mira chooses, she can instead remain in 2B status under the CSPA.

III. Some Derivative Beneficiaries Lose Out When They Age Out, Marry or Divorce

Unless a derivative beneficiary can convert to another preference category when they age out, marry, or divorce, they will lose the priority date of the original petition. The only exception is where the CSPA protects an aged-out beneficiary. The petition itself remains valid as to the principal beneficiary and derivatives who have not lost their status.

[26] *Tovar v. Sessions*, 882 F.3d 895 (9th Cir. 2018); Accord, *Cuthill v. Blinken*, 990 F.3rd 272 (2nd Cir. 2021) .

Example: Miguel, a U.S. citizen, files a third preference petition for his daughter Mary, whose husband and two children are included as derivative beneficiaries. Mary's daughter (Miguel's granddaughter) marries. She is no longer a derivative beneficiary because she no longer meets the definition of a child in the INA.[27] Since there is no visa category to which Mary's daughter can convert (there is no visa category for the grandchild of a U.S. citizen), she also loses the priority date of the third preference petition.

Example: Amal, a U.S. citizen, files a fourth preference petition for her sister Marjan, under which Marjan's wife and their children are derivative beneficiaries. Because the wait is so long, Marjan's son Jamal is 26 by the time the priority date becomes current. Even with the CSPA, his adjusted age is over 21 by the time the priority date is current, so he ages out. He is no longer Marjan's derivative beneficiary, and he cannot convert to another visa category (there is no visa category for the nephews/nieces of U.S. citizens), so he loses both his eligibility as a derivative and the priority date of the original visa petition.

Example: Marjan (above) and her wife divorce before the priority date filed by Marjan's sister, Amal, becomes current. Since the ex-wife is no longer married to Marjan, she no longer qualifies as Marjan's derivative beneficiary, and so she loses both her eligibility to immigrate with Marjan and the priority date of the petition.

Example: Norma, an LPR, files a visa petition for their husband, Jose, in which Norma's 20-year-old son, Guillermo, is included as Jose's derivative. Jose and Guillermo are both in the F2A visa category. Guillermo gets married. Since there is no visa category for the married sons and daughters of LPRs, Guillermo no longer qualifies as a derivative beneficiary and will not be eligible to immigrate with Jose when the petition's priority date becomes current. He will also lose the priority date of the petition.

IV. Automatic Revocation of Visa Petitions

Certain circumstances can result in the automatic revocation of a visa petition, including some changes in family status.[28] In such cases, the priority date is lost, though in some cases the visa petition can be reinstated and/or other remedies exist.[29]

[27] *See* INA § 101(b)(1).

[28] *See* INA § 205.

[29] *See*, for example, ILRC's Practice Advisory entitled: *Benefits for Surviving Relatives,* available here: https://www.ilrc.org/immigration-benefits-surviving-relatives

A. Automatic Revocation of Family Preference Visa Petitions[30] Occurs When:

- The Department of State terminates the visa registration under INA § 203(g).[31]
- The petitioner files written notice of withdrawal of the petition with USCIS.[32]
- The principal beneficiary or a self-petitioner dies.[33] I-130 petitions may be reinstated via INA § 204(l) for certain eligible beneficiaries, or through humanitarian reinstatement.[34]
- The petitioner dies, except that if the petitioner was a U.S. citizen who filed for their spouse, the I-130 is not revoked, but automatically converts to an I–360 benefitting the surviving spouse and derivatives.[35] I-130 petitions may also be reinstated via INA § 204(l) for certain eligible beneficiaries, or through humanitarian reinstatement.[36]
- The LPR or U.S. citizen petitioner and beneficiary spouse divorce. Since the relationship on which the petition was based no longer exists, the petition is revoked, and the priority date is lost.[37] There is an exception to this rule for the spouses of abusive petitioners under VAWA.[38]
- A VAWA self-petitioner remarries before the VAWA I-360 petition has been approved.[39]
- A beneficiary child or son or daughter of an LPR petitioner marries. Since there is no visa category for the married children of LPRs, there is no visa category available for conversion of the petition. Therefore, the visa petition is automatically revoked,[40] and the priority date is lost.
- Upon loss of LPR status by petitioner, unless the former LPR became a U.S. citizen.[41]

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[30] There are separate rules for other types of immigrant visa categories that are not discussed here.

[31] 8 CFR § 205.1(a)(1); INA § 203(g) provides that the Secretary of State may terminate the registration of a visa petition if the applicant fails to apply for an immigrant visa within one year after notification of its availability (date priority date became current) unless, within two years of notification, the applicant shows that the failure to apply was due to circumstances beyond the applicant's control.

[32] See 8 CFR § 205.1(a)(3)(i)(A).

[33] See 8 CFR § 205.1(a)(3)(i)(B).

[34] INA § 204(l), 8 CFR § 205.1(a)(3)(i)(C)(2).

[35] See 8 CFR § 205.1(a)(3)(i)(C)(1).

[36] INA § 204(l), 8 CFR § 205.1(a)(3)(i)(C)(2).

[37] See 8 CFR § 205.1(a)(3)(i)(D).

[38] See 8 CFR § 205.1(a)(3)(i)(D). VAWA refers to The Violence Against Women Act, Pub.L. 103-322 (1994); and various reauthorizations and extensions of its protections. See Pub.L. 106-386, Pub.L. 109-162, etc.

[39] INA § 204(h); see 8 CFR § 205.1(a)(3)(i)(E).

[40] See 8 CFR § 205.1(a)(3)(i)(I).

[41] See 8 CFR § 205.1(a)(3)(i)(J).

WARNING! Terminations of visa registration under INA § 203(g) by DOS have been happening more often in recent years. This happens because the DOS considers the visa petition and immigrant visa case to be "inactive" due to the beneficiary not taking steps to proceed with the immigrant visa case once contacted by the NVC to begin consular processing.[42] Incredibly harsh consequences for the petition beneficiary then result, as all the time waiting for the priority date to become current is lost. A new petition must be filed, and a new priority date established. Such terminations can be easily avoided, by maintaining contact on at least a yearly basis with the NVC or the U.S. consulate, once the priority date is current, depending on where the case is currently pending. The beneficiary simply must notify the NVC or the consulate of their continued interest in immigrating to the United States or take some action online on the Consular Electronic Application Center (CEAC) website to move the case forward. This is true even if the beneficiary has become eligible for adjustment of status through DHS. In this regard it is important to monitor the DOS Visa Bulletin to know when the beneficiary's priority date will soon be current, as notifications from the NVC may go astray, beneficiaries and petitioners may move without changing their address with the government, or the government may send notice to the wrong address or email. In certain exceptional circumstances a termination under INA § 203(g) may be overcome.[43]

V. Exceptions to the Revocation of Visa Petitions

There are some important exceptions to the rules governing revocation of visa petitions that are worth mentioning here.[44]

A. Widow/er of U.S. Citizen

We have already mentioned the automatic conversion of an I-130 visa petition to a widow/er self-petition (I-360) in the event of a U.S. citizen petitioner's death. A widow/er may also file a

[42] 9 FAM § 504.13-2

[43] 9 FAM § 504.13-3

[44] For more detailed information on this topic, please see ILRC's practice advisories titled: *Potential Remedies for Immigrant Families After Losing a Family Member to the Pandemic: Widow(er)s of U.S. Citizens, 204 (l) and Humanitarian Reinstatement,* available here: https://www.ilrc.org/sites/default/files/resources/08-21_remedies_for_loss_of_family_due_to_covid.pdf; and *Immigration Benefits for Surviving Relatives*, available here: https://www.ilrc.org/immigration-benefits-surviving-relatives

Form I-360 self–petition even if no I-130 was ever filed by the U.S. citizen deceased spouse. To qualify, the widow/er must meet the following criteria:

- Must file the self-petition within two years of the U.S. citizen spouse's death (unless an I–130 spouse petition is already on file),
- Must prove that the marriage was a good-faith marriage,
- There was no divorce or legal separation at the time of the U.S. citizen spouse's death.

The widow/er will be treated as an immediate relative. However, unlike other immediate relative petitions, widow/er petitions may include as derivative beneficiaries any children of the widow/er who were under 21 when the original petition (I-130 or I-360) was filed. Those who qualify for this relief are not subject to the affidavit of support requirement to overcome the public charge ground of inadmissibility.

B. INA § 204(l)

INA § 204(l) provides relief to several categories of immigrants where the petitioner or principal beneficiary has died and is not limited to cases where the petitioner was a U.S. citizen. It is also not limited to the beneficiaries of family visa petitions. It includes, for example, qualifying derivative beneficiaries of I-140 employment-based petitions, asylum applications and refugee/ asylee derivative petitions, and T or U visa petition derivative beneficiaries.[45]

It applies to the beneficiaries of family-based visa petitions where either the petitioner has died, or the principal beneficiary has died, and the petition is still pending or approved. These are the criteria to qualify under INA § 204(l):

- At least one of the remaining beneficiaries must have resided in the U.S. at the time of the qualifying relative's death, and must continue to reside in the U.S.
- The beneficiaries must also be admissible.
- The beneficiaries must find a substitute sponsor[46] to file an affidavit of support on their behalf unless they are exempt from this requirement.[47]

[45] *Id.*, In addition to ILRC's practice advisories, there is also a USCIS Policy Memorandum on INA § 204(l): USCIS, *Approval of Petitions and Applications after the Death of the Qualifying Relative under New Section 204(l) of the call and Nationality Act*, PM-602-0017, (December 16, 2010); AILA Doc. No. 11011061.

[46] *See* 8 CFR § 213a.1 for the list of family members who may be a substitute sponsor.

[47] For example, a beneficiary may be exempt from the affidavit of support requirement if they either worked or can be credited with 40 quarters of work. See INA § 213A(a)(3).

- The petition can be denied in the discretion of DHS if granting it would not be in the public interest.

C. Humanitarian Reinstatement

Humanitarian reinstatement is a completely discretionary remedy for reinstating a petition where a petitioner has died. It applies only to previously *approved* petitions where the *petitioner* has died. Derivative beneficiaries are not eligible for this relief when a principal beneficiary has died. To initiate humanitarian reinstatement, the beneficiary must:

- Send a letter to the USCIS office that approved the petition (there are no forms for making this request).
- Have a substitute sponsor,[48] unless they qualify for one of the exemptions to the affidavit of support requirement.[49]
- Provide copies of the petition, receipt notice and approval notice, and
- Provide substantial evidence to support a favorable exercise of discretion, such as hardship to the beneficiary in particular, hardship to lawfully residing family members in the U.S., evidence of adverse health conditions, either of the beneficiary or of lawful family members, unusually long processing delays, or any other evidence that shows a compelling case for the favorable exercise of discretion.

There is no guarantee that a request for humanitarian reinstatement will be granted since it is within the sole discretion of DHS and there is no appeal from a denial. Processing times are also extremely unpredictable.

VI. When a New Visa Petition Can Retain/Recapture the Priority Date of a Previously Filed Visa Petition

Sometimes a visa petition gets misplaced by USCIS and a new one must be filed, or other circumstances occur that result in the filing of a new visa petition. The rule governing when a priority date can be kept is that the original petition must have been approved, and you must have the same petitioner, the same beneficiary, and the same visa category.[50] This phenomenon has sometimes been referred to as “recapturing” the priority date of the original petition, as

[48] *See* 8 CFR § 213a.1.

[49] *See* INA § 213A(a)(3).

[50] *See* 8 CFR § 204.2(a)(4) and INA § 203(h).

opposed to "retention" of the priority date, though, as noted above, the two terms are used interchangeably and basically mean the same thing.

If the petitioner and beneficiary have proof that the original visa petition was approved, including proof of the priority date, then the new visa petition will have the same priority date as the old one. The new visa petition is considered a reaffirmation or reinstatement of the original petition.[51]It is also possible that USCIS will accept a duplicate copy, without filing fee, of the lost petition. This latter practice has proven acceptable in the past, on occasion.

> **Example:** Ali, a U.S. citizen, files a first preference visa petition for his daughter Amira. The petition is approved but misplaced by USCIS, and when the priority date becomes current USCIS tells her it can't find the visa petition. Ali has the visa petition approval notice and sends a certified copy of it to CIS, and files a new or duplicate I-130 for Amira at the same time. Since Ali is the same petitioner as before, Amira is the same beneficiary and the visa category is the same, the priority date for Amira's new petition will be the same as the original one.

As noted above, former USCIS policy required F2A derivative beneficiaries who age out to have the LPR parent petitioner file a new F2B visa petition on their behalf, and 8 CFR § 204(a)(4) still indicates that this is a requirement, notwithstanding the change in policy. While a new visa petition is no longer required,[52] if a new petition is filed it will retain the priority date of the original petition. Since the now F2B beneficiary is still in the second preference category, they fit the same petitioner, same beneficiary, same visa category rule.

> **Example:** Molly, an LPR, files a visa petition for her husband Malcolm. Their three children are included as derivatives in this F2A visa petition. Their eldest son, Shay, ages out. Molly is not required to file a new visa petition for Shay, but if she does so, he will retain the priority date of the original petition that Molly filed for Malcolm.

Note: If the now F2B beneficiary has children of their own, it might be wise to file a new I-130 in order to avoid confusion about whether their own children are eligible to be included as derivative beneficiaries without the necessity for filing a new visa petition. The 2013 USCIS *Cuellar de Osorio* Policy Memo,[53] and the case law it relied upon, did not address this issue directly.

[51] 8 CFR § 204.2(a)(h)(2).

[52] See 2013 USCIS Cuellar de Osorio Policy Memo.

[53] http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-0625_Post_Cuellar_de_Osorio_PM_Effective.pdf.

Example: Maria, an LPR, files an F2A visa petition for her husband, Jose, and their children Jaime and Inez. Before the priority date becomes current, Inez ages out, even with the benefit of the CSPA, and automatically becomes a F2B beneficiary. Inez remains unmarried, and has a child of her own, Lucia. Can Lucia be included as a derivative of Inez? She should be, but to be on the safe side Maria files a separate I-130 for Inez to be sure that Lucia is included as Inez's derivative beneficiary, and requests that the earlier priority date for Inez be recaptured.

Important Note: *Even with the same petitioner, beneficiary, and visa category, the original priority date cannot be retained/recaptured if the original visa petition was revoked, terminated under INA § 203(g), or already used by the beneficiary to immigrate.* [54]

Example: Jake, an LPR, files an F2A visa petition for his wife, Su. They subsequently divorce, which results in the automatic revocation of the petition. Later, they reconcile and remarry, and Jake files a new visa petition for Su. Su will not be able to keep the priority date from the original petition. Even though they are the same petitioner, same beneficiary, and same visa category, the revocation of the original visa petition prevents them from retaining the priority date of the first I-130.

VII. Special Rules for Very Old Cases: Western Hemisphere Cases and *Silva* Letters

A. Western Hemisphere Cases

In the not too distant past, immigrants, at least those from the Western Hemisphere, were not subject to the visa preference categories. Before 1977, Western Hemisphere country immigrants were under a different system from other immigrants. All were "non-preference" immigrants, and obtained priority dates that were processed in chronological order according to the date applications were filed, regardless of whether they were family or employment based. U.S. citizens did file I-130 visa petitions for their immediate relatives, but for other relatives of U.S. citizens, form FS-497 was filed with the consular office along with supporting documents establishing eligibility. Relatives of LPRs seeking to immigrate their relatives could file an I-550 application with INS, which then sent the form to the U.S. consulate in their home countries.

The priority dates established by these actions, which occurred prior to January 1, 1977, still may be usable now with any new preference petition filed today. These old priority dates are

[54] 8 CFR § 204.2(h)(1) & (2).

called “Western Hemisphere Priority Dates” (WHPD) or “Western Hemisphere Derivative Priority Dates” (WHDPD).

Other WHPD priority dates were established by (1) the local labor office filing date for approved labor certifications, (2) the consular office’s receipt of an application under the Labor Department’s Schedule A, and (3) the date of the consular officer’s receipt of the FS-497 for persons who were not going to be employed (such as retirees and investors). The derivative spouses and children of principal beneficiaries were considered to have the same WHPD priority date as principal beneficiaries. This includes spouses and children acquired after the establishment of the priority date but before the principal beneficiary was admitted to the U.S. as an LPR. In some rare circumstances, after-acquired spouses and children might also benefit.

Congress changed the law effective January 1, 1977, but in so doing it protected the priority dates of those who had qualified under these rules.[55] You are unlikely to come across one of these old cases today, but some are still around. If you have a client who can prove that they were the beneficiary of a pre-1977 Western Hemisphere case, they can recapture their old priority date and have it assigned to a new visa petition in any preference category. There are various ways to prove eligibility. The applicant may show correspondence with the Department of State, such as with a U.S. embassy or consulate, expressing an intent to immigrate to the U.S., or by the filing of an application, or the receipt of a “Silva letter.” The Department of State itself may have a record of the applicant’s pre-1977 application or correspondence. A parent or spouse may have actually immigrated before 1977, which established a WHPD for both “prior-acquired” and some “after acquired” spouses and children. The applicant may also submit proof of the principal applicant’s priority date along with proof that the applicant had a qualifying relationship with the principal at that time, or that the applicant is the child of a marriage that existed before the principal applicant’s admission to the US as an immigrant.[56] The rules are complicated, and if a person or their parent, spouse or ex-spouse, may have had contact with legacy INS[57] or a U.S. consulate with regard to immigrating prior to January, 1977, it is worth researching whether they can utilize and recapture an old WHPD or WHDPD priority date to immigrate now, sometimes saving decades of waiting for a new priority date to become current.[58]

[55] See Section 9(b) of the INA Amendment of 1976, PL 94-571, 90 Stat. 2703.

[56] See 9 FAM § 503.3-4(A)-(B).

[57] The Immigration and Naturalization Service (INS) was the predecessor agency to USCIS.

[58] Mautino, *Western Hemisphere Derivative Priority Dates: Don't Forget To Use Them,* 2 AILA, Immigration and Nationality Law Handbook 141 (1992); Mautino, *Western Hemisphere Derivative Priority Dates: What Have You Been Missing?*, in AILA, Selected Writings: Immigration & Nationality Law in Transition 201 (1990); Solomon, *Priorities and Preferences: Keeping Place in the Immigrant Visa Line*, 92-06 Immigr. Briefings 1, June, 1992.

Example: Gilberto, from Mexico, applied in 1975 to the U.S. consulate to immigrate and the consulate accepted and date-stamped his FS-497 form with the date of filing. Gilberto was married to Maria at the time, and they had one son, Alfonso, age 15 at the time. On April 10, 1980, they had a second son, Armando. Gilberto decided not to immigrate and did nothing more. Today, Maria's U.S. citizen brother filed a fourth preference petition for her. Maria is entitled to Gilberto's 1975 priority date, because she was married to Gilberto at the time. This is true whether or not Maria and Gilberto are still married.

The older son, Alfonso, just married an LPR who filed an F2A preference petition for him. Alfonso may also use Gilberto's old 1975 priority date, because he was Gilberto's minor, unmarried child at the time the petition was filed. Armando is unmarried, but once Maria becomes an LPR, she can petition for him under the F2B preference category, and Armando may also use Gilberto's old 1975 priority date because he was a child of the marriage which existed at the time of the application, even though he was not yet born when the priority date was established.

Maria, Alfonso and Armando could also use that priority date established by Gilberto, of course, if Gilberto had actually followed through and immigrated, as long as each of them had not used that priority date to immigrate through or with Gilberto in the past.

Example: Julio immigrated to the U.S. in 1963 at the age of 15 years. He lived in the U.S. but later married Jesica, whom he met while travelling and visiting in Mexico, in 1976. Julio returned to the U.S. and eventually, Jesica came and joined him using her border crossing card. In 1983 they divorced and Jesica returned to Mexico. Her U.S. citizen sister filed a fourth preference for her last week. While Jesica is not eligible for Julio's original priority date, she is entitled to a WHPD as of the date of her marriage to Julio in 1976.

B. *Silva* Letters

Silva v. Bell[59] was a case in the Seventh Circuit Court of Appeals, which required the government to recapture many of the visas for the Western Hemisphere cases that had incorrectly been "charged" to Cuban refugees. The former Immigration and Naturalization Service was required to send letters, called *Silva* letters, to those who could benefit from these recaptured visas. Most people who received *Silva* letters were Mexican nationals, and though having a *Silva* letter did

[59] 605 F.2d 978 (7th Cir 1979).

not directly result in a gain of legal status, it did, for a time at least, provide people with a quasi-legal status and a work permit. Ultimately, most people who had *Silva* letters were able to immigrate through the amnesty program in the 1980s.[60] Those who did not obtain amnesty and who have *Silva* letters in their DHS files may use them as proof of their old priority dates, and, as a result, they and potentially their spouses and children, can recapture those old priority dates when applying for immigration benefits through any preference visa category now.[61]

VIII. The Intersection of Priority Date Rules with the Child Status Protection Act (CSPA)

Changes to the priority date rules made by the CSPA have already been alluded to many times in this practice advisory. Nevertheless, this is a brief summary of those changes. For more detailed information on the CSPA, please refer to the materials posted on our website, the USCIS Policy Manual, and the Foreign Affairs Manual.[62]

A. Children of U.S. Citizens

1. U.S. Citizen Petitions for a Child Under 21

- Before the CSPA, the child beneficiary of a U.S. citizen who turned 21 would automatically convert to a first preference immigrant.

- Under the CSPA, the child remains an immediate relative and never ages out, no matter how old they are when they seek to adjust status or consular process.[63]Their age is "frozen" if both the visa petition is filed and the petitioner becomes a U.S. citizen before the beneficiary's 21st birthday.

2. LPR Petitioner for Child Principal Beneficiary Naturalizes

- If child is under 21 (biological age), then the child, formerly an F2A beneficiary, becomes an immediate relative and their age is "frozen."

[60] The amnesty program was created by the Immigration and Control Act of 1986 (IRCA), P.L. 99-603; 100 Stat. 3359 (November 6, 1986).

[61] 9 FAM § 503.3-4(A)-(B).

[62] See: https://www.ilrc.org/sitewide-search?search=CSPA; 7 USCIS-PM A.7; 9 FAM 502.1-1(D)

[63] This rule also applies to VAWA self-petitioners. See Neufeld Memo, titled: *Revised Guidance for the Child Status Protection Act,* HQ DOMO 70/6.1, AFM Update AD07-04, AILA Doc. 08050660, 4/30/08 (hereinafter Neufeld Memo),. The former rule, which is still found at 8 CFR 204.2(i)(2) stated that upon attaining the age of 21, the immediate relative child would convert to a first preference immigrant.

- If child is over 21 (CSPA adjusted age) then becomes a "son or daughter" and the petition converts to first preference. However, the beneficiary can opt out of first preference to remain in the F2B category.

3. Married Son/Daughter of USC Petitioner Divorces or is Widowed

- If under 21, the petition for son or daughter converts to immediate relative.
- If over 21, the petition for son or daughter converts to first preference.

B. Child Beneficiaries of Preference Petitions

The CSPA modified the "aging out" rules for visa petitions. Before, when a principal or derivative beneficiary of a preference petition which required the beneficiary to remain a "child," turned 21 before their visa number became available (meaning the date the priority date in the original visa category became current), that beneficiary would have "aged out." Then, the petition on their behalf would have either converted to a new preference category, or in the case of a derivative beneficiary, they may have lost eligibility under that petition altogether. Now, under the CSPA, some beneficiaries may avoid aging out, based on the following calculations:

- On the date the priority date for the petition's preference category becomes "current," the beneficiary may deduct the time between the filing of the petition and the petition's approval date from their current biological age.
- If the result of that calculation, called the "adjusted age," or "CSPA age," is under 21, the petition beneficiary remains a "child"[64] for purposes of remaining in the preference category and immigrating.
- However, they must "seek to acquire"[65] an immigrant visa within one year of the visa availability date or they will lose CSPA protection, with certain exceptions.[66]

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[64] The definition of "child," as referred to in the INA, includes children who are under 21 and unmarried. All others are referred to as "sons and daughters." "Sons and daughters" may include children who are 21 and unmarried, but "child" can never be 21 (per adjusted CSPA age) or married. See INA 101(b)(1).

[65] "Seek to acquire" means filing an application for adjustment if in the U.S., or filing an immigrant visa application with a US consulate, or filing Form I-824, Application for Action on an Approved Application or Petition if the beneficiary needing to "seek to acquire" is listed on the I-824. It also encompasses other affirmative actions taken within one year of the visa availability date. *See Matter of O. Vasquez,* 25 I&N Dec. 817 (BIA 2012); 9 FAM § 502.1-1(D)(6).

[66] Priority date "retrogression" or backward movement, may help the beneficiary restart the "seek to acquire" time "clock," though that only occasionally occurs. Retrogression can also cause a loss of CSPA protection if the adjusted CSPA age is over 21 at the point that the priority date again becomes current. "Extraordinary circumstances" may be alleged to overcome a missed "sought to acquire" deadline. *Matter of O. Vasquez,* 25 I&N Dec. 817 (BIA 2012).

- If the adjusted age is over 21, or if they do not seek to acquire an immigrant visa within one year, they age out.

C. Opt-Out Provision

As we have noted above, when an F2B beneficiary's LPR parent naturalizes, that beneficiary automatically converts to a first preference immigrant. However, under the CSPA, the beneficiary may opt out of becoming a first preference immigrant and remain in F2B status if the waiting period for first preference exceeds the waiting period for F2B status. Unlike the adjusted age provision of the CSPA, there is no deadline for making the choice between first preference and F2B status.

D. CSPA Special VAWA Provisions

Some new rules governing VAWA petitions were implemented by the CSPA:

- Children of abusive U.S. citizens whether petitioning for themselves or included as derivatives in a parent's petition, whose VAWA petition (form I-360) is filed before they turn 21, are immediate relatives and will not age out.

- If an abusive LPR petitioner filed an I-130 petition for a child, either as the principal or as a derivative beneficiary, then the subsequently filed I-360 VAWA self-petition retains the priority date of the original I-130 (this is true for abused spouses of LPRs as well).

- When a derivative child beneficiary of a parent's I-360 ages out, using the CSPA formula, they automatically convert to a principal I-360 beneficiary, without having to file a separate I-360 self-petition. They also retain the priority date of the original I-360 of their parent.

- Even if the abused self-petitioner dies, the derivative beneficiary may retain eligibility for permanent residence.

- VAWA petitioning children who can prove that their delay in filing an I-360 was due to the abuse they suffered from the abusive USC or LPR parent, may file the I-360 up to age 25.

- VAWA "child" beneficiaries who marry while the I-360 is pending, but the marriage is terminated before the I-360 is adjudicated, retain their eligibility to immigrate. If they remain married, the I-360 will be denied.

IX. The Intersection of Priority Date Rules with INA § 245(i)

INA § 245(i) is not about retention/recapture of priority dates, but sometimes gets confused with this concept. Under INA § 245(i), certain eligible immigrants who entered without inspection, or are otherwise barred from adjustment pursuant to the adjustment "bars" set out in INA § 245(c), are nevertheless eligible to adjust status in the United States under this special provision. Normally, most family immigration adjustment cases fall within INA § 245(a), which mandates that an adjustment applicant must have been inspected and admitted or paroled into the U.S. in order to be eligible for adjustment, and in addition is not barred by INA § 245(c).[67] *All of the rules governing priority dates that have been discussed earlier in this practice advisory apply equally to people adjusting under § 245(i).*

Those who qualify under § 245(i) adjustment are:

- Both derivative and principal beneficiaries of labor certifications, I-140s or I-130's that were:
  - Properly filed, **and**
  - Approvable when filed, **and**
  - Were filed on or before January 14, 1998, **or**

- Both derivative and principal beneficiaries of labor certifications, I-140s or I-130's that were:
  - Properly filed, **and**
  - Approvable when filed, **and**
  - Were filed between January 15, 1998 and April 30, 2001, **and**
  - The principal beneficiary was present in the United States on December 21, 2000.

Someone who had a visa petition or labor certification that qualifies under § 245(i) may adjust status notwithstanding the fact that they entered the U.S. without inspection, or fell out of status or worked without authorization, for example, whether they immigrate under the originally filed petition or labor certification or a subsequent, unrelated visa petition or labor certification.

People who qualify under § 245(i) and immigrate through a subsequently filed visa petition ***do not retain the priority date of the originally filed petition unless it is for the same petitioner, same beneficiary, and same visa category as the subsequently filed petition, and it has not been revoked.*** In other words, there is no change in the priority date rules for petitions that qualify under § 245(i). The priority date of the "245(i)" qualifying petition simply serves to help prove the adjustment applicant's eligibility to adjust status in the U.S., despite the § 245(c) bars applicable to "regular" 245(a) adjustment.

[67] § 245(i) adjustment applicants must of course also be otherwise admissible in order to immigrate under this provision.

Example: Julie, an LPR, filed a visa petition for her son Jamie on January 10, 1998. Jamie was living in the U.S. at the time, and had entered the U.S. without inspection. Jamie got married to Anna, another undocumented immigrant, in 1999, which meant that Julie's 1998 petition was automatically revoked. Ten years later, Jamie and Anna divorced. Julie, still an LPR, filed a new I-130 on Jamie's behalf after his divorce in 2008.

Question: Is Jamie eligible to immigrate under INA § 245(i)?

Answer: Yes. Because Jamie was the beneficiary of a properly filed and approvable when filed I-130 visa petition, which was filed before January 14, 1998, he is eligible to adjust status under § 245(i) as soon as his priority date is current under the new petition.

Question: Can Jamie recapture the priority date of the original petition filed on January 10, 1998 for the new petition filed in 2008?

Answer: No. Even though the new petition has the same petitioner, same beneficiary, and same visa classification as the first, he cannot recapture the priority date of the old petition. This is because the first petition was revoked when Jamie got married, which means that he lost both his eligibility to immigrate on that petition and the priority date for that petition. His new priority date is the date that Julie filed the new petition on his behalf. He will have to wait till that priority date is current before he will be eligible to adjust status under § 245(i).

X. Accompanying and Following to Join

Accompanying and following to join are concepts that apply to the timing of the admission of derivative beneficiaries compared to when the principal beneficiary is admitted to the US as an immigrant. Derivatives who qualify under these rules will have both the same priority date and the same preference category as the principal beneficiary. Otherwise, these rules have no bearing on the concept of retention/recapture of priority dates.

A. Accompanying

"Accompanying" means the derivative spouse or child of a principal beneficiary enters the U.S. as an LPR either with the principal beneficiary or within six months of the principal's entry or appearance at a U.S. consulate for chargeability purposes.[68]

[68] See 22 CFR § 40.1(a)(1); 9 FAM 502.1-1(C)(2)b.(1). *See also* XI. Cross-Chargeability, *infra*.

B. Following to Join

After six months, a derivative spouse or child of a principal beneficiary who has been admitted to the U.S. as an LPR is not considered to be accompanying the principal. Instead, the derivative spouse or child is considered to be "following to join."[69]As long as the spouse was acquired *before* the principal's admission as an immigrant, they may enter any time after the principal's admission.[70] A child born subsequent to the principal's admission, is also eligible to follow to join if the marriage between the principal beneficiary parent and the derivative spouse parent existed before the principal's admission as an LPR.[71]

Both accompanying and following to join derivatives of a visa petition may not enter the U.S. as permanent residents before the principal beneficiary. And such derivatives will lose their ability to follow to join, if the principal beneficiary naturalizes before the derivatives enter the U.S. with their immigrant visas, or before they adjust status within the United States.

XI. Cross-Chargeability

The general rule for "chargeability" for priority date purposes is that a visa applicant is "charged" to their country of birth. If a derivative applicant is born in a different country than the principal beneficiary, they may generally be charged to the principal's country of birth, if an immigrant visa would not otherwise be available to them. This would occur when the quota for the derivative beneficiary's country of birth is subject to a greater priority date backlog than that of the principal applicant.

Also, conversely, if the principal visa petition beneficiary's priority date is not yet "current," but they have a derivative spouse born in a different country whose priority date is "current" for the same category, both spouses may be "charged" to the more favorable Visa Bulletin priority date as long as they are both otherwise eligible to immigrate, and are issued visas and immigrate together.[72]

> **Example:** Marisol, born in Mexico, is the beneficiary of a fourth preference visa petition filed by her sibling, Rafael, in 2002. Marisol is married to Edenilson, who was born in El Salvador. The fourth preference Mexico priority date is now at July 15, 1998, still a long way from being "current." However, the fourth preference priority date for El Salvador is now at October 22, 2006. Marisol can request to be

[69] 22 CFR § 40.1(a(1).
[70] 9 FAM 503.2-4(A)(c)(1).
[71] 9 FAM 502.1-1(C)(2)b.(2)(c).
[72] 9 FAM 503.2-4(A)(h); 7 USCIS-PM A.6.

> "cross-charged" to El Salvador, with her marriage certificate and Edenilson's birth certificate, and both can immigrate together now.

The same is true for derivative children who are born in a different country than their parent. They may be "charged" to either parent's country of birth. However, parents cannot be similarly cross-charged to their child's country of birth.

A derivative spouse or child acquired after the principal's admission as an immigrant, may still, in very rare circumstances, be allowed to immigrate as an "accompanying" derivative. This only occurs when the derivative spouse or child needs to be cross-charged to the principal's country of birth because their own country of birth is more "oversubscribed" or backlogged. They must then enter the U.S. within six months of the principal's entry or chargeability request.[73] However, as previously noted, an after-acquired child of a marriage which existed at the time the principal immigrated, but the child was born after the principal's admission as an LPR, will not be considered "after–acquired" but will be allowed to "follow to join."

[73] *See* Foreign Affairs Manual (FAM) at 9 FAMe503.2-4(A)(d).

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About the Immigrant Legal Resource Center

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